No. S079925

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT MORA'S REPLY BRIEF

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

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DEATH PENALTY

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INTRODUCTION

In this brief, appellant Mora does not reply to respondent's contentions which are adequately addressed in his opening brief. In addition, the absence of a reply by appellant Mora to any particular contention or allegation made by respondent, or to reassert any particular point made in his opening brief, does not constitute a concession, abandonment or waiver of the point by appellant Mora (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant Mora's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant Mora's opening brief.

ARGUMENT

I

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

In his opening brief, appellant Mora argued that the prosecution engaged in prejudicial misconduct by repeatedly failing to disclose material it was required to provide under California Penal Code section 1054.1, and *Brady v. Mary*land (1963) 373 U.S. 83 (*Brady*). (MAOB 39-48.)[1] The trial court agreed with appellant that the prosecutor had violated California's discovery law and possibly *Brady*, and that sanctions were warranted. (MAOB 38; see, e.g., 7 RT 1058-1061, 13 RT 1997-1998, 2005.) Nonetheless, the trial court's few remedial actions were not only inadequate, but served to heighten the prejudice and basic unfairness resulting from the prosecutor's violations of its statutory and constitutional disclosure obligations. (MAOB 44, 49.) As a result, appellant was denied a fair trial in violation of his rights under the Sixth, Eight and Fourteenth Amendments to the federal Constitution, article I, sections 7 and 15 through 17 of the California Constitution and state statutory rights. (MAOB 31, 42-49.)

Respondent concedes some and disputes others of the asserted discovery violations, but contends that none of the resulting errors were

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[1] In this brief, the following abbreviations are used: "MAOB" refers to appellant Mora's opening brief; "RB" refers to respondent's brief; "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

Brady error, and that all were harmless under state law. (RB 25.) First, in refutation of its effort to minimize the magnitude of the violations, respondent requires fully seven pages (almost one-third) of its argument merely to describe the volume and variety of untimely disclosures in this case. (RB 25-34.) Respondent's contention thus fails on its face.

Moreover, insofar as respondent contends there was no *Brady* violation as a matter of law because the material was produced during trial, its contention and the California law upon which respondent purports to rely are wholly inconsistent with federal application of the *Brady* rule. (RB 36, citing *People v. Verdugo* (2010) 50 Cal.4th 263, 283; *People v. Morrison* (2004) 34 Cal.4th 698, 715.) Respondent acknowledges as much. (RB 37, fn. 9 [federal citations therein].) As such, respondent's *Brady* analysis must be rejected, in the first instance, to conform California law to controlling federal constitutional principles. Beyond this, appellant has demonstrated clear *Brady* error resulting in the prejudicial impairment of his ability to prepare and present his defense; he is entitled to a reversal of the judgment on this ground.

A. The Prosecution's Untimely Disclosure of Material Evidence Violated the California Discovery Statutes as Well as the State Constitution

Respondent does not dispute appellant's recitation of the pertinent facts. Respondent acknowledges that there were at least seven separate instances of delayed disclosure of relevant investigative materials. These materials were disbursed piecemeal over the course of the trial. (RB 25-32; MAOB 32-37.) The previously withheld documents – nearly all in the possession of the Compton Police Department – included reports of forensic test results and police reports memorializing the statements of

numerous percipient witnesses. On this record, respondent cannot reasonably maintain that the flood of delayed disclosures was "inconsequential." (RB 38.)

Addressing respondent's contentions in order: First, respondent contends that the prosecutor's delayed disclosure of the Gun Shot Residue (G.S.R.) results was not untimely. (RB 38.) The trial court disagreed and went so far as to sanction the prosecution by excluding the results as to appellant due to the belated disclosure on the eve of trial.[2] (MAOB 35, fn. 19; 1 RT 63-68; 13 RT 2039.) Respondent next contends that appellant forfeited his claim with respect to the diagrams of the crime scene because he failed to assign discovery error to the untimely disclosure. (RB 42.) The record belies this contention in that the initial motion to dismiss for discovery violations was directed to all the undisclosed materials from the prosecution's "murder book," including the two diagrams that first alerted defense counsel to the problem. (MAOB 33; 7 RT 1038.)

Respondent advances multiple contentions to counter appellant's claims regarding the untimely disclosure of police reports containing a large number of witness statements and exculpatory information. (RB 43-47.) These reports were only produced by court order after defense counsel had discovered them in the Compton Police files. (7 RT 1038-1040.)

Respondent concedes that Ramon Valadez's statement was subject to discovery under Penal Code section 1054.1, and that William Florence's

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[2] The exclusion of the positive G.S.R. test results as to appellant Mora did not fully eliminate the prejudice resulting from the delayed disclosure. Because co-defendant Rangel's attorney was able to bring out that the G.S.R. results were negative as to Rangel, the jury could readily have inferred from his own attorney's silence that the results were positive as to appellant Mora. (13 RT 2039.)

statement was subject to disclosure as exculpatory evidence. (RB 43.) Respondent, however, ignores appellant's and the trial court's broader concerns regarding additional undisclosed witness statements whose exculpatory value lay in contradicting the testimony of key prosecution witnesses, including Ramon Valadez, Paula Beltran and Fidel Gregorio. (7 RT 1038-1041, 1046-1047.)

Rather than grapple with appellant's particularized complaints, respondent baldly and untenably asserts that no prejudice resulted from the untimely disclosures. (RB 44.) Respondent's first point is that defense counsel were given five days – only two actual court days – to investigate the newly disclosed reports and witnesses. (RB 44.) Respondent, however, fails to acknowledge, among its other lapses, that in the middle of this brief adjournment the prosecutor produced yet another batch of previously withheld materials including the statement of Yesenia Jimenez, the warrant for Jade Gallegos, the other person identified as the passenger-side shooter, and the G.S.R. report. (MAOB 34-35.)

Respondent suggests that the adjournment must have been adequate because both defense counsel proceeded on the next court date without declaring themselves unprepared. (RB 44.) Respondent confuses counsel's respectful submission to the trial court's decision with an affirmation of the adequacy of the recess. In actuality, defense counsel continued to protest the untimely disclosure of material information and ultimately sought a mistrial on this ground. (MAOB 38; 13 RT 1993-1998.)

Respondent contends, moreover, that no prejudice resulted from the discovery violations because the evidence of appellant Mora's guilt was overwhelming. (RB 45-47.) However, much of the evidence proffered by respondent to demonstrate the strength of the prosecution's case shows

instead that its case was seriously flawed – flaws only revealed in some instances by the withheld evidence.

Appellant Mora's defense was mistaken identity, and that the true culprit was Jade Gallegos, whom appellant resembled in key respects, namely, both men had shaved heads and tattoos on their midriffs. (See 5 RT 656; 12 RT 1950.) Paula Beltran selected appellant from a field line-up that did not include Jade Gallegos, although he had been detained with appellant at Lopez's house, or any one with a shaved head except appellant (and co-defendant Rangel). (4 RT 552; 6 RT 979.) Fidel Gregorio only saw the passenger side shooter from the midriff down. (4 RT 644-646; 5 RT 709; 12 RT 1975-1976.) Neither Beltran nor Gregorio had ever seen appellant or Gallegos prior to the shootings. On the other hand, Sheila Creswell, a neighbor who knew both appellant and Gallegos by sight, testified that it was Gallegos, not appellant, who fled from the scene of the shootings with co-defendant Rangel. (5 RT 788, 804, 823, 825-826, 831.)

At trial, Lourdes Lopez, who was living with Gallegos at the time of the shooting, recanted her earlier statements to the police, testifying that police had threatened to turn her daughter over to social services if she did not tell them what they wanted to hear. (7 RT 1138, 1141-1143.) Then, there was the testimony of Ramon Valadez, whom respondent lauds as "bearing [the] credibility of a disinterested witness." (RB 46.) Disinterested or not, Valadez is utterly lacking in credibility having been forced to admit that he repeatedly lied to the police and continued to lie in his direct testimony before the jury. (6 RT 850, 907, 910, 943-944, 994, 997-998.) Thus, far from being overwhelming, the evidence of appellant's guilt was replete with inconsistencies and admitted fabrications. Respondent's prejudice argument fails, therefore, even under the more

forgiving *Watson* standard for violations of state law. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Reversal Is Required since Appellant's Ability to Present a Defense and Receive a Fair Trial Was Irreparably Damaged by the Prosecution's Untimely Disclosure of Materially Favorable Evidence

Respondent's rote rejoinder to appellant's claims of cumulative *Brady* error is that, because the favorable evidence was disclosed during the trial, no *Brady* violation occurred.[3] This contention is based on this Court's statement in *People v. Verdugo*, *supra*, 50 Cal.4th 263, 283 and *People v. Morrison, supra,* 34 Cal.4th 698, 715, that "[E]vidence that is presented at trial is not considered suppressed [under *Brady*], regardless of whether or not it had been previously disclosed during discovery." Respondent's reliance on these decisions is misplaced for several reasons.

This rule, first stated in *People v. Morrison*, *supra*, is based on a line of federal cases, principally, *United States v. Slocum* (11th Cir. 1983) 708 F.2d 587, which condition a *Brady* violation on a defendant's exercise of reasonable diligence. (34 Cal.4th at p. 715 [cases cited therein].) In *Slocum*, the *Brady* claim was raised under the rubric of "newly-discovered" evidence in a new trial motion. (708 F.2d at pp. 599-600.) The court rejected the post-conviction challenge on dual grounds: first that the prosecution is not obligated under *Brady* to furnish information which "the defendant already has or, with any reasonable diligence, the defendant could obtain himself" (*id.* at p. 599); and second, that "newly-discovered"

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[3] The prosecution's violation of its statutory duty to produce exculpatory evidence under Penal Code section 1054.1, subdivision (e), is subsumed within appellant's discussion of the more comprehensive constitutional duty imposed by *Brady* and its progeny.

evidence does not warrant a new trial unless the "evidence is discovered *following* the trial" (*id.* at p. 600 (italics in original), quoted in *People v. Morrison*, *supra*, 34 Cal.4th at p. 715 (italics in original).

People v. Verdugo, supra, 50 Cal.4th 263, erroneously merges these two independent rules – one a limitation on *Brady* based on a defendant's independent duty to investigate; the other a definition of newly-discovered evidence in the new trial context. The resulting conflated rule – that evidence produced at trial is *never* suppressed – is contrary to federal law. As respondent recognizes, under federal *Brady* principles, evidence that is produced "late in the trial" has nonetheless been "suppressed by the State." (See *United States v. Douglas* (9th Cir. 2008) 547 F.3d 1187,1202; *Knighton v. Mullin* (10th Cir. 2002) 293 F.3d 1165, 1173, fn. 2; *United States v. Miller* (9th Cir. 1976) 529 F.2d 1125, 1128.)

Where the evidence is disclosed during trial, the inquiry on review is "whether the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving a constitutionally guaranteed fair trial. (*United States v. Hibler* (9th Cir. 1972) 463 F.2d 455, 459.) That is precisely appellant's claim herein.

Appellant's *Brady* claim is based on the overall disruptive and burdensome impact on the defense of the prosecutor's dribbling out previously undisclosed material evidence over the course of the trial. Instead of addressing this accumulation of prejudice, respondent focuses on each untimely-disclosed piece of evidence in isolation.

Appellant prepared his trial defense based on the reasonable, but ultimately erroneous assumption that all relevant and exculpatory discovery had been timely produced. A major prong of the defense – of particular significance in a mistaken identity case – was to discredit the thoroughness,

and arguably good faith, of the investigation. (Cf. *Kyles v. Whitley* (1995) 514 U.S. 419, 443.) This defense was predicated to a large degree on the presumed failure by the police to perform a fingerprint analysis. When the the fingerprint report was finally produced – after the close of the prosecution's case – appellant's defense was nullified with no opportunity for a meaningful reconfiguration at that late stage of the trial.

In themselves, the fingerprint results were exculpatory and could have been used effectively in the cross-examination of prosecution witnesses. Any exculpatory value of the negative fingerprint comparisons was substantially offset, however, by the irreparable damage to the defense and to counsel's credibility resulting from the inexcusably delayed disclosure of the evidence.

The modest remedial actions taken by the trial court fell far short of the measures needed to ensure appellant Mora a fair trial. Indeed, here, only the declaration of a mistrial would have restored appellant Mora to the far more favorable position he would have enjoyed if the prosecutor had only complied with her statutory and constitutional duties to promote justice and fairness.

Respondent's concluding contention that no dismissal – or mistrial – was required rests on the erroneous supposition that no material evidence was suppressed. (RB 52.) As demonstrated above, this supposition is contrary to both the record and established federal law. More importantly, appellant has shown that the pattern of late disclosures so prejudiced the preparation and presentation of his defense that he was denied a constitutionally fair trial. (Cf. *In re Brown* (1998) 17 Cal.4th 873, 887-890.) The judgment therefore cannot stand.

II

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

During the discussion of jury instructions, appellant Mora submitted, at the trial court's request, a special instruction directed to the prosecutor's demonstrable violation of the discovery laws. (See Argument I, *ante.*) Appellant's instruction correctly informed the jury both that the prosecution had violated the discovery statutes and that the violations were attributable to the actions of the Compton Police Department. (5 CT 1169.) The trial court rejected the proffered special instruction and in its stead gave a modified version of CALJIC No. 2.28 which failed even to mention the prosecution. (5 CT 1114, 1169.) In his opening brief, appellant argued that the trial court erred in refusing to give the requested discovery instruction. (MAOB 54-62.) In support of his argument, appellant relied on the principle first stated in *People v. Sears* (1970) 2 Cal.3d 180, 190, that a defendant has a right to an instruction "relating particular facts to any legal issue." (MAOB 55.) Violations of this principle, as with other instructional issues, are subject to independent appellate review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733, 737.

Respondent seeks a more deferential standard of review by re-framing appellant's instructional argument as a challenge to the adequacy of the discovery sanctions imposed by the court. (RB 56-57.) Respondent

confuses appellant's Arguments I and II, *ante*, and, as a result, argues legal principles that are not pertinent to the instant, albeit related, instructional claim. Respondent's contention is at odds, moreover, with the trial judge's own assessment of the seriousness of the cumulative, unexcused discovery violations in this case. (7 RT 1048; 13 RT 1997.)

A. No Forfeiture Occurred

Respondent's contention that appellant forfeited his instructional claim is similarly unfounded and is based, moreover, on inapposite case law.[4] Respondent maintains, contrary to the record, that appellant waived the instructional issue on appeal because he did not object to CALJIC No. 2.28. (RB 55-56, citing *People v. Riggs* (2008) 44 Cal.4th 248, and *People v. Bolin* (1998) 18 Cal.4th 297.)

In *People v. Riggs*, *supra*, this Court held that the defendant, the party who committed the discovery violation, had forfeited a challenge to the completeness of the trial court's sanctioning instruction which was similar but not identical to CALJIC No. 2.28. (44 Cal.4th at p. 309.)

In *People v. Bolin*, this Court held that defendant had waived any claim that the trial court erred in giving CALJIC No. 2.06 regarding consciousness of guilt because defense counsel had agreed that the instruction was supported by the evidence and had not objected to the wording of the instruction. (18 Cal.4th at p. 326.)

Unlike appellant Mora's case, where he specifically requested a jury instruction regarding the prosecution's failure to fully and timely provide

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[4] Respondent contends that co-appellant Rangel forfeited his special instruction claim by not joining in appellant Mora's request for a special instruction. Respondent does not contend that appellant Mora waived this issue. (RB 55.)

pretrial discovery to defense counsel, neither *Brolin* nor *Riggs* involved a special instruction requested by the defense.

In addition, appellant's special instruction differed from the modified CALJIC instruction in several respects. Each such difference was, effectively, an anticipatory and adequate objection to the conflicting wording in the instruction actually given. In electing to give the modified version of CALJIC No. 2.28, after reviewing the parallel instruction drafted by appellant, the trial court implicitly ruled against appellant both in declining to assign any responsibility to the prosecution for the discovery violations and in limiting the scope of the discovery at issue. The purposes of Penal Code section 1259 were thus fulfilled. and it would have been futile, as well as redundant, for appellant to reiterate his objections based on the differences between the defense instruction and the instruction given once the court had made its decision.[5] (Pen. Code, § 1259 ["the appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; *People v. Hill* (1998) 17 Cal.4th 800, 820 ["A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile."].)

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[5] Respondent cites three cases in support of its argument that the requested special instruction was repetitive of CALJIC 2.28, as given: *People v. Friend* (2009) 47 Cal.4th 1, 50; *People v. Carter* (2003) 30 Cal.4th 1166, 1231; and *People v. Gurule* (2002) 28 Cal.4th 557, 659-660. The People did not argue forfeiture in any of these cases, and this Court reached the instructional claim under circumstances analogous to those here.

B. The Requested Special Instruction Was Warranted and Not Duplicative of CALJIC No. 2.28

Respondent first contends that appellant Mora was not entitled to any sanctioning instruction because, from the prosecution's perspective, the continuance granted by the court was a sufficient remedy for the discovery violations. (RB 57-58.) Of course, the trial court came to the opposite conclusion as evidenced by its decision to give CALJIC No. 2.28. More to the point, appellant has made a compelling showing that he was prejudiced by the stream of untimely disclosures that prevented effective cross-examination of critical prosecution witnesses and undermined a major prong of his defense. (See MAOB 48-50.)

As for its second contention that the special instruction and CALJIC No. 2.28 were "largely repetitive," respondent simply glosses over the significant differences between the two instructions. (RB 58-59.) First, as argued in the opening brief, CALJIC No. 2.28, as modified and unlike the special instruction, failed to articulate how the untimely disclosures directly impacted appellant's ability to effectively present his case. (MAOB 57.) Rather, CALJIC No. 2.28, as given, only set forth the generic, abstract rationale for discovery time limits without furnishing the jury with any factual basis for determining the actual scope of the violations or their deleterious effect on the presentation of the defense. (MAOB 57-58.)

The court's instruction also limited the jury's consideration to only two of the numerous violations of the discovery statute. (5 CT 1114; 14 RT 2176, 2197-2198.) The defense instruction broadly referenced all the violations. (5 CT 1169.) Moreover, only the defense instruction specified the burden on the defense of having to continue investigating the case during the course of trial. (5 CT 1169.) Further, in absolving the

prosecution of any responsibility for the violations, the instruction given by the trial court was misleading and, in effect, directed the jury to give no weight to the violations since it would seem unfair to penalize the prosecution when the instruction faulted only the Compton Police Department. (MAOB 58.) Indeed, this is precisely the argument made by the prosecutor in closing argument. (15 RT 2415.)

For these reasons, CALJIC 2.28, as modified, not only was no substitute for the requested special instruction, it entirely defeated the purpose of such an instruction – to hold the prosecution, not the police department, accountable for the damage resulting to the defense from the untimely disclosures of vital evidence in a capital case.

In short, the trial court's rejection of appellant's requested instruction and its giving of a modified CALJIC No. 2.28 instead, was demonstrable error that prejudiced the defense and violated appellant's state and federal constitutional rights. Reversal of the judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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III

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

In his opening brief, appellant Mora separately challenged the trial court's ruling forbidding him from arguing that members of the Compton Police Department intentionally withheld evidence from the defense. (MAOB 63-71.) Appellant maintained that he had a right to make this argument because there was sufficient evidence to support the inference that the Compton Police Department's pattern of withholding discovery was not mere negligence. (MAOB 66-67.) Appellant argued that this infringement of defense counsel's advocacy in counsel's last address to the jury denied appellant his state and federal constitutional rights to the effective assistance of counsel, due process, a fair trial and a reliable penalty determination, requiring reversal of the entire judgment. (U.S. Const. 6, 8 & 14 Amends; Cal. Const., art. I, §§ 7, 15, 16, 17; see MAOB 64.)

Respondent virtually ignores appellant Mora's extended, well-reasoned argument, devoting only a few perfunctory sentences to the issue. (RB 56, 62-63.) Respondent addresses none of the cases cited by appellant that recognize the broad latitude afforded attorneys for both sides in conducting closing argument. (See, e.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795-796, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103; *People v. Hill* (1998) 17 Cal.4th 800, 819.) Instead, respondent tersely asserts, in the first instance, that appellant Mora's

complaint regarding the limitation on closing argument was forfeited for failure to object. (RB 56.)

Respondent, however, undermines its own position by merging the instructional and closing argument issues under a single heading.

Although legally distinct, the instructional and summation claims are factually and temporally related. The court's ruling, at the prosecutor's urging, restricting appellant's closing argument built on its immediately preceding ruling rejecting appellant's special instruction and modifying CALJIC No. 2.28 to "specifically [leave] out 'intentional' . . . ." (14 RT 2175.) In effect, it was a single ruling reaching both the instruction itself and appellant's projected argument on the same point.

The reason for the requirement of a specific objection is to fairly inform the trial court, as well as the opposing party, of the specific grounds for an objection so that the other party can respond appropriately and the court can make a fully informed ruling. (Cf. *People v. Partida* (2005) 37 Cal.4th 428, 434-435.) The purpose of this requirement was fully met here because the court and prosecutor were fully informed, and had in mind at the time of the ruling, all of appellant's prior, cumulative arguments in favor of sanctions, including a mistrial, for the untimely disclosure of a mass of critical investigative material. Indeed, in seeking a preemptive ruling limiting appellant's closing argument, the prosecutor demonstrated full knowledge of appellant's specific objections to the Compton Police Department's conduct in withholding mandated discovery and *Brady* material. (See 13 RT 1993-1998; MAOB 66-67.) On this record, respondent's forfeiture argument must be rejected.

On the merits of the claim, respondent defends the trial court's preclusion of any inference that the police intentionally withheld

discoverable materials on the ground that no evidence had been presented to the jury regarding the police department's handling of the evidence. Again, the record does not support respondent's overreaching assertion.

In deciding that CALJIC No. 2.28 was appropriate, the court necessarily and correctly found, contrary to respondent's contention, that the jury had been presented with evidence regarding the police department's failure to timely disclose evidence. Indeed, although no such sanctions were imposed, the court considered the police department's actions sufficiently serious to warrant monetary penalties. (7 RT 1048; see also 13 RT 1997.) Considering, in addition, the number and gravity of the discovery violations, as well as the experience level of the police officers involved, there was ample evidence before the jury to support an argument that the discovery violations were not accidental or negligent.

Moreover, contrary to respondent's final point, the court's imposition of its own interpretation of the evidence on defense counsel, and hence the jury, was not harmless. An integral part of appellant's defense of mistaken identity was that members of the Compton Police Department had manipulated witnesses and mishandled the evidence. (MAOB 69.) The court's erroneous curtailment of this valid argument was thus highly prejudicial, both in itself and in compounding the trial court's instructional error concerning the attribution of responsibility for the many discovery violations in this case. (See MAOB 51-62.)

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

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IV

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

Appellant has argued that he was denied his state and federal constitutional rights to a fair trial and a fair penalty determination as a result of the many discovery violations committed by the prosecution and the Compton Police Department (MAOB 31-50 [Argument I]); the trial court's refusal to give appellant's requested jury instruction regarding the prosecution's failure to fully and timely provide pretrial discovery to appellant's trial counsel (MAOB 51-62 [Argument II]); and the trial court's erroneous ruling forbidding appellant's trial counsel from arguing that the many discovery violations committed by the Compton Police Department were intentional (MAOB 63-71 [Argument III]). Appellant has demonstrated, moreover, that because it cannot be shown beyond a reasonable doubt that these three related errors raised in Arguments I through III, either individually or collectively, had no effect on the jury's guilt or penalty verdicts, reversal of the entire judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341); see also MAOB 269-272 [arguing that reversal of the entire judgment is required based on the cumulative effect of all of the errors raised by appellant in his opening brief]; MAOB 72-73.)

No further reply is offered or required because respondent makes no counter-argument to appellant's assertion of reversible cumulative error.

V

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

A. Introduction

Lourdes Lopez, appellant's former girlfriend, testified that she was interviewed by the police several times on the day of the shootings. Her first contact with the police took place at her house at around 3:00 a.m., and the first interview took place at her house. (7 RT 1141, 1183.) Lopez and her three year old daughter were then transported to the Compton Police Department around 6:00 a.m., where she was interviewed several times more by the police over the next eight hours. (7 RT 1140.) According to Lopez, several of her statements were tape-recorded; two taped statements were offered by the prosecution at trial.[6] She said that first taped interview took place around 8:00 a.m. and lasted from 45 minutes to an hour. (7 RT 1144, 1158, 1179.)

Lopez said that the almost the entire time, the police called her names and threatened to have her arrested and charged with perjury if she

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[6] Lopez was adamant that she gave more than two taped statements. She said that she gave her first taped statement around 8:00 a.m., about two hours after she got to the police department. The two taped statements offered by the prosecution at trial were taken at 12:31 p.m. and around 2:15 p.m., respectively. (See 8 RT 1289-1290.) The taped statement that most likely contained all of the stops and starts was probably the first one, as Lopez testified, "I just know there was a lot of misunderstandings at the beginning." (8 RT 1240.) That this tape was never disclosed to the defense is not surprising given all of the other blatant discovery violations in this case.

did not tell them what they wanted to hear. She said that the police also threatened to turn her three-year-old daughter over to social services if she did not change her statement. (7 RT 1138, 1142-1143; 8 RT 1259, 1270.)

At trial, the prosecution offered two of Lopez's taped statements for impeachment purposes, one that was taken at 12:31 p.m. and ended at 12:38 p.m. (1 CT 1-10), and a second taped interview that took place about two hours later and ended at 2:46 p.m. (1 CT 11-34; 8 RT 1271, 1289-1290.) Lopez said that the police threatened her before she gave her first taped statement (7 RT 1180), which was taken at 12:31 p.m., and again before she gave her second taped statement some two hours later (8 RT 1269-1271, 1289-1295).

Lopez never said that the police threatened her while the tape recorder was on; only that she thought that the tape recorder had been stopped and then started again at least twice.

Over vigorous defense objection, the prosecutor was allowed to play for the jury the tape recordings of Lopez's two taped interviews in their entirety so that Lopez could point out on the tapes where the tape recorder had been stopped and then started again during the taped interrogation. The jury was also provided with an unredacted transcript of the taped interviews.

The trial court did not listen to the tapes before overruling the various defense objections to them, but only read the transcripts of the tapes.

In his opening brief, appellant argued that the playing of the tape recordings in their entirety, and the giving of the unredacted transcripts of the two tapes to the jurors, violated appellant's right to a fair trial because Lopez's taped statements contained improper references to gangs,

appellant's alleged propensity for violence, his recent incarceration in jail, and that he had an outstanding arrest warrant.

Respondent contends that the trial court did not abuse its discretion in admitting the tape recordings in their entirety because they were relevant to the jury's determination of Lopez's credibility as a witness regarding her claim that she had been threatened by the police when they interviewed her, and that the tape recorder had been stopped and started again at least twice during the police interview. Respondent also contends that any prejudice flowing from the admission of the tapes was outweighed by the probative value of the playing of the tapes. Finally, respondent contends that appellant cannot demonstrate that he was prejudiced by the admission of the tapes. (RB 71-72.)

Respondent's contentions lack merit.

B. The Trial Court Abused its Discretion in Admitting the Tape Recordings in Their Entirety as They Were Irrelevant and Highly Prejudicial

Respondent contends that it was important that the jury hear the taped statements in their entirety so it could determine for itself whether the tape recorder had been stopped and started again, as Lopez had claimed. But, as was argued by defense counsel below, there were several other much less prejudicial ways by which the prosecution could have impeached Lopez's credibility as a witness that did not involve the playing of the tapes in their entirety.[7]

First, the tapes could have been played for Lopez outside the

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[7] The prosecutor initially used the transcripts of the two taped statements to impeach Lopez with her prior inconsistent statements, being very careful not to make any reference to gangs or any other inadmissible evidence.

presence of the jury so that she could hear them and identify where the tape recorder was stopped and started again. If she could not pinpoint where the tape recorder was stopped, that could have been then brought out in the presence of the jury, as it was when the tapes were played in the jury's presence, and Lopez testified that she was unable to pinpoint those instances when the tape recorder had been stopped. (8 RT 1268-1269.) That would have resolved the issue once and for all without exposing appellant's jury to the highly irrelevant and prejudicial matters contained on the tapes.

Second, the prosecution could have had an expert examine the tapes to determine scientifically if they had been stopped and started again.[8]

Third, the objectionable portions of the tapes could have been skipped over and the transcripts edited, something the prosecutor below offered to do. (8 RT 1243.)[9]

Fourth, the jurors could have been provided copies of the transcripts of the two tape recordings that omitted the objectionable references so that they could see for themselves whether any coercive statements were made by the police during either of the two taped interviews.

Fifth, if any threats had been made (or not made) that could have

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[8] The defense offered this alternative, arguing that Lopez, as a lay person, lacked the necessary expertise to say when the tape recorder was stopped and started again. (8 RT 1241.)

[9] The trial court rejected the prosecutor's offer, saying: "That wouldn't make any difference, because the jurors would have a copy of the transcript if we were to play it." (8 RT 1243.) As noted in appellant's opening brief, the trial court's statement is remarkable (and further evidence that its ruling in this case was an abuse of discretion) in view of the fact that statements, whether written or recorded, are redacted all of the time to remove prejudicial material.

been brought out on cross-examination by the prosecutor without any need to play the tapes by going through the transcripts of the tapes line-by-line, omitting any objectionable references.

Finally, the police officers who interviewed Lopez were available to refute any charge that they coerced Lopez into incriminating appellant, and in fact did so.[10]

The trial court's refusal to consider any of these alternatives to the admission of the tapes in their entirety with all of their objectionable references was arbitrary and constituted an abuse of discretion.

In response to appellant's argument that the trial court's erroneous ruling resulted in the admission of highly prejudicial references to gangs, appellant's alleged propensity for violence, his recent incarceration in jail, and that he had an outstanding warrant at the time of his arrest, respondent contends that:

> 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.

(RB 72.)

However, the playing of the two tapes did not disprove Lopez's testimony that she had been threatened and coerced by the police during the

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

many hours she was at the police station; only that she was not coerced while the tape recorder was recording, which represented only a small fraction of the time she spent at the police station. Moreover, Detective Branscomb testified that neither he nor Sergeant Swanson ever threatened Lopez. Thus, the unredacted tapes were cumulative to other prosecution evidence. As held by this Court in *People v. Cardenas* (1982) 31 Cal.3d 897:

> "[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant."

(*Id.* at p. 905, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242.)

With respect to the tapes' references to gang membership, respondent acknowledges (as it must) that the "'admission of evidence of a criminal defendant's gang membership creates a risk that the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged,'" quoting from this Court's holding in *People v. Williams* (1997) 16 Cal.4th 153, 193, but nevertheless contends that "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." (*Ibid.*; RB 72.) In addition to *Williams*, *supra*, respondent cites *People v. Brown* (2003) 31 Cal.4th 518, 547, and *People v. Gurule* (2002) 28 Cal.4th 557, 654-655. In each of the cases cited by respondent, however, the gang evidence was admitted because it was found by the trial court to be either highly probative to establish the defendant's guilt of the charged crime (*People v. Brown*, *supra*, and *People v. Williams*, *supra*) or to establish past criminal activity by the defendant

involving violence or the threat of violence under Penal Code section 190.3, subdivision (b) (*People v. Gurule*, *supra*.).[11] In the present case, however, the gang evidence was not admitted to prove appellant's guilt of the charged crimes, but only to prove an insignificant collateral matter, namely, whether Lopez's claim that the tape recorder had been stopped and then started again during the taped police interrogation could be substantiated by the playing of the tapes in their entirety.

As argued in appellant's opening brief, California courts have long recognized the potentially prejudicial effect of gang membership evidence, and have ruled that it should be admitted only sparingly. For example, courts have admitted such evidence when the very reason for the crime, usually murder, is gang related. (See *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497, and cases cited therein.)

> But when gang membership evidence was admitted to only show bias, convictions have often been reversed. (*In re Wing*

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[11] In *People v. Brown*, *supra*, 31 Cal.4th 518, this Court ruled that the admission of gang evidence "was very probative, serving to assist the jury in determining whether defendant's statement that he shot the victim was mere braggadocio or a true statement of fact. By swearing to its truth on his gang, defendant himself distinguished his statement from mere bravado." (*Id.* at p. 547.)

In *People v. Gurule*, *supra*, 28 Cal.4th 557, evidence of defendant's gang membership was admitted at the penalty phase as evidence of his past criminal behavior involving violence or the threat of violence. This Court held that such evidence was relevant to show that defendant's crimes were "not the product of a personal grievance but of a larger social evil." (*Id.* at p. 654, quoting *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

Finally, in *People v. Williams*, *supra*, 16 Cal.4th 153, this Court held that the gang evidence was properly admitted because it was highly relevant to the prosecution's theory that the defendant shot and killed the victim because he thought he was a member of a rival gang. (*Id.* at pp. 193-194.)

> *Y.* (1977) 67 Cal.App.3d 69, 136 Cal.Rptr. 390 [A court trial].) Even when offered to buttress identification, the prejudicial effect may be too great. (*People v. Perez* (1981) 114 Cal.App.3d 470, 170 Cal.Rptr. 619.) As the *Perez* court noted: "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series. The word gang . . . connotes opprobrious implications . . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*Id.* at p. 479, 170 Cal.Rptr. 619.)

(*People v. Maestas*, *supra*, 20 Cal.App.4th at p. 1497.) Further, this Court has "condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660; see also *People v. Anderson* (1978) 20 Cal.3d 647, 650-651.)

In appellant's case, the gang evidence was not admitted to prove appellant's guilt of the charged crime, but on a matter that was both collateral and irrelevant to Lopez's credibility as a witness.[12]

The same can be said of Lopez's taped statements concerning appellant's alleged propensity for violence and that he had an outstanding arrest warrant. Neither statement had anything to do with Lopez's credibility as a witness, and both statements were inadmissible in appellant's case. The reference to appellant's alleged propensity for violence was inadmissible under Evidence Code section 1101, subdivision (a) [defendant's propensity for violence generally inadmissible].

With respect to Lopez's statement that appellant had an outstanding

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[12] The crimes committed in this case were not alleged to be gang related, and any evidence of gangs had been excluded for purposes of voir dire and trial. The prosecutor agreed that she would bring nothing in with respect to gangs in her case-in-chief. (8 RT 1247.)

warrant for his arrest, this Court has noted "that prior cases have recognized the extreme danger of prejudice from introduction of evidence of previous arrest." (*People v. Anderson*, *supra*, 20 Cal.3d at p. 651; see also *People v. Arlington* (1899) 123 Cal. 356, 357 [being arrested is "not conducive to a good character for defendant"].)

In sum, the probative value of the playing of the two tapes in their entirety with their references to gangs and gang violence, as well as appellant's alleged propensity for violence, his recent incarceration in jail, and that he had an outstanding arrest warrant, was outweighed by their prejudicial effect.

C. The Trial Court's Error Requires Reversal

Appellant's defense was that he was mistakenly identified as the person who shot Andy Urrutia, and that the person who was responsible for shooting Urrutia was Jade Gallegos, a person who closely resembled appellant in appearance.[13] Appellant also maintained that if he was guilty

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

Paula Beltran, the fiancee of victim Andy Encinas, told the police that both of the shooting suspects were Latin males with shaved heads, and that both appeared to be about five-feet eight-inches tall. (12 RT 1903-1904.) Fidel Gregorio, the person who was seated on the backseat of the 4-Runner at the time of the shooting, told the police that the person with Rangel had no shirt, a tattoo on his stomach, and was five-feet eight or five-

(continued...)

of any crime, it was of being an accessory after the fact for hiding the murder weapons in his car. The trial court's erroneous admission of the unredacted tapes severely undercut appellant's defense by making it appear that appellant was a violent and dangerous gang member, that the charged crimes were somehow gang-related, and that appellant was therefore guilty of those crimes.

In its brief, respondent has failed to demonstrate beyond a reasonable doubt that the erroneous admission of this irrelevant and highly inflammatory evidence did not contribute to at least one juror's decision to find appellant guilty,[14] particularly in light of the fact that one of the seated

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[13](...continued)
foot nine-inches tall. (4 RT 644-645; 5 RT 709.) At the time of the shooting, both Gallegos and appellant had similar shaved-head hairstyles and tattoos on their stomachs, and neither was wearing a shirt prior to the shooting (5 RT 656; 6 RT 979; 7 RT 1107, 1192-1193; 8 RT 1274-1275; 9 RT 1495; 12 RT 1947-1948, 1950), and even the prosecutor acknowledged, "No doubt about it, he [Gallegos] looks similar [to appellant]." (14 RT 2257.) Evidence was presented at trial that Gallegos is approximately five-feet eight-inches tall, while appellant is approximately five feet, eleven-inches tall. (9 RT 1499; 12 RT 1950-1951.)

[14] In contending that appellant cannot demonstrate prejudice, respondent places great reliance on Ramon Valadez's observations the night of the shootings as proof positive of appellant's involvement. (RB 73.) But Valadez's observations should carry little weight here, as he admitted to having consumed a six-pack of 12-ounce Budweiser that night, as well as snorting a couple of one-inch lines of methamphetamine. (6 RT 883-885.)

Respondent also relies on Lopez's statement to the police that appellant allegedly told her just before the police arrived to go into the bedroom because he did not want his daughter to wake up with all the commotion, or see her him go to jail. (RB 73.)

At trial, Lopez testified that told the police this, but she further
(continued...)

juror had admitted her bias against gang members during jury voir dire.[15] (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, appellant's conviction and sentence of death must be reversed.

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[14](...continued)
testified that appellant never told her why the police might take him to jail. (7 RT 1091-1093.) In view of the fact that appellant had an outstanding warrant at the time of the shootings (see 1 CT 32), his alleged statement to Lopez that the police might arrest him is nothing short of ambiguous and does not in any way establish his guilt of the shootings.

[15] See 8 RT 1246-1248.

VI

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

In his opening brief, appellant argued that the trial court's refusal to instruct on the offense of accessory after the fact (Pen. Code, § 32) violated appellant's federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to a fair trial, to due process of law, to present a defense, to a properly-instructed jury, and to a reliable adjudication at all stages of a death penalty case, and that this error requires reversal of both the guilt and death verdicts. (MAOB 88-102.)

Respondent disagrees and, relying on a number of this Court's prior decisions, contends that the trial court properly declined appellant's request for an instruction on accessory after the fact because it is not a lesser-included offense of murder. Respondent also contends that if any error was committed in refusing to give appellant's requested instruction, it was harmless under any standard. (RB 103-106.) Appellant has already discussed these points in his opening brief, and will therefore not repeat that discussion here. Accordingly, the issues are fully joined and no reply is necessary.

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VII

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

In appellant's opening brief, he argued that the trial court committed reversible error in instructing his jury pursuant to CALJIC No. 2.03 (willfully false or misleading statements). (MAOB 103-113.) Appellant argued that CALJIC No. 2.03 is an impermissibly argumentative instruction that invades the province of the jury by focusing the jury's attention on evidence favorable to the prosecution, by placing the trial court's imprimatur on the prosecution's theory of the case, and by lessening the prosecution's burden of proof. The giving of this instruction in appellant's case permitted his jury to draw an irrational and unjust inference about his guilt. The instruction therefore violated appellant's state and federal constitutional rights to due process and a fair trial, to equal protection of the law, to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and to a fair and reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Respondent simply relies on this Court's prior decisions rejecting appellant's argument, adding nothing new to the discussion. (RB 106-107.) Accordingly, the issues are fully joined and no reply is necessary.

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VIII

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

Appellant has argued that, by instructing his jury that they could convict him of felony-murder in violation of Penal Code section 189 when he was charged only with malice murder in violation of Penal Code section 187, the trial court exceeded its jurisdiction and violated appellant's rights to due process, a jury determination on every element of the charged crime, adequate notice of the charges against him, and a fair and reliable capital guilt trial. (MAOB 114-121.)

Respondent contends that appellant's argument should be rejected based on previous decisions of this Court. (RB 95.) Appellant has already addressed that point in his opening brief and will not repeat that discussion here.

Accordingly, as argued in the opening brief, reversal of the entire judgment is required.

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IX

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

Appellant argued that the trial court committed reversible error by giving a series of standard guilt phase instructions – CALJIC Nos. 2.01, 2.02 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 – which both individually and collectively undermined the requirement of proof beyond a reasonable doubt, thereby violating appellant's rights to due process, trial by jury, and reliable guilt and penalty verdicts. (MAOB 122-131.)

Respondent simply relies on this Court's prior decisions rejecting appellant's argument, adding nothing new to the discussion. (RB 101-102.) Accordingly, the issues are fully joined and no reply is necessary.

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X

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

In his opening brief, appellant argued that the failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and that the error denied him his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict, and his right to a fair and reliable determination that he committed a capital offense. (MAOB 132-140.)

Respondent simply relies on this Court's prior decisions rejecting appellant's argument, adding nothing new to the discussion. (RB 95.) Accordingly, the issues are fully joined and no reply is necessary.

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XI

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

A. Respondent's Analysis of Appellant's Insufficiency of the Evidence Argument Is Flawed Because it Rests on an Incorrect View of the Evidence

In his opening brief, appellant argued that the entire judgment must be reversed because the evidence was legally insufficient to sustain his attempted robbery convictions, his convictions of robbery-murder felony murder, and the true findings on the robbery-murder special circumstance finding. (MAOB 141-151.)

As shown by the evidence in this case, the prosecution's entire case for attempted robbery rests on the words allegedly uttered by the two shooters moments before the two victims were shot. However, the words allegedly uttered by the two shooters were nothing more than a ruse or a pretext to disguise their true intent, which was to shoot the victims because they had ventured into a Hispanic neighborhood where, in the minds of the shooters, they did not belong. Indeed the first words uttered by one of the shooters (identified as Rangel) to victim Andy Encinas were, "Do you want to go to sleep?" (3 RT 403-405, 409-410.) When Encinas did not answer, Rangel said, "Why are you quiet? I asked you a question: Do you want to go to sleep?" (3 RT 405-406.) Encinas did not respond and got inside his vehicle. (3 RT 406-407.) Rangel followed Encinas to the driver's side of the vehicle, and Rangel's companion (identified as appellant) went to the other side of the vehicle where victim Anthony Urrutia was seated in the

front passenger seat. (3 RT 407.) Encinas and Urrutia were both shot moments later immediately after Rangel pointed his gun at Encinas and said, "Check yourself. Check yourself. Give me your wallet," and appellant pointed his gun at Urrutia and said to him, "Give me your wallet." (4 RT 632-633, 636-637, 5 RT 701-702.) Absolutely nothing was taken by appellant or Rangel from either Encinas or Urrutia, or from the interior of Encinas's vehicle.

Respondent rejects appellant's sufficiency of the evidence argument based primarily on "the fact that the evidence shows that the victims had in fact removed and exposed their wallets in response to appellants' demands." (RB 83.) But respondent's view of the evidence is wrong, as there is absolutely no evidence that either of the two victims ever "removed and exposed their wallets." The only person who could have provided that evidence was Fidel Gregorio, who was sitting on the back seat of Encinas's vehicle at the time of the incident, and he never testified that he saw either of the two victims remove their wallets from their person or, for that matter, that he ever saw the victims' wallets in the car at any time, either before or after the shootings.

In addition, as noted by appellant in his opening brief, the prosecution presented conflicting evidence regarding where the victims' wallets were actually found after the shooting. Police officer Raymond Brown testified that Encinas's wallet was found inside the closed console in the center of his vehicle, and Urrutia's wallet was found on the passenger seat of the vehicle. (9 RT 1432, 1452-1453.) However, Detective Marvin Branscomb testified that, "if I remember correctly," Urrutia's wallet was found inside the center console of the vehicle, and that Encinas's wallet was found on the floorboard of the vehicle. (10 RT 1521-1522, 1535, 1536-

1537, 1539.)

In any event, the police testimony does not support respondent's assertion that "[w]hen the police arrived on the scene, they observed . . . two wallets which belonged to the victims in plain view inside the car." (RB 82, italics added.) They plainly did not. The police may have observed one wallet which belonged to one of the victims in "plain view inside the car," but how it got to where it was found rests entirely on conjecture and speculation.

In sum, respondent's mistaken view of the evidence undermines completely its response to appellant's argument regarding the sufficiency of the evidence of attempted robbery in this case.

B. Respondent's Remaining Contentions

Appellant has already addressed in his opening brief the other points raised by respondent and will not repeat them in his reply brief. Accordingly, the issues are fully joined and no further reply is necessary.

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XII

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

Appellant has argued that the multiple-murder special circumstance and the death verdict must be reversed because there was insufficient evidence that he intended to kill Andy Encinas, whom appellant did not shoot, and because the jury was misinstructed that it could find true the multiple-murder special circumstance without finding an intent to kill. (MAOB 152-159.)

Respondent counters that the instruction given, requiring proof either of an intent to kill or a reckless indifference to human life, was correct based on the law in effect at the time of appellant's trial. (RB 90-91.) Respondent is wrong. First, appellant is fully cognizant of the change in the law referenced by respondent. Second, and more importantly, this change did not, contrary to respondent's lengthy and faulty analysis, eliminate the intent to kill requirement of the multiple-murder special circumstance for an aider and abettor. (Pen. Code, § 190.2, subd. (c);[16] *People v. Anderson*

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[16] Penal Code section 190.2, subdivision (c), provides in relevant part that: "Every person, *not the actual killer*, who *with intent to kill*, aids, abets . . . . any actor in the commission of murder in the first degree shall be punished by death or imprisonment . . . for life without the possibility of (continued...)

(1987) 43 Cal.3d 1104, 1147 ["Intent to kill is not an element of the multiple-murder special circumstance [for the actual killer]; *but when the defendant is an aider and abettor rather than the actual killer, intent must be proved.*"], italics added.)

The 2011 edition of CALCRIM, consistent with all the prior versions, clearly distinguishes between the multiple-murder and felony-murder special circumstances by offering two separate instructions on the mental state requirements applicable to aiders and abettors. The first, CALCRIM No. 702, applies to the subset of special circumstances governed by Penal Code section 190.2, subdivision (c) – specifically, section 190.2, subdivisions (a)(2) (prior murder convictions); (a)(3) (multiple murder convictions); (a)(4) and (a)(6) (murder by means of destructive device); and (a)(5) (murder to prevent arrest or complete escape). As to these special circumstances, CALCRIM No. 702 provides: "In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as [an aider and abettor /[or] a member of a conspiracy], *the People must prove that the defendant acted with the intent to kill.*" (Italics added.)

The language of reckless indifference, which derives from section 190.2, subdivision (d), does not appear in CALCRIM No. 702, but rather, is found only in CALCRIM No. 703, which is limited to the felony murder special circumstance. CALJIC No. 8.80.1, as given in this case, combined these separate special circumstances instructions and thus muddled the

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[16](...continued)
parole if one or more of the special circumstances enumerated in subdivision (a) have been found to be true under Section 190.4. (Pen. Code, § 190.2, subd. (c), italics added.)

critical distinction between them.

Respondent's argument is correspondingly confused. In *Cabana v. Bullock* (1986) 474 U.S. 376 and *Tison v. Arizona* (1987), the United States Supreme Court held that a major participant in a felony that results in murder who acted with reckless disregard for human life may be eligible for the death penalty. (RB 87-88.) In the wake of these decisions, this Court held in *People v. Anderson*, *supra*, that for the *actual killer*, the multiple-murder special circumstance does not require proof of an intent to kill. (43 Cal.3d at pp. 1149-1150; see also RB 89.) *Anderson*'s holding was codified in section 190.2, subdivision (b); *Tison*'s holding in section 190.2, subdivision (d). None of these cases or statutes, cited by respondent, eliminated the intent to kill requirement for the multiple-murder special circumstance as applied to an aider and abettor of a felony who was not the actual killer of the victim.

Specifically, respondent relies on *People v. Dennis* (1998) 17 Cal.4th 468 and *People v. Rogers* (2006) 39 Cal.4th 826 for the Court's observation that it had "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 p.516, quoted in *People v. Rogers*, *supra*, 39 Cal.4th at p. 892; RB 92.) Neither case is apposite because in both *Dennis* and *Rogers* the defendant was the actual killer of both victims. Consequently, the multiple-murder special circumstances in those cases was governed by section 190.2, subdivision (b), not, as here, subdivision (c).

In *People v. Dennis*, *supra*, 17 Cal.4th 468, the defendant attacked his former wife, who was then eight months pregnant, resulting in the death of both the wife and her fetus. (*Id.* at p. 489.) The defendant was convicted of first degree murder for killing the wife and second degree murder for

killing the fetus. In *People v. Rogers*, *supra*, 39 Cal.4th 826, the defendant was convicted of first degree murder for the killing of one prostitute and second degree murder for the earlier killing of another prostitute. (*Id.* at pp. 836-837.) Both defendants argued that the multiple-murder special circumstance required proof of an intent to kill both victims. This Court's comment, upon which respondent premises its entire argument, was directed to the specific contention that the multiple-murder special circumstance required proof that the *actual killer* of multiple victims had the specific intent to kill each of them.

Respondent takes the Court's observation entirely out of context and, as result, misstates its import. Neither *Dennis* nor *Rogers* apply to the issue at hand which, it cannot be stated too often, is governed by the intent to kill requirement of section 190.2, subdivision (c).

Based on its misunderstanding of the law, respondent proceeds to argue various facts and legal theories by which appellant could have been convicted of the second degree murder of Encinas. (RB 93.) Respondent's argument is at best irrelevant.

Indeed, the only discernible relevance of respondent's second degree murder analysis is to underscore the insufficiency of the evidence of intent to kill and the likelihood that the jury, faced with this insufficiency, based its true finding of the multiple-murder special circumstance on respondent's implied malice, i.e, reckless indifference, theory of liability. Given this alternative, there would have been no reason for any juror to reach the correct, more vexing question, i.e., whether appellant acted with the intent to kill Encinas. (See CALCRIM No. 702, para. 2.) Because appellant's jury had the option of relying on the legally incorrect implied malice theory and it cannot now be determined whether it based its multiple-murder

special circumstance finding on this impermissible theory, the death judgment must be reversed. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125, 1129.)

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XIII

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

A. Introduction

In his opening brief, appellant argued that the trial court erroneously allowed the prosecutor to elicit irrelevant and prejudicial gang evidence from Deputy Kovac during his testimony regarding the Juhn incident. The evidence in question was Kovac's identification of appellant as one of the jail inmates who Juhn said had assaulted him. That identification evidence became irrelevant and inadmissible once appellant agreed to stipulate that appellant was one of the people identified by Juhn. That evidence was also inadmissible under Evidence Code section 352, as its probative value was clearly outweighed by its prejudicial effect. (MAOB 160-176.)

Respondent contends that the evidence was properly admitted because the prosecutor was not required to accept appellant's offer to stipulate, appellant failed to move for a mistrial when Deputy Kovac made references to gang membership in his testimony, and, assuming error was committed, it was harmless. (RB 107-110, 116-120.)

Respondent's contentions are without any merit.

B. The Trial Court Erred in Refusing to Compel the Prosecution to Accept Appellant's Stipulation

Respondent contends that the prosecutor was not required to accept the defense stipulation because "the prosecutor's question regarding the tattoo went to the heart of the identification of Juhn's assailant." (RB 117.) That may be true, but appellant's offer to stipulate that he was one of the

people Juhn had identified as one of his assailants also "went to the heart of the identification of Juhn's assailant" and removed that issue from any dispute or controversy. (*People v. Bonin* (1989) 47 Cal.3d 808, 849.) As held by this Court in *Bonin, supra*: "[I]f a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury." (*Ibid.*) This requirement applies to all undisputed foundational facts, including identity, and not just the elements of the offense. (*Id.* at pp. 848-849.) Thus, applying this Court's words in Bonin to this case: "'If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively.'" Here, the defense offer removed from dispute the fact that appellant was in fact one of the individuals identified by Juhn and listed in Kovac's report. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible. Thus, as in *Bonin*, "the court should have compelled the prosecution to accept the defense's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation." (*Id.* at p. 849.)

Respondent has chosen to ignore completely this Court's holding in *People v. Bonin, supra*, and instead rely on a line of cases that concern an entirely different situation where, unlike the situation in appellant's case, the effect of the stipulation would arguably be to deprive the state's case of its effectiveness and thoroughness. (RB 117-118.) But respondent never explains how the stipulated fact at issue here would have in any way deprived the state's case of its effectiveness and thoroughness. And that is obviously because it does not. In any event, as shown below, none of the four cases cited by respondent – *People v. Salcido* (2008) 44 Cal.4th 93,

People v. Garceau (1994) 6 Cal.4th 140, *People v. Bradford* (1997) 14 Cal.4th 1005, and *People v. Pinholster* (1992) 1 Cal.4th 865 – are in any way apposite to appellant's case.

In *People v. Salcido*, *supra*, 44 Cal.4th 93, defendant was charged with multiple counts of murder and attempted murder. At trial, the prosecution offered evidence to establish that two of the victims had been sexually molested at the time of the murders. Defendant's offer to stipulate to the admission of evidence relating to the positions and condition of the bodies was refused. (*Id.* at pp. 146-147.) In upholding the admission of this evidence, this Court held that the evidence at issue was relevant as it depicted the crime scene and the injuries inflicted, it had a "bearing on the defendant's account of events and state of mind," and it "also tended to establish defendant's attitude toward his victims and that he acted methodically and deliberately rather than as the result of uncontrollable impulses arising from his ingestion of drugs and alcohol. (*Id.* at p. 147.) Thus, unlike the stipulation at issue in appellant's case, the stipulation in *Salcido* would have likely "deprive[d] the state's case of its effectiveness and thoroughness." (*Ibid.*)

In *People v. Garceau*, *supra*, 6 Cal.4th 140, this Court described the issue there as follows:

> Over the objections of defense counsel, the trial court admitted into evidence a photograph depicting the victims' bodies shortly after they were unearthed, a photograph depicting a superficial depression of [victim] Maureen Bautista's sternum, which Dr. Karl Kirschner opined was the result of a knife wound, four small tissue samples taken from the victims, and Maureen Bautista's jawbone, demonstrating a penetrating stab wound. The prosecution offered the foregoing evidence to establish the identity of the victims, to corroborate the prosecution's expert testimony [], and to

establish that defendant had acted with malice.

> In an effort to preclude admission of the challenged evidence, defense counsel offered to stipulate that Larry Tom Whittington assisted in placing the bodies in the dresser, that Maureen Bautista's death was caused by a blow of considerable force, that the jawbone had comprised part of her anatomy, and that the bodies unearthed were those of Maureen and Telesforo Bautista. After the prosecution rejected the stipulation, the trial court admitted the challenged evidence.

(*Id.* at p. 180.)

> In affirming the decision of the trial court, this Court noted that The probative value of the challenged photographs, jawbone, and tissue samples (exhibits that we have reviewed) clearly extended beyond the scope of the defense's offers to stipulate. The prosecution therefore was not obligated to present its case in the sanitized fashion suggested by the defense.

(*Id.* at p. 182.) Again, the situation in *Garceau* is nothing like the factual situation presented in appellant's case.

In *People v. Bradford*, *supra*, 14 Cal.4th 1005, the defendant argued that the trial court erred in admitting irrelevant, inflammatory, and cumulative photographs of the victim's body and the surrounding crime scene. This Court rejected defendant's claim that the prosecution should have been required to stipulate to what was shown in the photographic evidence, holding that "the prosecution was not obligated to accept antiseptic stipulations in lieu of photographic evidence. (*Id.* at pp. 1050-1051.) As is readily apparent, the situation in *Bradford* bears no similarity to appellant's case.

Lastly, in *People v. Pinholster*, *supra*, 1 Cal.4th 865, defendant cited *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805, for the proposition that the trial court committed

penalty phase error when, during the guilt phase, it refused to accept his stipulation to the identity of the victims as shown in proffered photographs in lieu of the identification testimony of the victims' mothers. In rejecting defendant's claim, this Court noted that the decisions in *Booth* and *Gathers* had been "reconsidered" by the high court in *Payne v. Tennessee* (1991) 501 U.S.808, but even "assuming for the purpose of discussion that there was an abuse of discretion at the guilt trial, we see no possibility of prejudice at the penalty trial." (*People v. Pinholster*, *supra*, 1 Cal.4th at pp. 958-959.) The decision in *Pinholster* has no relevance to the stipulation in appellant's case.

In sum, none of the four cases cited by respondent apply to the facts in appellant's case. Accordingly, it was error for the trial court not to have compelled the prosecutor to accept appellant's stipulation.

C. Appellant Did Not Forfeit the Issue By Not Requesting a Mistrial

Respondent contends that appellant cannot complain about Kovac's gang references because he did not move from a mistrial when the references were made by Kovac in front of the jury. (RB 118.)

Respondent is wrong.

Out of the presence of the jury, appellant objected to Kovac making any reference to appellant's King City Criminals "just for merely a point of identification." (18 RT 2710.) Later in the same proceedings, appellant's counsel said, " there is one more issue, and that's with respect to the gang evidence. [¶] Before we ever began this procedure, there was nothing relating to gangs as to Mr. Mora. He is not linked to any gang activity. Just to bring in a gang affiliation merely for the point of identification by an officer that as not related to the crime, I think is highly prejudicial." 18 RT

2713.) Appellant's counsel then said, "I'm willing to stipulate that Mr. Mora was the person he [Kovac] contacted." (*Ibid.*) The court said, "The People aren't willing to accept it."

The court then laid out the procedure by which Kovac could make his identification of appellant by looking at the tattoo outside of the jury's presence and saying that was the tattoo he had noted in his report "without saying what it is." (*Id.* at p. 2717.) Defense counsel requested that Kovac be told not to blurt out what the tattoo is, and the court ruled, "He can describe it, but tell him not to say the words." (*Id.* at p. 2718.)

Back in the jury's presence, Kovac was asked if he recognized the person Juhn had identified as one of his assailants. He said that he did not. He testified that after Juhn pointed out appellant as one of his assailants, Kovac checked appellant's wristband, which said that his name was Joseph Mora. (*Id.* at p. 2720.) He then asked appellant for his address, and appellant provided that information. (*Id.* at p. 2721.) Kovac examined Mora to look for any signs that he had been in a fight." (Ibid.) The prosecutor asked Kovac whether he looked for anything else for identification. (*Id.* at pp. 2721-2722.) He said that he looked for tattoos. Appellant's defense counsel objected on relevance grounds, which was overruled by the trial court. (*Id.* at p. 2722.) Kovac then said that he observed a three-word tattoo on appellant's chest, which he recorded in his report. (*Ibid.*) While Kovac went to examine appellant's tattoo outside the jury's presence to see if it was the same one he had recorded in his report, the prosecutor pressed the court to allow her to have appellant remove his shirt and display the tattoo to the jury. The court ruled, "I don't see that there is any real probative value in exposing the tattoo . . . on Mr. Mora's chest to the jury at this point. (*Id.* at pp. 2723-2724.) The prosecutor then

asked that the witness be allowed to tell the jury what the tattoo said. The court denied that request, stating: "No. Again, I think that information is, again, more prejudicial than probative. [¶] However, the defense is not going to be able to get up and argue that it's some prayerful exclamation on his chest. You can't argue what was written if the People can't inquire about it." (*Id.* at p. 2724.) Defense counsel stated, "Your Honor, we offered to stipulate." (*Ibid.*) Still outside the jury's presence, Kovac indicated that he recognized the tattoo that he had recorded in his crime report. (*Id.* at p. 2725.) The court admonished the prosecutor that she could inquire about the tattoo, "but not as to the words that were contained." (Ibid.) The court further admonished Kovac "You are still restricted from giving the exact words you saw in front of the jury, sir." (*Ibid.*)

In the jury's presence, Kovac said that he had examined appellant's chest and saw the same tattoo that he had noted in his report. He said that the tattoo was along appellant's neckline, and it was a three-word phrase. (*Id.* at p. 2726.) That should have been enough to confirm Kovac's unchallenged identification of appellant as one of Juhn's alleged assailants, but the prosecutor wanted more. She asked Kovac "on your report do you write down all the tattoos or do you just pick one?" Kovac answered, "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." (*Id.* at pp. 2726-2727.) Defense counsel did not object to Kovac's answer, but a short time later asked that the prosecutor not be allowed to argue that the tattoo Kovac saw on appellant's chest was a gang tattoo, or that he was looking for gang tattoos. (*Id.* at p. 2764.) The court ruled, "There won't be. There can't be. There is no evidence to support that." (*Id.* at p. 2765.)

A fair reading of the record shows that, after her offer to stipulate

was rejected by the prosecutor and the trial court refused to compel the prosecutor to accept it, appellant's defense counsel did her best to prevent Kovac from testifying in any way, shape or form that appellant's tattoo was a gang tattoo. A motion for mistrial based on Kovac's answer that "if at all possible, I will pick out a tattoo that shows a gang name, gang affiliation, anything like that," would have simply highlighted his answer for the jury, something defense counsel clearly did not want to do. Moreover, in view of its prior rulings, as well as its refusal to compel the prosecutor to accept the defense stipulation, it is highly unlikely that the trial court would have granted a motion for a mistrial. Hence, defense counsel's failure to move for a mistrial does not bar appellant's instant claim. (Cf. *People v. Maury* (2003) 30 Cal.4th 342, 420 ["counsel is not required to make futile objections or motions"]; *People v. Williams* (1997) 16 Cal.4th 153, 215 [trial counsel may have decided not to object because an objection would have highlighted the testimony and made it seem more significant].)

D. The Error Requires Reversal

Respondent's final contention is that the error was harmless because the "prosecution's case at the penalty phase was overwhelming." (RB 118.) This subject has been addressed at some length in appellant's opening brief and no useful purpose will be served by repeating it here.

E. Conclusion

For the reasons set forth above and in appellant's opening brief, appellant's death judgment must be reversed.

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XIV

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

A. Introduction

At the penalty trial, appellant's counsel said that they intended to present the testimony of three Los Angeles County deputy sheriffs, who would testify that appellant, while incarcerated in the county jail in this case, was trusted to perform various jobs, and that he had followed their orders and posed no disciplinary problems. The prosecutor said that if appellant chose to present this testimony, it was "fair game in rebuttal" for her. The prosecutor also said that she did not have to disclose what she might or might not have as rebuttal evidence to the deputies' testimony, a view that was shared by the trial court. Based on the prosecutor's statements, appellant's counsel attempted to secure a ruling from the trial court regarding the scope of the evidence the court would permit the prosecutor to present in rebuttal to the deputies' proffered testimony. The trial court declined to make such a ruling, saying that without knowing the nature of the rebuttal evidence the prosecutor might have, it could not make a ruling as to what it would allow the prosecutor to present in rebuttal. The court said that the prosecutor might have admissible rebuttal evidence, and that was the best it could say without knowing what in fact the prosecutor had. Based on the trial court's rulings, appellant's counsel decided not to call the sheriff's deputies.

In his opening brief, appellant argued that the trial court's error in

not requiring the prosecutor to provide discovery of what evidence she intended to present in rebuttal to appellant's proffered testimony of the sheriff's deputies violated appellant's federal and state rights to the assistance of counsel and an informed decision on whether to present mitigating evidence (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15), his rights to due process, a fair trial, and a meaningful opportunity to present a defense (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), his right to reciprocal discovery (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; Pen. Code, § 1054 et seq.), and his right to a reliable determination of penalty in a capital case (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 15 & 17). (MAOB 177-202.)

Respondent ignores much of appellant's argument, and simply contends that appellant has forfeited his right to complain of this error because "he did not even request the disclosure of the identity of the prosecutor's possible rebuttal witness." (RB 132.) In making this contention, respondent does not dispute that appellant had the right to reciprocal discovery of the prosecution's witness. (RB 131-132.) Alternatively, respondent contends that "there was no reasonable possibility the verdict would have been different had appellant presented his proffered mitigating evidence." (RB 132.) Respondent is wrong on both counts.

B. Appellant's Instant Claim Has Not Been Forfeited

In support of its claim that appellant has forfeited the instant claim, respondent makes the remarkable statement that appellant "did not even request the disclosure of the identity of the prosecutor's possible rebuttal witness." (RB 132.) Respondent's statement borders on the absurd. A fair reading of the record does not support respondent's contention at all, as it is very clear that appellant wanted to know exactly what the prosecutor's

purported rebuttal evidence was so that they could make an informed decision whether to present the testimony of the three deputies. Here, the prosecutor adamantly refused to disclose what evidence she had to either the court or defense counsel, and would have almost certainly refused to disclose the identity of her purported rebuttal witness.

Moreover, in making this unfounded contention, respondent ignores the large body of law that requires the prosecution "to provide reciprocal discovery of 'any of its witnesses who will be used in refutation of the defense witnesses if called.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 957, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 475.) As recognized by this Court in Izazaga, "A disclosure of witnesses under section 1054.3 . . . *triggers* a defendant's right to discover rebuttal witnesses under section 1054.1." (54 Cal.3d at p. 376, italics added.) Section 1054.1 requires that the prosecution provide the defense with "The names and addresses of persons the prosecutor intends to call as witness at the trial."

In short, the prosecutor was required to provide to appellant's defense counsel full discovery of the identity of witness she contemplated calling to refute the testimony of the three deputies.

In this case the prosecutor's refusal to provide full discovery of her purported rebuttal witness coupled with the trial court's refusal to require the prosecutor to do this put defense counsel in the untenable position of having to make a very important tactical decision without knowing what dangers they faced, if any, if they called the three deputies as witnesses. The prosecutor's refusal to provide full discovery of its rebuttal evidence, which necessarily included the witness' name and address, and the trial court's endorsement of the prosecutor's actions was in direct contravention

of this state's discovery laws. (See *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at pp. 375-376.) Accordingly, appellant's instant claim is properly before this Court on appeal.

C. Respondent Has Failed to Demonstrate That the Error in this Case Was Harmless Beyond a Reasonable Doubt

Respondent next contends that, assuming that appellant's claim has not been forfeited and is properly before this Court on appeal, any error regarding this claim is nonetheless harmless beyond a reasonable doubt in light of the facts of the crime, namely, that "outside such a confined environment [jail] appellant participated in the killing of two innocent unsuspecting individuals"; the prior Juhn incident in the county jail; and because "the most 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 [sic] authorities to perform various work in the county jail and had performed that work without problems." (RB 132-133.)

Respondent's harmless error analysis is flawed and meritless.

In this case, appellant's defense counsel wanted to present evidence to show that appellant, while incarcerated in the county jail in this case for nearly two and one-half years, was trusted to perform various jobs and posed no disciplinary problems. This was essential mitigating evidence that could have served "as a basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5, quoting *Lockett v. Ohio* (1978) 438 U.S. 568, 604.) "[E]vidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." (*Skipper v. South Carolina*, *supra*, 476

U.S. at p. 7, fn. 2.)[17]

Respondent obviously fails to appreciate the significance of appellant's proffered evidence, as it would have informed appellant's penalty jury about appellant's favorable institutional adjustment and good behavior during the nearly two and one-half years he was in custody in this case.[18] One can only presume that appellant's jailers, including the three deputies in this case, were fully aware of appellant's entire disciplinary record while in their facility, including the alleged prior Juhn incident,[19]

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[17] In *Skipper v. South Carolina*, *supra*, the high court held the trial court's exclusion of the testimony of two jailers and one "regular visitor" to the jail that purported to show the defendant had "made a good adjustment" during his time spent in jail denied the defendant his right to place before the sentencing jury all relevant evidence in mitigation of punishment. (476 U.S. at p. 1.) The high court noted that a sentencer should not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (*Id.* at p. 4, internal citations omitted. Specifically, the court noted:

> Evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating . . . [because] . . . a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.

(*Id.* at pp. 5–6.)

[18] Appellant was arrested shortly after the shootings in this case, on August 24-25, 1997, and the hearing on prosecution rebuttal discovery was held on February 16, 1999. (4 CT 1045-1048.)

[19] Respondent wrongly states that appellant was the instigator of the Juhn incident. He was not. (19 RT 3018-3019 [prosecutor stipulates that "Mr. Juhn stated he could only remember the instigator of the crime, not the

(continued...)

which took place some 13 months before his incarceration in this case. (See 19 RT 2676-2682.) Nevertheless, his jailers entrusted appellant to perform various jobs in the county jail. According to the defense proffer, the deputies would testify that appellant followed their orders, and posed no disciplinary problems.

Respondent reveals its ignorance of the import of appellant's proffered mitigating evidence, when, after acknowledging that this evidence would have shown that appellant performed well and posed no disciplinary problems in a "confined environment, i.e., the county jail," it goes on to say that this evidence "was not at all helpful to appellant" because it does not measure up to appellant's conduct "outside such a confined environment." (RB 132-133.) But appellant's penalty jurors were not asked to decide whether appellant should ever be allowed to live outside of a "confined environment"; rather, they were asked to decide whether appellant should be sentenced to death or spend the rest of his life in the confines of a prison, and the proffered testimony would have gone a long way to show that appellant would in fact do well in a prison environment if sentenced to life without the possibility of parole.

The proffered testimony would have also gone a long way to blunt the force of the Juhn incident and the prosecutor's argument based on that incident,[20] by showing that appellant, if sentenced to life without the

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[19](...continued)
other participants. The instigator was not suspect Mora."].)

[20] In this case, the prosecutor referred to the Juhn incident in her penalty phase closing argument as evidence that appellant posed a dangerous threat towards others in a custodial setting: "And what do we know about him from that [alleged prior jail assault]? We know that this
(continued...)

possibility of parole, would not pose a future threat to other inmates and prison personnel. In other words, since the alleged Juhn incident, appellant learned how to behave in a custodial setting. The importance of this type of mitigating evidence to a sentencing jury in a capital case cannot be underestimated, and has been discussed at some length in appellant's opening brief and will therefore not be repeated here. (See MAOB 197-202.)

In short, respondent's answer to appellant's instant argument fails to demonstrate that the error in this case was harmless beyond a reasonable doubt and did not play a contributing role in the jury's decision to impose the death sentence. (*Chapman v. California*, (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.) Accordingly, appellant's death sentence must be reversed.

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[20](...continued)
defendant, while in jail, will prey on a very vulnerable person." (20 RT 3209; see also 20 RT 3212 ["this defendant . . . committed that violent act and preyed upon somebody in county jail"].)

XV

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

Appellant argued that the trial court committed reversible error in refusing to modify CALJIC No. 8.85 to include language proposed by appellant instructing the jury not to double count "circumstances of the offense" that were also "special circumstances. (MAOB 203-209.) Appellant demonstrated that the error was prejudicial in his case based on the reasonable likelihood that the jury, in the absence of an express instruction to the contrary, would have considered the same facts as both aggravating circumstances of the crime and separately aggravating special circumstances. (MAOB 207-209.) As a result, as further shown in his opening brief, appellant was deprived of his Eighth and Fourteenth Amendment rights to a fair and reliable penalty trial and death sentence, based on a proper consideration of relevant sentencing factors. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.)

Respondent implicitly acquiesces, as it must, in appellant's claim of error. Respondent's only counter-argument is that no prejudice resulted because the prosecutor did not expressly suggest to the jury that double-

counting the aggravating factors is permissible. Respondent relies on *People v. Russell* (2010) 50 Cal.4th 1228 for the proposition that, absent such express suggestion, amounting to prosecutorial misconduct, prejudice cannot be shown. (RB 148.) However, there would be no requirement that courts give a double-counting instruction under any circumstances, if respondent's broad reading of *Russell* were correct. Notably, this requirement, disregarded in CALJIC and by the trial court, has been fully recognized and restored in CALCRIM, the state's plain language criminal jury instructions. (See CALCRIM No. 763.)[21]

Appellant anticipated respondent's contention and cogently refuted the flawed premises underlying *Russell, supra*, 50 Cal.4th 1228 and similarly reasoned cases. (MAOB 205-206.) The prejudice analysis in these cases rests on the unfounded assumption that jurors will grasp that they are not allowed to double count circumstances of the crime that are also special circumstances unless expressly urged to double-count by the prosecution. As noted in appellant's opening brief, this assumption is belied, in the first instance, by the trial court and the prosecutor's shared, erroneous assertion that there is no limit on the number of times jurors can use a fact that is both a special circumstance and a circumstance of the crime. (20 RT 3118-3120; MAOB 206.) Moreover, no improper prompting by the court or prosecution is required to foster double-counting by the jury where the language of CALJIC No. 8.85, unmodified, itself

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[21] CALCRIM No. 763 includes, within brackets, the prohibition against double-counting any fact that is both a "special circumstance" and also a "circumstance of the crime." The Bench Notes to this instruction state that, when requested, the court *must* give this bracketed paragraph as required by *People v. Melton* (1988) 44 Cal.3d 713, 768, italics supplied.) *Melton* was also the controlling case at the time of appellant's trial.

invites such misunderstanding.

CALJIC No. 8.85 directs the penalty phase jury to consider "(a) the circumstances of the crime" . . . "*and* the existence of any special circumstance(s) found to be true." As both commonly and judicially understood, the word "and" is a conjunctive construction linking independent ideas or requirements. (See *Bruesewitz v. Wyeth LLC* (2011) __ U.S. __, 131 S.Ct. 1068, 1078; *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.) As such, jurors, like the trial court and prosecutor in appellant's case, would naturally interpret the phrase in question to permit separate and duplicative consideration of the same facts when used both to support the conviction and the true finding of a special circumstance. In short, there is no logical or empirical support for the supposition underlying this Court's narrowing of the harmless error analysis to focus exclusively on whether the prosecutor explicitly urged the jury to engage in double-counting.

Appellant has demonstrated that under both state and federal harmless error standards, as ordinarily applied, the trial court's error in refusing the modified instruction was prejudicial. As noted in appellant's opening brief, with the exception of a single, uncharged jail incident, the prosecution's argument for death was based entirely on the circumstances of the crime and the special circumstances under Penal Code section 190.3, factor (a). (MAOB 209.) In addition to his youth, appellant's mitigation evidence showed prolonged abandonment, rejection and neglect by both his parents, as well as a maternal history of prostitution and substance abuse. (See, e.g., 19 RT 2994-2995, 3006-3011, 3028-3030; cf. *In re Lucas* (2004) 23 Cal.4th 632, 731-732 ["Such evidence [of abandonment and abuse in childhood] may be the basis for a jury's determination that a defendant's

relative moral culpability is less than would be suggested solely by reliance upon the crimes of which he stands convicted and the other aggravating evidence."].) Thus, on the evidence presented, reasonable jurors could have decided to spare appellant's life but may not have done so because they double-counted the aggravating circumstances of the crime, as permitted by the unmodified instruction. Accordingly, appellant's death sentence must be reversed because the state cannot prove "beyond a reasonable doubt" that the trial court's failure to give the requested, judicially-sanctioned modification of CALJIC No. 8.85 could not have contributed to the death verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ochoa* (1998) 19 Cal.4th 353, 379 [same standard for state law violation of Penal Code section 190.3, factor (a).)

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XVI

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

Appellant has argued that the trial court committed reversible error in rejecting his request for seven specially-tailored penalty phase instructions that directed the jury's attention to the particularized circumstances in his case that militated in favor of a life sentence. (MAOB 210-230; see *Zant v. Stephens* (1983) 462 U.S. 862, 885; *Jurek v. Texas* (1976) 428 U.S. 262, 274.) As a result, he was denied the right to jury instructions pinpointing his case for life in violation of his state and federal constitutional rights to a fair and reliable penalty determination. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1276, citing *People v. Sears* (1970) 2 Cal.3d 180, 190.)

Appellant's requested instructions sought to admonish the jury that: (1) death is the most severe penalty the law can impose; (2) drug and alcohol intoxication may not be considered aggravating factors; (3) a defendant's background may only be considered as mitigation; (4)-(6) the jury has the discretion to find that life imprisonment without the possibility of parole is the appropriate punishment even if aggravating factors substantially outweigh mitigating factors or if aggravating evidence, without regard to mitigation, is not substantial enough to warrant death; and (7) death may not be imposed as a subjective response to argument or evidence.

Respondent does not contend that any of the requested instructions incorrectly state the law. Rather, it merely lists the cases in which this Court has upheld the refusal of similar, though not identical, penalty phase

instructions requested by the defense. (See RB 120-122.) As respondent notes, the rationale underlying these decisions is that the standard penalty phase instructions generally suffice to advise the jury of the scope of its sentencing discretion. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1363; RB 121.) As this Court has recognized, however, misguided suggestions by the court or the prosecution can undermine the sufficiency of the standard instructions, as can jurors' preconceptions. (*People v. Carey* (2007) 41 Cal.4th 109, 133, citing *People v. Livaditis* (1992) 2 Cal.4th 759, 784.) In appellant's case, jurors' mistaken assumptions, foreshadowed in voir dire, went uncorrected because of the trial court's own mistaken view of the law.

The trial court and the prosecutor repeatedly took positions that were contrary to long-standing precedent. For instance, the court refused appellant's instruction that death is the more, indeed the most, severe punishment on the ground there was no legal authority for the instruction. (20 RT 3132; MAOB 211.) The court was wrong.

Appellant's opening brief cited several of the many state and federal decisions endorsing the principle reflected in the requested instruction that death is a more severe punishment than life without the possibility of parole. (MAOB 221-222.) Nonetheless, this Court has previously upheld the refusal to give such instruction on request on the assumption that CALJIC No. 8.88 and jurors' common sense render the instruction unnecessary. (*People v. Cook*, *supra*, 40 Cal.4th at p. 191.) This assumption is readily contradicted, however, by the expressed attitudes of actual, as opposed to ideal, jurors. Two recent decisions, *People v. Tate* (2010) 49 Cal.4th 635 and *People v. Thomas* (2011) 52 Cal.4th 336 are particularly instructive in this regard.

In *People v. Tate*, *supra*, a deadlocked jury sought clarification as to

whether "death [was] the more severe punishment, or [was] life without chance of parole." (49 Cal.4th at p. 706.) The court re-read CALJIC No. 8.88, the standard instruction which explains the weighing process at the penalty phase. (*Ibid.*) Defense counsel asserted that several prospective jurors had indicated during their voir dire that they thought life without parole was worse than death. (*Ibid.*) Defense counsel then requested an admonition to the effect that the death penalty could not be imposed as an act of mercy. (*Ibid.*) The court declined to give the admonition. (*Id.* at p. 707.)

While acknowledging that the requested admonition was a correct statement of the law, this Court found no abuse of discretion in the trial judge's denial of the request. (*Ibid.*) This Court ratified the trial judge's assumption that the principle that death is the more severe penalty is *explicit* in the "substantial" comparison directive of CALJIC No. 8.88. (*Ibid.*, italics in original.)

In *People v. Thomas*, *supra*, 52 Cal.4th 336, this Court addressed the defendant's contention that the trial court had prejudicially erred in instructing the jury, initially at the *prosecutor's* request and later on its own motion, that death is the greater penalty. (52 Cal.4th at p. 361.) In rejecting the claim, this Court relied on *People v. Harris* (2005) 37 Cal.4th 310, which held that it was within the trial court's discretion to instruct, pursuant to jury request, that death is the more severe sanction. (*Id.* at p. 361.)

Their divergent holdings notwithstanding, these cases underscore not only that some prospective jurors believe that life without the possibility of parole is the more severe punishment, but that seated jurors can persist in this belief even after instruction with CALJIC No. 8.88. CALJIC No. 8.88 does not expressly state that death is the greater penalty; rather its calculus

of substantial aggravation implies as much. Not every juror draws the intended inference or cases such as *People v. Harris*, *supra*, 37 Cal.4th 310 and *People* v. *Tate*, *supra*, 49 Cal.4th 635 would not continue to be heard. (See also MAOB 212-213 and cases cited therein.)

In appellant's case, appellant has identified five sitting jurors who came to deliberations predisposed to believe that life in prison without the possibility of parole could be the more severe punishment. (MAOB 215.) In these circumstances, the trial court's rejection of the requested instruction, based on its patent misunderstanding of the law, was an abuse of discretion and constitutional error. This error created an unacceptable risk of a jury verdict that did not reflect the ultimate severity of the death penalty, thus requiring reversal of the death judgment.

In a similar vein, the trial court and the prosecution's conflation of aggravating and mitigating circumstances led to the rejection of appellant's legitimate mitigation instructions. Appellant proffered two special instructions admonishing the jury, first, that drug and alcohol intoxication could not be considered aggravating and second, that appellant's background could only be considered mitigating. Both instructions correctly stated the law. (MAOB 216, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 464; MAOB 219 citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033; see also *People v. Howard* (1988) 44 Cal.3d 375, 439.) Both instructions were warranted under the circumstances of this case.

With respect to drug and alcohol use, appellant was rightly concerned that jurors would regard such use as an aggravating factor because that is precisely the view expressed by several jurors during voir dire. (MAOB 218; 43 CT 11135, 11213, 11291, 44 CT 11447.) Neither the court nor the prosecutor did anything to disabuse these jurors of this view

because they shared it. (20 RT 3132-3133.)

As for appellant's background, the court's comments and refusal of the requested instruction effectively licensed the prosecution's argument converting mitigating evidence of appellant's personal background into proscribed bad character evidence supporting a death verdict. (MAOB 220-221.) The Factor (k) background evidence presented by appellant, including his fathering a daughter and his having been the innocent victim of a near-fatal shooting, was intended to elicit sympathy from the jury, not to prove appellant's good character. The prosecutor, however, did not confine his closing argument to the permissible argument that the evidence was not mitigating, but rather improperly used the background information to impugn appellant's character because he had not become a better person as a result of his experiences. (19 RT 2997, 3046, 3048; 20 RT 3197, 3229; cf. *People v. Boyd* (1985) 38 Cal.3d 762, 774-775.)

Respondent does not maintain that either requested mitigation instruction misstated the law, but rather that the court has rejected appellant's claims in prior cases. (RB 121, citing *People v. Tafoya* (2007) 42 Cal.4th 147 and *People v. Farnam* (2002) 28 Cal.4th 1071.) Contrary to respondent's representation, neither *Tafoya* nor *Farnam* addressed the precise claim presented here. In both of those cases, the defendants challenged the constitutionality of CALJIC Nos. 8.85 and 8.88 on various grounds. In conjunction with these challenges, the defendants in *Tafoya* and *Farnam* argued that the court had a constitutional duty to advise the jury *sua sponte* which factors are relevant solely to mitigation and which solely to aggravation. (*Tafoya*, *supra*, 42 Cal.4th at p. 188; *Farnam*, *supra*, 28 Cal.4th at p. 191.) In contrast, here, appellant has argued, quite narrowly, that the court erred in rejecting a requested non-argumentative,

legally correct special instruction focusing the jury's attention on the proper consideration of mitigating evidence. Respondent cites no case on this precise point.

Respondent also misses the mark in addressing the parallel special instruction regarding background evidence. Although, as respondent contends, this Court has previously upheld the refusal to give such a limiting instruction, the rationale for so holding rests on the assumption, contrary to this Court's usually high estimation of the public, that jurors have no common sense and, if instructed as appellant requested, will confuse a defendant's personal and familial background with his criminal history and desist from considering the latter in aggravation. (See, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 135 [finding no error in refusal of mitigation instruction and noting that a defendant's criminal history, which is part of his background, may be considered in aggravation]; *People v. Ochoa* (2001) 26 Cal.4th 398, 457 [upholding refusal to read requested mitigation instruction because gang-related criminal activity may be a proper aggravation factor].) In appellant's case, there was no likelihood whatsoever that the jury would have failed to consider aggravating factors if instructed as appellant requested. On the other hand, if not so instructed, there was a strong likelihood that the jury would – and did – adopt the prosecutor's improper argument that appellant's substance abuse and personal background, rather than warranting sympathy, weighed in favor of the death penalty. Accordingly, the court erred in refusing the proffered special instructions and its error cannot be shown to be harmless. Accordingly, the death sentence must be reversed.

Respondent is equally terse in addressing appellant's argument that the trial court erred in refusing three additional special instructions

clarifying the weighing process. (MAOB 221-224; RB 121-122.) For each rejected instruction, respondent cites a case in which this Court has previously found that capital defendants are not entitled to the instruction. Such perfunctory arguments do not merit reply. Therefore, appellant will stand on the arguments advanced in his opening brief, adding only that the clarification appellant requested has now been incorporated, at least in part, in CALCRIM which has supplanted CALJIC as the state's official instruction manual. (See, e.g., CALCRIM No. 766 ["Death Penalty: Weighing Process . . . Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death."].)

Respondent does not address appellant's last argument regarding the rejection of his requested instruction cautioning the jury not to be swayed toward a death verdict by emotional evidence and argument. (MAOB 224-230.) Consequently, no reply is required.

Finally, because it assumes no error occurred, respondent does not counter appellant Mora's detailed prejudice arguments. Appellant, therefore, stands on the prejudice analysis presented in his opening brief and re-asserts that his death judgment must be reversed.

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XVII

APPELLANT'S CONVICTION OF CAPITAL MURDER MUST BE REVERSED BECAUSE CALIFORNIA'S MULTIPLE MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL

In appellant's opening brief, appellant argued that the multiple murder special circumstance must be overturned because it violates the Eighth and Fourteenth Amendments, while acknowledging that this Court has already rejected these claims of error. (MAOB 231-235.) Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 149-155.) Accordingly, the issues are fully joined and no reply is necessary.

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XVIII

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

Appellant has argued that the trial court erred in failing to fulfill its duty to conduct an evidentiary hearing after receiving sworn information from appellant's trial counsel that prejudicial juror misconduct had occurred during penalty phase deliberations. (MAOB 236-250.) Appellant's counsel had credibly alleged in a declaration supporting appellant's new trial motion that (1) Juror No. 2 informed his fellow jurors during penalty deliberations that he had determined, based on his military experience and training, that appellant had "executed" Anthony Urrutia and that, for this reason alone, appellant also must be "executed"; (2) Juror No. 7 then changed her penalty vote based on Juror No. 2's opinion that appellant had committed an execution-style killing; and (3) other jurors maintained that appellant initiated the shootings by paging Rangel, for which there was no evidence at trial. (45 CT 11768.)

However, despite its recognition of the seriousness of these allegations, the trial court took no steps to explore or resolve the issue. As a result, appellant's state and federal constitutional rights to a fair trial by an impartial jury were compromised requiring that the death verdict be set aside and that the case be remanded to the superior court for a hearing on appellant's allegations of juror misconduct.

Respondent contends that appellant's juror misconduct argument fails because (1) it is based on the averments of defense counsel, not of the

jurors themselves; (2) appellant's motion for a new trial disclosed no juror misconduct; and (3) the described juror conduct came within the protection of Evidence Code section 1150, prohibiting inquiry into jurors' subjective reasoning processes. (RB 143-147.) Respondent's various contentions were anticipated and substantially rebutted in appellant's opening brief.

First, respondent contends that the trial court had no obligation to conduct an evidentiary hearing because appellant did not support his new trial motion with juror declarations. (RB 143-144.) However, neither the statutes nor the case law upon which respondent relies support it's absolutist position.

None of the governing statutes – Penal Code section 1181, subdivisions (2) and (3), Evidence Code section 1150, Code of Civil Procedure sections 206 and 237 – expressly condition a post-conviction evidentiary hearing based on a claim of juror misconduct on the submission of sworn juror declarations. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 387 ["Code of Civil Procedure sections 206 and 237 do not infringe upon the trial court's inherent power to investigate strong indicia of juror misconduct"].)

Appellant has acknowledged that a trial court does not ordinarily abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support thereof constitutes unsworn hearsay. (*People v. Avila* (2006) 38 Cal.4th 491, 604.) Nonetheless, a court may not ignore strong indicia of jury misconduct based solely on a procedural flaw in the moving party's showing. (See, e.g., *People v. Bryant* (2011) 191 Cal.App.4th 1457, 168 [where both defense counsel and the prosecutor relied on unsworn statements from jurors, case remanded to trial court for further consideration because "the issues

asserted in this case were serious and if proven by sworn evidence [would] give rise to a presumption of prejudice"]; *People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 385.)

Respondent's narrow reliance on *People v. Hayes* (1999) 21 Cal.4th 1211 and *People v. Carter* (2003) 30 Cal.4th 1166 is thus misplaced. In *Hayes*, the motion for new trial was supported by written statements from defense counsel and an investigator, neither of which was executed under penalty of perjury. (21 Cal.4th at p. 1253.) In opposition, the prosecution submitted affidavits by a juror that directly contradicted part, but not all, of the showing made by the defense. (*Id.* at p. 1254.) In view of the juror's repudiation and refusal to verify the statements proffered by defense counsel, this Court found no abuse of discretion in the trial judge's refusal to conduct an evidentiary hearing where no admissible testimony had been submitted or was forthcoming from the defense. (*Id.* at p. 1259.)

Similarly, in *People v. Carter*, *supra*, 30 Cal.4th 1166, defense counsel's proffer, which lacked specifics and was based on hearsay, was contradicted by the sworn statements from the subject juror denying the allegations of misconduct reported by the defense. (30 Cal.4th at p. 1217.) Here, in contrast to both *Hayes* and *Carter*, defense counsel's proffered declarations, which were executed under penalty of perjury, were not contradicted by any juror, the prosecutor, nor by respondent in his opposing brief. (See RB 144 [arguing that the views expressed by Juror No. 2 and Juror No. 7 did not support a finding of misconduct, but not disputing that the jurors made the statements attributed to them in trial counsel's declarations]; 45 CT 11853-11854.)

Respondent also fails in its attempt to distinguish *People v. Brown* (2003) 31 Cal.4th 518, 581-582, a case upon which appellant relies. (RB

144; MAOB 245-246.) Specifically, appellant noted that in *Brown* this Court evaluated the declarations of counsel in determining whether the defendant had demonstrated a strong possibility of juror misconduct. (MAOB 246.) Respondent first contends that this Court's consideration of the declarations in *Brown* was dicta. (RB 144.) At best, this contention reflects respondent's misunderstanding of both appellant's point and the concept of dicta.

Black's Law Dictionary distinguishes between "dictum," "a statement of opinion or belief considered authoritative because of the dignity of the person making it," and "judicial dictum," "an opinion by a court on a question that is directly involved, briefed and argued . . . that is not essential to the decision." (Black's Law Dictionary (8th Ed. 2004).) Neither definition strictly applies to the *Brown* Court's exemplary consideration of attorney declarations which was essential to this Court's rationale for its decision, though not itself the holding of the case.

Alternatively, respondent contends that *Brown* is distinguishable from appellant's case because the declarations in *Brown* were mutually corroborative. (RB 144.) As noted above, the defense declarations here were uncontroverted, and in the trial court's estimation, raised "an issue of significance and concern" that "should be fully explored." (21 RT 3310.) As such, the trial court was required to conduct a further inquiry into defense counsel's credible and troubling allegations of juror misconduct.

The trial court's role as a gatekeeper of juror personal identifying information invests the court with the inherent power, even aside from Code of Civil Procedure sections 206 and 237, to manage inquiries into juror misconduct. (*People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 385, and statutes and cases cited therein.) While Code of Civil Procedure sections

206 and 237 allow jurors to prevent the release of information to parties, their attorneys, investigators working for counsel or the general public, "[j]urors may not thwart an investigation of misconduct by the court itself. The trial court may subpoena even reluctant jurors when necessary to determine whether the fact-finding process has gone awry." (*People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 387.) In short, "where the trial court is presented with a credible prima facie showing that serious misconduct occurred, the trial court may order jurors to appear at the hearing and to answer questions about whether misconduct occurred." (*Id.* at pp. 385-386, 387, citing *People v. Cox* (1991) 53 Cal.3d 618, 700.) It is error, moreover, for a trial court to conclude that it is has no power to order jurors to attend an evidentiary hearing even if they decline to discuss the case with counsel. (*Ibid.*)

Here, the trial court plainly misunderstood its discretion to secure the presence of and to then question jurors credibly suspected of misconduct – notwithstanding their refusal to communicate with counsel. Even beyond its failure to order Jurors Nos. 2 and 7 to appear at the hearing, the court compounded its error by failing to make any use of Juror No. 2's voluntary appearance in court when the most serious allegations of misconduct traced back to that juror.

Respondent ignores the trial court's failure to exercise its gatekeeping role, maintaining instead that the views expressed by Juror No. 2, and the fact that Juror No. 7, relied on those views, did not support a finding of misconduct because these views were nothing more than common sense based on the jurors' background. (RB 144.)

Respondent goes even further and contends that this Court's decision in *People v. Steele* (2002) 27 Cal.4th 1230 is dispositive. However, neither

respondent's characterization of the juror misconduct in appellant's case nor its conclusive reliance on *People v. Steele* is well-taken.

In *People v. Steele*, *supra*, the defendant stabbed a mentally disabled woman and was convicted of first degree murder. Following his conviction, the defendant moved for a new trial based on juror misconduct. He argued that four of the jurors with alleged experience in the military and Vietnam and two jurors with alleged medical experience committed misconduct by offering their expertise to the other jurors. (*Id.* at p. 1265.) According to declarations submitted by the defense, some of the jurors claimed to possess superior knowledge of the defendant's military training and Vietnam experience and its effect while others questioned the validity of the neurological testing instrument, the BEAM test, used by the defense experts to detect brain abnormalities. (*Ibid.*)

At trial, the defense presented expert opinion testimony from several psychiatrists and neurologists that the defendant suffered from PTSD brought on by his traumatic experiences in the Vietnam war and from neurological and psychological deficits resulting from head injuries. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1240-1242.) The prosecutor presented no evidence, apart from the defendant's statements, regarding the nature and psychological effects of his military experience. No mental health or medical expert testified for the prosecution. (*Id.* at pp. 1238-1240.) On cross-examination, the prosecutor elicited from one of the defense experts that BEAM testing for brain abnormalities was a fairly new technique that had been used primarily for treatment purposes. (*Id.* at pp. 1241-1242.) While acknowledging that opinion in the scientific community was divided, the witness expressed the view that BEAM testing was generally accepted in the scientific community for clinical use. (*Id.* at p.

1242.)

According to the declarations supporting the new trial motion, four jurors drew on their military experience to inform the other jurors that the defendant's military records did not show that he had the Vietnam combat experience or the SEAL training described by various defense witnesses. (*People v. Steele*, *supra*, 37 Cal.4th at pp. 1266, 1277.)

The declarations also reported that two different jurors with medical experience questioned the methodology used to establish the validity of the BEAM test. (*People v. Steele*, *supra*, at pp. 1266-1267.) This Court agreed with the trial court that no misconduct had occurred, finding that because extensive evidence had been presented concerning the extent and nature of the defendant's military training and experience, as well as evidence concerning the validity of the BEAM testing, the views expressed by the jurors, based on their asserted specialized experience, came within the range of permissible interpretations of the evidence. (*Id.* at pp. 1265-1266.) In the majority's view, the jurors had not crossed the fine line between a juror using his or her background in analyzing the evidence and "an opinion explicitly based on specialized information obtained from outside sources." (*Id.* at p. 1266, citing *In re Malone* (*Malone*) (1996) 12 Cal.4th 935, 963.)

Chief Justice George disagreed. While concurring in the denial of the new trial motion, he disagreed with the majority on whether the declarations alleged juror misconduct. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1276-1280 (conc. opn. of George, C.J.).) First, he took exception to the majority's characterization of the jurors' statements as permissible interpretations of the evidence at trial. Rather, in his view, the statements of the jurors contradicted the evidence at trial based on specialized, extraneous information that would be unfamiliar to most lay jurors. (*Id.* a p.

1279.) With respect to the defendant's military training and combat experience, Chief Justice George noted that the statements of the jurors with a military background directly contradicted the testimony of a defense witness that the defendant had learned how to kill with various weapons in a military school and that he may have experienced a particularly traumatic type of combat while on a special assignment that would not be recorded in the defendant's military records. (*Ibid.*)

As for the validity of the medical test used to determine that the defendant suffered from brain damage, Chief Justice George focused on the contradiction between the testimony of the two defense neurologists and the statements of the jurors with medical experience based upon "specialized, externally derived information and not upon the evidence at trial." (*People v. Steele*, 27 Cal.4th at p. 1279 (conc. opn. of George, C.J.) Although both defense neurologists acknowledged that the BEAM test was a fairly new technique, the focus of the prosecutor's cross-examination, both testified that the test was reliable. (*Ibid.*) Nothing in the opinion indicates that the prosecutor attacked the validity of the BEAM test based on the adequacy of the control group. (See *id.* at p. 1241.) The jurors' statements, as recounted in the declarations, thus were based entirely on the jurors' outside experience and contacts in the medical field, rather than on any evidence produced at trial. (*Id.* at pp. 1266, 1278.)

Accordingly, Chief Justice George concluded:

> With regard to both subject areas in which jurors allegedly interjected extraneous information, the declarations in this case describe juror misconduct. The majority's contrary conclusion constitutes a departure from existing law, which establishes that a juror commits misconduct whenever he or she introduces into deliberations extraneous information

based upon specialized expertise.

(*Id.* at p. 1280.)

Appellant acknowledges that the majority considered Chief Justice George's opposing view of the juror misconduct issue and rejected it. Nonetheless, appellant respectfully submits that this Court should revisit its decision in *Steele,* less because it is inconsistent with then controlling law and more because it licenses extrajudicial, unqualified expert opinion testimony during jury deliberations.

As both the majority and Chief Justice George concurred, the starting point for analyzing juror misconduct based on extraneous information is *In re Malone*, *supra*, 12 Cal.4th 935. *Malone* established the line between a juror's permissible use of his or her own life experiences, including education and professional experience, to interpret the evidence and an impermissible injection of specialized information based on sources outside the evidence. (12 Cal.4th at p. 963.) Contrary to the *Steele* majority's description of this line as "fine," the line drawn in *Steele* was, in fact, broad and bright. As this Court stated in *Malone*:

> A juror . . . *shall not discuss* an opinion *explicitly* based on specialized information obtained from outside sources. Such injection of external information *in the form of a juror's own claim to expertise or specialized knowledge* of the matter at issue is misconduct.

(*Ibid*, italics added.)

In *Malone*, *supra*, the defense had introduced exculpatory polygraph evidence. (12 Cal.4th at p. 942.) The polygraph examiner testified on direct examination that studies showed polygraph accuracy of 90 percent, but conceded on cross-examination that other studies put polygraph accuracy at around 60 percent. (*Id.* at p. 964.) During deliberations, a juror

expressed her negative opinion on the reliability of the defendant's polygraph based on her own professional study of psychology. (*Id.* at pp. 947-948.) Notwithstanding that the juror's statements concerned matters properly before the jury through trial evidence, this Court found jury misconduct because the juror asserted that her opinion of the polygraph evidence was drawn from her own professional knowledge. (*Id.* at p. 963, fn. 16.)

It is thus impossible to reconcile *Malone* with the majority's holding in *Steele* that jurors committed no misconduct when they injected extraneous opinions into jury deliberations that they expressly based on extrajudicial experience and specialized knowledge. No ordinary witness would have been permitted to testify at trial that the defendant in *Steele* was not exposed to combat in Vietnam and was not taught to kill in training based on his or her own unrelated military experience. (See, e.g., Evid. Code, § 702(a) [". . . the testimony of a witness is inadmissible unless he has personal knowledge of the matter"].) As, if not more clearly, no witness would have been allowed to render an expert opinion on the reliability of an advanced neurological test without a foundational determination of the witness's qualifications and expertise. (See Evid. Code, §§ 402 and 801(b).) Consequently, the defendant in *Steele* was convicted, as alleged in his proffered declarations, on the basis of inadmissible opinion "testimony" for which there was no proper foundation and which was immune from confrontation. (Cf. *Crawford v. Washington* (2004) 541 U.S. 36, 59 [testimonial out-of-court statements offered against a criminal defendant held inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination.]; *Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1484,

1490, overruled on other grounds by *Lindh.v. Murphy* (1997) 521 U.S. 320.) For these reasons, appellant submits that the majority opinion in *Steele* should be reconsidered, or if not reconsidered, that *Malone*, not *Steele*, controls the disposition of appellant's case.

Under *Malone*'s bright line test, the fact that the juror in this case (Juror No. 2), as credibly alleged, asserted that his view of the evidence – namely, that the shooting was an execution – was based on his unexamined extrajudicial military experience and constituted juror misconduct. Worse yet, in allegedly advising other jurors that this aggravating factor standing alone justified a death verdict, the juror invited his fellow jurors to disregard the court's instructions that they consider mitigating evidence. (CALJIC No. 8.85; cf. *People v. Wilson* (2008) 43 Cal.4th 1, 25 [a juror who refuses to follow the court's instructions is unable to perform his duty and may be discharged at any time. Such instructions include that each juror render a verdict according to the evidence presented and the instructions given]; *People v. Engelman* (2002) 28 Cal.4th 436, 444 ["Claims of misconduct may merit judicial inquiry even though they may implicate the content of deliberations. For example, as we have explained above, a juror is required to apply the law as instructed by the court, and refusal to do so *during deliberations* may constitute a ground for discharge of the juror."].)

A similar analysis applies to the allegations in counsel's declaration that Juror No. 2 had expressed the view to his fellow jurors that appellant had planned the killings and that no killings would have occurred but for appellant's paging of co-appellant Rangel, even though no evidence was produced at any phase of the trial that appellant did so. (MAOB 248; 45 CT 11761, 11831, 11839.)

Moreover, contrary to respondent's contention, because the gravamen of the asserted misconduct was the publishing of the extraneous, improper information to the jury during deliberations – that is, an objectively ascertainable act, not subjective reasoning – the limitation on inquiry into jurors' deliberative processes imposed by Evidence Code section 1150 does not apply here. (*People v. Steele*, *supra*, 27 Cal.4th 1230, 1261.)

Thus, although the information presented by appellant Mora's trial counsel did not conclusively impeach the death verdict, counsel's declarations raised a sufficiently "strong possibility" that a variety of extraneous, possibly erroneous information had been injected into the penalty phase deliberations to require the trial court to conduct a hearing on the matter. The trial court's failure to conduct such a hearing, especially when one of the jurors alleged to have committed the misconduct was present in the courtroom, implicated appellant's rights under the Sixth and Fourteenth Amendments to due process and a fundamentally fair trial by an unbiased jury. (See *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors"]; *In re Hitchings* (1993) 6 Cal.4th 97, 110; *People v. Galloway* (1927) 202 Cal. 81, 92. In the absence of such a hearing, the death verdict rendered in this case cannot meet the constitutionally recognized requirement of heightened reliability and the type of measured, normative process in which a jury is constitutionally tasked to engage in the determination that death is the appropriate penalty. (U.S. Const., 8th & 14th Amends.; see *Kansas v. Marsh* (2006) 548 U.S. 163, 180; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Accordingly, the judgment of death entered against appellant must be

vacated, and the case remanded to the trial court for a hearing on appellant's allegations of juror misconduct.

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XIX

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In appellant Mora's opening brief, appellant set forth numerous bases on which California's death penalty statute violates the federal Constitution, while acknowledging that this Court has already rejected these claims of error. (MAOB 257-267.) Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 149-155.) Accordingly, the issues are fully joined and no reply is necessary.

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XXI

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant Mora has argued in his opening brief that reversal of his convictions and death sentence is required based on the cumulative effect of the various errors in his case. (MAOB 269-272.) Respondent contends in its respondent's brief that "there was no error, or even assuming any errors, they were clearly harmless in light of the overwhelming evidence presented at both the guilt and penalty phase." (RB 155.) Respondent's contention lacks merit.

In the present case, each of the guilt phase errors, boh singly and standing alone, was sufficient to undermine the prosecution's case against appellant Mora and the reliability of the jury's guilty verdict. Because the cumulative effect of these errors so infected appellant Mora's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643), his convictions must be reversed (see *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital-murder conviction for cumulative error]).

The jury's death verdict as to appellant Mora must also be evaluated in light of the cumulative impact of the errors occurring at both the guilt and penalty phases of his trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644

[court considers prejudice of guilt phase instructional error in assessing penalty phase]; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase].)

Here, there is at least a reasonable possibility that the guilt and penalty phase errors, singly and in combination, had a prejudicial effect upon the jury's consideration of the evidence presented at the penalty phase against appellant Mora, as well as its ultimate decision to sentence him to death.

Accordingly, contrary to respondent's contention, the combined impact of the various errors in appellant Mora's case requires reversal of his convictions and death sentence.

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CONCLUSION

For the reasons set forth in appellant Mora's opening and reply briefs, the entire judgment must be reversed.

DATED: April 16, 2012

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender

Attorneys for Appellant Mora

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, Peter R. Silten, am the attorney assigned to represent appellant Mora in this automatic appeal. I conducted a word count of this brief using our my computer's software. On the basis of that computer-generated word count, I certify that this brief is 21,771 words in length.

P. R. Silten

PETER R. SILTEN

Attorney for Appellant Mora

DECLARATION OF SERVICE

Re: *People v. Mora and Rangel* No. S079925

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT MORA'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: John Yang
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Each said envelope was then, on April 16, 2012, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 16, 2012, at San Francisco, California.

DECLARANT