SUPREME COURT COPY

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

JOSEPH MONTES,
Defendant and Appellant

Supreme Court No. S059912

Riverside No. CR-58553

DEATH PENALTY CASE

Automatic Appeal From the Superior Court of the State of California,
In and For the County of Riverside, California
Honorable Robert J. McIntyre, Judge

APPELLANT'S OPENING BRIEF ON AUTOMATIC APPEAL

VOLUME 1 OF 2
PRETRIAL MOTIONS AND GUILT PHASE
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DEATH PENALTY

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSEPH MONTES, Defendant and Appellant.	Supreme Court No. S059912 Riverside No. CR-58553 DEATH PENALTY CASE **APPELLANT'S OPENING BRIEF**

INTRODUCTION TO STATEMENT OF THE FACTS

Joseph Montes was found guilty of involvement in the carjacking and felony murder of 16-year-old Mark Walker, and was sentenced to death.

At least four other people were implicated in the offense. Three of them — Ashley Gallegos, Travis Hawkins and Salvador Varela — were tried together with Montes, convicted, and sentenced to life without the possibility of parole. The identity of the fifth person, later determined to be Miguel Garcia, was unknown at the commencement of trial. Although the record does not disclose exactly what sentence Garcia eventually received, it appears that his case was handled in juvenile court, and that he was given

"almost a walk" in exchange for possible testimony in the case.[1] (Vol. 26 of the Reporter's Transcript of Proceedings, hereinafter "RT" at p. 7177.)

The prosecution sought the death penalty only for Montes. At the time of the offense Gallegos was 17 years (and 10 months) of age. Hawkins was 14. (Volume 28 of the Clerk's Transcript on Appeal, hereinafter "CT" at p. 7624.) Sal Varela was 23 years old, but had not been involved in the initial carjacking. (28 CT 7635.) Although Montes was 20 years old, testing indicated that he was at least borderline mentally retarded. (28 CT 7632-7633, 7650.)

The guilt phase case proceeded entirely on a felony-murder theory, and the jury was not instructed on express or implied malice murder. The jury was instructed that it could find the special circumstances true if they determined that each defendant, with reckless indifference to human life and as a major participant, aided and abetted robbery, kidnapping, or kidnapping for robbery. (27 CT 7355.)

From the outset the prosecution took the position that the identity of the actual shooter was both unknown and immaterial. All co-defendants were equally guilty of the offense. Gun use allegations were not filed for this reason. (Volume 4 of Reporter's Transcript of Pretrial Proceedings, hereinafter "PRT" at pp. 799, 893.) In his closing guilt phase argument, the

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[1] Although he was never called as a witness.

prosecutor suggested that Hawkins, Gallegos, or Montes could have committed the murder, but it was more likely that either Montes or Gallegos was the actual shooter. The jury was specifically told that it was not being asked to decide who actually committed the murder. (36 RT 6519-6520.)

Accordingly, the facts necessarily found true by the jury were that Mark Walker was killed during the commission of the charged felonies, that Montes was a major participant in the felonies, and that he acted with reckless indifference for human life. (Pen. Code, § 190.2;[2] 27 CT 7352, 7355-7356.) The jury was never asked to, and never did, decide that Montes was the person who fired the shots which killed Walker, or that he acted with an intent to kill.

While reviewing the testimony in this case it is important to keep witnesses' motivations in mind. Accounts vary considerably, depending upon the relationship of the witness to the several defendants. What emerges is a pattern in which members of the Varela/Gallegos/Hawkins camp (and especially people with close ties to Varela and Gallegos) skewed their statements and testimony in a blatant attempt to shift blame for Walker's murder onto Montes, and away from the other participants.

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[2] All further statutory references are to the Cal. Penal Code, unless otherwise indicated.

STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

A. GUILT PHASE

By an amended information filed September 4, 1996, appellant, Joseph Montes, and his co-defendants — Ashley Gallegos, Travis Hawkins, and Salvador Varela — were charged with the following offenses:

Count I – murder (§ 187, subd. (a)) of Mark Walker. Special circumstances alleged that the victim was killed during the commission of robbery (§ 190.2, subd. (a)(17)(i)), kidnaping for robbery (§ 190.2, subd. (a)(17)(ii)), and kidnaping (§ 190.2, subd. (a)(17)(ii));[3]

Count II – kidnap during a carjacking (§ 209.5);

Count III – carjacking (§ 215);

Count IV – felon in possession of a firearm (§ 12021, subd. (a)(1)) (charged against Montes only).

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[3] Prior to its amendment in 1995, subdivision (17)(ii) provided for a special circumstance of kidnapping, in violation of either section 207 or 209. Section 209, subdivision (b) describes the offense of kidnapping for robbery.

Counts I, II and III included a special allegation that a principal was armed with a firearm during commission of the offense (§ 12022, subd. (a)(1)). It was further alleged that Montes had been previously convicted of a serious or violent felony (burglary) within the meaning of Penal Code section 667, subd. (a)(1). (25 CT 7036-7040.)

A notice of intent to seek the death penalty was filed as to Montes only. The prosecutor, Mr. Mitchell, made it clear that the death penalty was not sought for Gallegos and Hawkins because they were both juveniles at the time of the crime. (22 CT 6184-6186; 2 PRT 486.)

Montes subsequently stipulated to having suffered the alleged prior conviction for purposes of both the section 12021 and the section 667, subdivision (a) enhancement. He did not seek bifurcation of the prior. (4 RT 480; 32 RT 5942; 33 RT 6074-6077; 26 CT 7198-7199.)

Montes brought a number of pretrial motions which will be discussed in more detail in their respective argument sections. For purposes of an overview, these included: (1) motions for severance or separate juries; (2) motions to compel discovery regarding death penalty charging practices of the Riverside County District Attorney's Office (hereinafter "*Murgia*"[4] motions); (3) a motion to preclude the district attorney's office from seeking

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[4] *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [hereinafter *Murgia*].

the death penalty on grounds of invidious discrimination; (4) a *Pitchess*[5] motion which was tied together with the preceding two motions. All Montes' motions were denied.

Ultimately, because of *Aranda/Bruton*[6] problems, the trial court ruled that Sal Varela's case would be severed. Rather than hold successive trials the court granted the prosecution's request to have dual juries hear the case, and ordered a separate jury empaneled for Varela. With the exception of evidence concerning Varela's statement to police (introduced in Varela's trial only), both juries were present in court and simultaneously heard all the evidence. (Augmented RT[7] of proceedings held August 23, 1995, at pp. 29-30, 44.)

Trial began September 13, 1996. (4 CT 953.) During jury selection, the prosecutor excused a number of African-Americans and Hispanics from the venire. Appellant objected and brought a series of *Batson*[8]-*Wheeler*[9]

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[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[6] *People v. Aranda* (1965) 63 Cal.2d 518, 530; *Bruton v. United States* (1968) 391 U.S. 123.

[7] The transcripts from this date were not included in the original record on appeal and were subsequently added by augmentation. The pages are inserted between PRT pp. 885 and 886.

[8] *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712].

[9] *People v. Wheeler* (1978) 22 Cal.3d 258.

motions, arguing that the prosecutor's exercise of peremptory challenges denied Montes his right to a jury drawn from a representative cross-section of the community and equal protection. (25 CT 7055-7056, 7057-7058; 6 RT 936, 941; 7 RT 1163, 1164, 1165, 1308, 1310, 1320.) On three occasions the court found that a prima facie case had been established. (7 RT 1167, 1308-1310, 1315-1316, 1320.) Ultimately, however, the court denied each of the motions. (6 RT 943; 7 RT 1174, 1323.)

On November 13, 1996, as closing arguments were about to begin in the guilt phase, the court excused Juror No. 7 over defense objection. Juror 7 was replaced with Alternate Juror No. 2. (25 CT 7209-7211.)

The Montes/Gallegos/Hawkins jury returned verdicts on November 22, 1996. The verdicts were sealed pending a decision by the Varela jury. (26 CT 7252-7253.)

On November 26, 1996, the verdicts were announced. The jury found appellant Montes and co-defendants Hawkins and Gallegos guilty as charged and returned true findings on the firearm and special circumstance allegations. (40 RT 7122-7136; 27 CT 7468-7469, 26 CT 7282-7291.) Montes had earlier stipulated to having suffered the alleged prior burglary conviction. (26 CT 7191-7192.)

On the same day, Varela's jury found him guilty as charged, returned true findings on the firearm allegations, a true finding on the murder during

kidnaping special circumstance, and not true findings on the remaining special circumstances. (40 RT 7165-7168.)

B. PENALTY PHASE

Before commencement of the penalty phase evidence, and over Montes' objection, the court excused Alternate Juror No. 2. Alternate Juror No. 3 was substituted in to take her place. (28 CT 7504; 41 RT 7230-7238.)

Over Montes' objections (26 CT 7259-7281) the court ruled that victim impact evidence would be admissible at the penalty phase. (28 CT 7503, 7506; 41 RT 7181-7201.) This evidence included a 10-minute videotape made by Walker's parents, set to music (Exhibit P-12). (28 CT 7505, 7507; 41 RT 7298, 7340-7348; 42 RT 7356-7359.) Following this evidence, Montes' moved for a mistrial. The motion was denied. (28 CT 7506; 41 RT 7248-7341.)

At the conclusion of the penalty phase evidence Montes again moved for a mistrial, this time based on prosecutorial misconduct and discovery violations for failure to provide the defense with a letter the prosecution attempted to use in cross-examination of Montes' wife. (28 CT 7537; 44 RT 7765.)

Penalty deliberations commenced December 11, 1996. (28 CT 7553.) On December 16, 1996, the jury returned with a sentence of death. (28 CT 7623-7624; 45 RT 7994.)

On March 10, 1997, Montes moved for a new trial on the grounds of juror misconduct. (28 CT 7640-7688, 7689-7720.) The new trial motion was heard and denied on March 18, 1997. (28 CT 7728.)

The defense motion for automatic reduction of the death penalty was thereafter heard and denied. (28 CT 7727; 45 RT 8007-8013.)

Sentence was immediately pronounced as follows: for count III, designated as the principal term, the court imposed the upper term of nine years. A consecutive one year term for the section 12022(a) enhancement was added. For count IV, the court imposed two years (one-third the mid-term), concurrent. A five-year consecutive sentence was added for the section 667(a), serious felony prior conviction. Pretrial custody credits were awarded, and a restitution fine of $10,000 was ordered.

For count II, Montes was sentenced to life with the possibility of parole, plus a one-year term for the 12022(a)(1) enhancement, this sentence to run concurrent with the determinate term.

Finally, for count I, Montes was sentenced to death. The court found that section 654 applied, and directed that this term should be concurrent to the other terms. (28 CT 7727-7728; 45 RT 8018-8025.)[10]

The court then signed the Commitment Judgment of Death. (28 CT 7729.)

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[10] A trailing probation violation was dismissed. (28 CT 7734.)

STATEMENT OF FACTS

A. OVERVIEW

Mark Walker lived in Banning with his mother, Judith Koahou, and stepfather, Abel Koahou. (13 RT 2005.) On Saturday, August 27, 1994, at 2:30 p.m., Walker called his friend Jason Probst and arranged to attend a concert with Probst that evening. (13 RT 2079.) Walker never kept the appointment. (13 RT 2081-2082.)

After visiting his friend Lea Larkin (13 RT 2059), Walker returned home after 5:30 and asked his mother for permission to go clothes shopping at the mall. Ms. Koahou consented and gave Walker two $100 bills for his purchases. (13 RT 2009.) Walker put the bills into his grey and black nylon wallet. (24 RT 4197.)

Walker left home around 6:30-6:40 p.m. He told his mother he wanted to go listen to a local band which was playing in Yucaipa, pick up his friend Jason, and stop at Lea Larkin's house. (13 RT 2012.) Walker left driving the family's grey Buick Regal. (13 RT 2011.) Inside the Buick's trunk was some police gear belonging to Walker's stepfather. (13 RT 2030; 23 RT 4150.)

Russell Rigsby, a friend of Walker's, saw Walker around dusk getting gas for the Buick at a Texaco station in Cherry Valley (one to one-and-a-half miles from Beaumont, the town where Montes, Hawkins and

Gallegos lived). Walker told Rigsby he was going shopping, and might see Rigsby later at a party in Yucaipa. Walker was alone. (33 RT 6098-6099.)

Nathan Hanvey claimed to have seen Walker at a nearby liquor store with a wad of bills in his wallet sometime around dusk. According to Hanvey, a group of young Hispanic males were eyeing Walker and the money. (13 RT 2101-2103.) Hanvey identified one of these people as co-defendant Travis Hawkins. (13 RT 2116.) Hawkins and Walker knew each other, and had played basketball about a month earlier. (17 RT 2805-2806.)

Salvador Varela (hereinafter "Sal"), his sister Sylvia Varela, brother George Varela (hereinafter "George"), and George's girlfriend, Marci Blancarte, shared an apartment in Corona. (17 RT 2851-2852.) On the evening of August 27, 1994, a party was held in honor of Sal's birthday. (17 RT 2852.) Montes and Gallegos had been invited to the party earlier that day. (25 RT 4401, 4408.)

The party started around 6:00 p.m., and people congregated on the balcony where the keg of beer had been placed. (17 RT 2853-2854, 18 RT 2958, 22 RT 3673.) Some time before sunset, a grey Buick sedan pulled in and parked. (16 RT 2691; 17 RT 2858-2859.) Montes, Gallegos, Hawkins and a male wearing a Dodgers baseball cap exited the car and came up to the party. (16 RT 2696-2699.) Everyone at the party claimed they were

unable to identify the person wearing the LA Dodgers hat.[11] (See, e.g., 16 RT 2732; 22 RT 3682-3683.) Various witnesses identified Montes as the driver. (16 RT 2697; 19 RT 3063.)

Montes approached George Varela and asked for his help in dropping off the Buick. (25 RT 4436.) George suspected the vehicle was stolen and questioned Montes, who claimed the car belonged to a friend in Yorba Linda. (25 RT 4436.) George declined to help him. (25 RT 4437.)

Montes turned to Sal Varela for assistance with the vehicle. (18 RT 3067.) Ultimately, Sal left the party along with Montes, Gallegos, Hawkins and "Dodger Hat man." (22 RT 3824-3825.) The people departed in two cars, Montes driving the Buick, and Sal driving his van. (17 RT 2872.) Approximately 15 to 30 minutes later, the group returned to the apartment together in Sal's van. (17 RT 2876, 16 RT 2697, 22 RT 3689.)

That same evening, Alex Silver, his sister Laura Esqueda, and Laura's husband Robert were in the back yard of Silver's home overlooking Palisades Road, about three miles from the Varela residence. (24 RT 4339-4341.) Around 8:00 p.m. they heard four gunshots. Silver looked over the fence and saw a van parked on the highway shoulder and a car stopped

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[11] During trial this person was eventually identified as Miguel Garcia (Refugio Garcia's brother) a VBR (Vario Beaumonte Rifa) gang member. (27 RT 5041-5042; 29 RT 5193; 31 RT 5600, 5647-5649; 32 RT 5822.)

almost directly across the raised dirt median from the van. (14 RT 2241, 2334; 15 RT 2521.) Three Hispanic men (one of whom may have extended an arm for an instant) were standing near the open trunk of the car.[12] Silver went inside his home and called 911. (14 RT 2245-2248, 2278-2280; 15 RT 2439.)

The Esquedas watched Palisades Road while Silver was on the telephone in the kitchen. (14 RT 2248-2249.) Light shining on the back of the van made it appear that a third, unseen, vehicle was behind it. (14 RT 2263, 2355, 2371; 15 RT 2397, 2427, 2436; 16 RT 2605.) A nearby hillside would have obscured any third vehicle from view. (14 RT 2289-2290.)

Ms. Esqueda saw the three males run around the van to the passenger side. (14 RT 2354-2356.) Right after the males ran around the back of the van, "everything went black." (15 RT 2413.) The headlights from the Buick and the ones shining on the back of the van went off, and Ms. Esqueda saw no further movement. (14 RT 2357-2358, 2363, 2369; 15 RT 2385, 2395.)

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[12] Robert Esqueda initially saw two people standing behind the Buick. They were joined by a third person who came from the driver's side of the van. (15 RT 2439.)

From that point on, the only other light was a dome light inside the Buick. (15 RT 2413-2414.)[13] A few minutes later Ms. Esqueda became aware that the car had been moved across the street. The van was still there. (14 RT 2365-2366; 15 RT 2388-2389.) Mr. Silver also noted that the car had been moved across the street from the position where he first saw it. Silver did not see the car being moved. (14 RT 2261-2262, 2248, 2272, 2321.)

None of the witnesses saw the van drive away. (14 RT 2348; 15 RT 2391, 2446.) Officers responding to the scene did not encounter the van. (15 RT 2481-2482, 2489; 23 RT 4023.)

The police located the Buick sedan on the shoulder of Palisades Road across from a fire road. (15 RT 2489.) Inside the open vehicle trunk, the officers found Mark Walker, dead from gunshot injuries. (15 RT 2490-2492; 23 RT 4030.) Walker had been shot five times in the head at close range. (31 RT 5427-5428, 5435, 5438, 5449.) Each wound was individually fatal, and he would have died within minutes. (31 RT 5452-5453.)

The following morning, fingerprint evidence recovered from the car led to the identification of Montes as a suspect. (15 RT 2549-2550; 23 RT

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[13] According to Detective Anderson, the light was actually the trunk light. There was no dome light on inside the car. (23 RT 4126.)

4152-4153; 28 RT 5102-5104.) Montes was taken into custody later that day when he returned to his father's Beaumont residence. (23 RT 4156-4157, 24 RT 4261, 4273.) Montes directed authorities to Sal Varela. (24 RT 4198; 33 RT 5984.) Sal Varela, Gallegos and Hawkins were taken into custody between August 29 and September 2, 1994. (23 RT 4163, 4167, 4171.)

On January 17, 1995, a Glock 9-millimeter handgun (24 RT 4329-4330; 28 RT 5132-5134) was discovered by a jogger on the south side of Palisades Road, 1.1 miles from where the Buick had been found. (24 RT 4250-4252, 4334; 26 RT 4832-4833.) The handgun did not have a magazine and was filled with mud and rocks. (24 RT 4253.) Subsequent testing determined that this was most likely the murder weapon. (24 RT 4329-4330; 28 RT 5132-5134.)

The Glock was registered to Steven Glomb (26 RT 4832-4833), whose teenage daughter Christie knew Ashley Gallegos and Refugio Garcia. (27 RT 4909-4911.) Gallegos and Garcia had taken the Glock and a nickel-plated .380 Walther in August of 1994 to assist in setting up a drug business. (26 RT 4831-4835; 27 RT 4915, 4921; 29 RT 5203.) Gallegos kept the 9-millimeter Glock. (29 RT 5203-5205, 5346.)

It was never established who fired the shots that killed Mark Walker.

B. BACKGROUND ON WITNESSES AND DEFENDANTS

Much of the testimony in this case was provided by people with connections to Montes' co-defendants. This included Sal Varela's girlfriend Kim Speck, Sal's brother George, his sister Sylvia, and George's girlfriend Marci Blancarte.

Most other non-police witnesses were guests at the Varelas' party. They included Christopher Eismann, who was married to the Varelas' Aunt Irma (22 RT 3669-3670) and Arthur Arroyo, who had been friends with Sal and George Varela for seven years. (17 RT 2737.) Arroyo's girlfriend, Angie Avita, was a cousin of the Varelas. (16 RT 2685-2686). Kevin Fleming was a co-worker of George Varela. (18 RT 3050-3053, 3063.) Another important witness was George Varela's best friend, Victor Dominguez, even though he was not at the party that night. (25 RT 4392; 26 RT 4565.)

There were also long-standing relationships between the other co-defendants. The Varelas knew Ashley Gallegos from earlier days growing up in Beaumont. (25 RT 4388-4389.) The Varelas lived in Beaumont from 1982 to 1991. During that time, Gallegos lived one block away. (25 RT 4388-4389.) Gallegos' older brother was married to one of the Varelas' sisters. (25 RT 4389.) Sal Varela had a child with Gallegos' older sister. (17 RT 2864; 26 RT 4390.)

Joseph Montes was a relative outsider to this group. Montes had known the Varelas for a few months from 1990 to 1991, but Montes and George Varela were not the best of friends, and did not go to school together. (25 RT 4566.) Montes and the Varelas did not associate much after the Varelas moved from Beaumont in 1991. They had not really seen each other socially in years. (25 RT 4391; 2d Aug. CT, p. 73.)

Co-defendant Travis Hawkins was a cousin to both Montes and Victor Dominguez.[14] (25 RT 4395.) However, Montes did not live in Beaumont when Hawkins and Dominguez were growing up, and they did not go to school together. (27 RT 4895.)

Montes' father's side of the family was much closer to Travis Hawkins than to appellant. (27 RT 4894-4895, 4954.) Montes' paternal grandmother, Emily Dominguez, helped raise Hawkins. She was not close to Montes, and blamed him for her grandson Travis' predicament. (27 RT 4956; 1st Aug. CT, p. 12.) In fact, Hawkins' private counsel, Mr. Angeloff,[15] was initially retained by Hawkins' grandmother, Emily Dominguez. (Exhibit R to Montes' Motion to Augment the Record filed in this Court on June 14, 2007, and granted on August 15, 2007.) When

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[14] Montes and Victor Dominguez were half-cousins. (27 RT 4895.)

[15] Angeloff had previously represented Victor Dominguez. (20 RT 3287.)

Hawkins was arrested, he was found on the floor in the back of a car being driven by Victor Dominguez. Hawkins' mother, Lori, was in the front seat. (23 RT 4168-4169.)

In addition to witnesses' loyalties to the other three defendants, there were also problems with the potential tainting of people's statements and testimony. In one important regard, on August 30, 1994 (the day after Salvador Varela was arrested – 23 RT 4163; 24 RT 4234), Sal was permitted to visit in private for about 10 to 15 minutes with his girlfriend Kim Speck and his brother George. (21 RT 3477-3478, 3481; 24 RT 4204-4205.) It was not a usual police practice to permit such visits because of the obvious likelihood that people would try to get their stories together. (24 RT 4233.) In fact, the authorities had attempt to tape-record the conversations, but their efforts were unsuccessful because Sal, George and Sylvia all spoke very quietly and the tape did not pick up what they were saying. (24 RT 4233-4234.) This meeting between Sal, Speck and George took place before either George or Speck made any statements inculpating Montes.

Additionally, several members of the Varela contingent met together with Sal's attorney, Mr. Belter, to discuss the case. (17 RT 2935.) Later interviews by the Varela investigator, Mr. Shedlock, were often conducted in the presence of other Varela witnesses. For example, when Sylvia Varela

was interviewed by Shedlock about a week after the killing,[16] Marci, George, Eddie Jones and Kim Speck were also present. (17 RT 2911, 2933-34; 21 RT 3592.) Both George and Speck recalled that other people were present during Shedlock's interviews with them, even adding in their own comments. (25 RT 4512; 26 RT 4679-4680; 21 RT 3592.)

Further complications arose as the result of questionable conduct by Travis Hawkins' attorney, David Angeloff, who met with Kevin Fleming and George Varela without the presence of an investigator.

Victor Dominguez knew Angeloff, who had represented Dominguez on a felony in 1992. (27 RT 4891.) Dominguez helped Angeloff contact other witnesses in the case, including George Varela. (27 RT 4867.) On several occasions Angeloff and Dominguez approached George seeking a meeting. Eventually George agreed, and met with them to discuss his recollection about whether Hawkins stayed at the party when the van and the Buick left. (25 RT 4359, 4495, 4499, 4569, 4573.)

According to Fleming, Angeloff actively sought to influence Fleming's recollections and testimony concerning Hawkins and his activities on the night of the homicide. (19 RT 3178-3180, 3207-3211; see also 402 hearing at 19 RT 3227-3263.)

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[16] Speck spoke with Shedlock, but initially failed to show up for appointments with the district attorney and investigator Clark.

In addition, Sal Varela's former girlfriend, Kim Speck, received direct assistance from DDA Mitchell with her own pending criminal matter during the trial in this case. Speck had been arrested in October of 1994. She had received drug diversion, but did not complete it. Mitchell helped Speck with her drug case the Thursday before her trial testimony. He went to court with her and got her diversion reinstated. He also helped her get a traffic ticket dismissed. (21 RT 3475-3477.)

Finally, Montes was responsible for implicating Sal Varela in the crime. (24 RT 4198; 33 RT 5984.)

C. EVENTS ON SATURDAY AUGUST 27, LEADING UP TO THE VARELAS' PARTY

Some time between 3:00 and 5:00 a.m. on Saturday, August 27th, George Varela and his girlfriend Marci Blancarte were awakened by Joe Montes, Ashley Gallegos and two or three other men. (23 RT 4000; 25 RT 4399-4400.) Gallegos was in possession of a black handgun, possibly a .380 or .32. (25 RT 4404, 4407.) Gallegos declined George's offer to purchase the weapon. (25 RT 4406.) George told the men about the planned birthday party and invited them to attend. (25 RT 4401, 4408.)

Marci, Sylvia and George all claimed that during Saturday afternoon Montes called, or made collect calls to, the apartment and paged George on a number of occasions seeking a ride to the party from Beaumont for

himself and Gallegos. (17 RT 2887, 2943; 22 RT 3866, 3870; 25 RT 4411-4417, 4646; 26 RT 4822.) According to these witnesses, no one was willing to provide Montes with transportation. (17 RT 2889; 25 RT 4416-4417.)

However, phone records showed there had been no calls from Montes' residence (845-9871 – 32 RT 5865) to the Varela apartment any time in August. (32 RT 5873.) In fact, there had not been one single call from Banning or Beaumont to the apartment on August 27th. (18 RT 3037.) But there were five calls from the Varela residence to Gallegos' home number (845-9587) the afternoon of August 27 – at 3:36; 4:07; 4:10; 6:00 and 6:46 p.m. (17 RT 2912-2913; 18 RT 2952; 25 RT 4520-4521; 32 RT 5876.) Additionally, records for George Varela's pager on August 27th showed several pages to him in the afternoon. The calls placed to Gallegos' phone number were made shortly after those pages were received.[17] (25 RT 4520-4521.)

According to George, Gallegos called once from a pay telephone requesting a ride to the party. (25 RT 4414-4415.) Sylvia Varela later

[17] In his testimony, George said that he believed the 845-9587 number belonged to Montes. (25 RT 4520.) In fact, as noted, it was Gallegos' number.

called Gallegos to offer a ride, but Gallegos declined, saying he already had one. (17 RT 2890.)

As noted earlier, the murder weapon (a Glock 9 mm) and a Walther .380 were taken from the Glomb residence by Ashley Gallegos and Refugio Garcia in August. Gallegos retained the Glock 9 millimeter and Refugio kept the .380. (29 RT 5203-5205, 5346.) On the night of the Varelas' party, Gallegos came to Refugio's house and asked if he could borrow the .380. Gallegos had the 9 millimeter when he came by to pick up the .380. (32 RT 5885.) Gallegos explained to Refugio that he was going to a party in Corona and wanted the gun in case he was jumped. (29 RT 5208, 5238, 5336.) Gallegos stuck the .380 in his pants and got in the front passenger door of a grey car. (29 RT 5209.)

Refugio's brother, Miguel, was home when Gallegos came to get the gun. (29 RT 5213.) Miguel may have left in the car with Gallegos.[18] (29 RT 5365, 5374.)

Refugio gave widely varying stories about his observations of the grey car Gallegos left in, and the car's occupants.[19] Refugio initially

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[18] As noted earlier, it was later determined that Miguel was the previously unidentified "Dodger Hat man." (See, e.g, 29 RT 5176.)

[19] The variations in his statements are too numerous to set forth in detail.

testified that he could not see whether there was anyone else in the grey car. (29 RT 5209.) However, in a statement given before he was arrested, Refugio told the police he saw a white kid in the driver's seat of the Buick. (29 RT 5243.) After he was arrested Refugio changed his story, and said he did not see a white kid in the grey car with Gallegos. (29 RT 5244, 5297, 5338, 5352-5354, 5358; 32 RT 5857-5859.) Refugio was released on his own recognizance on the recommendation of Detective Clark and Deputy District Attorney Mitchell, after he changed his story. (32 RT 5888.)

D. EVENTS AT THE VARELAS' SATURDAY NIGHT

The Varelas' party started around 6:00 p.m. People congregated on the balcony where the keg of beer had been placed. (17 RT 2853-2854, 18 RT 2958, 22 RT 3673.) The Koahous' grey Buick arrived some time before sunset. Montes was identified as the driver. (16 RT 2691, 2697; 17 RT 2858-2859; 19 RT 3063; 22 RT 3680.) Montes, Gallegos, Hawkins, and a male wearing the LA Dodger's baseball cap (identified during trial as Miguel Garcia) exited the car. Gallegos, who was in the front passenger seat, made a bending motion as he stepped from the vehicle, as if getting something, and then tucked in his shirt. (16 RT 2699-2700.)

The four males came up to the party, and sought assistance with dropping the Buick off at another location. Kevin Fleming and Christopher Eismann both offered to drive, but Sal Varela refused the suggestions.

(18 RT 3069, 22 RT 3688.) Sal asked Kim Speck for the keys to his van, which she had hidden under a mattress so he would not drink and drive. (20 RT 3375.) Varela insisted she retrieve the keys, and explained he had to do a favor for Montes and would be right back.[20] (20 RT 3379-3382.)

Sal's van and the Buick left the party at the same time. Montes was identified as the driver of the Buick when it left the party. (16 RT 2709; 17 RT 2778, 2872.) Witnesses gave conflicting accounts about who, if anyone, left in the van with Varela. The difference in versions is significant because it demonstrates how witnesses were influenced to lie and/or change their stories in order to protect both Gallegos and Hawkins.

At the preliminary hearing Arroyo testified that Travis Hawkins left in the van with Sal. (17 RT 2762, 2841.) At trial Arroyo testified that Gallegos left in the van, and Hawkins went in the Buick. (16 RT 2709-2710; 17 RT 2760-2761.) Between the preliminary hearing and trial he learned that Gallegos was related to the Varelas. (17 RT 2828.)

Sylvia Varela testified that Gallegos left in the van with Sal, and that Montes and "Dodger Hat man" (Miguel Garcia) left in the Buick. She did not see Hawkins leave in either vehicle. (17 RT 2872.) Chris Eismann

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[20] At the preliminary hearing, Speck testified that Sal Varela told her he was going to do his friends, including Joe, a favor. At trial, her testimony was that Sal was doing "Joe" a favor. (21 RT 3635-3636, 3647.)

(married to Varela's aunt; 22 RT 3668) said Gallegos got in the van. (25 RT 3687.) George said that Gallegos left in the van. (25 RT 4438.) But there were discrepancies about what George actually saw. (25 RT 4432, 4442-4443.)

Richard Brown, who was not a relation to either the Varela or Gallegos family, said that all four of the people who came in the Buick left in the Buick. Varela left in the van by himself. (22 RT 3824-3825.)

Kim Speck initially told investigators that Gallegos left in the van with Sal Varela. She later admitted that she lied to investigators when she told them this. (21 RT 3464-3465.) In fact, in a phone conversation Speck had with Gallegos on Sunday night, Gallegos told her to say that he was in the van with Sal Varela. (21 RT 3435-3426.)

Speck did not initially tell the truth to investigators because of her relationship with Sal. (21 RT 3443-3444, 3449.) She told people that Gallegos left in the van because Sal wanted her to. (21 RT 3466.) Speck continued to lie even after her split with Varela, including at the preliminary hearing in 1995. (21 RT 3473-3474.)

Kevin Fleming originally told investigators that one or two people left in the van, and maybe four people in the Buick. He recalled that all the people who had arrived together in the Buick, including Hawkins, left together in that car. (19 RT 3182; 2d Aug. CT, p. 96-97.)

At trial, after he had met with Hawkins' attorney David Angeloff, Fleming's testimony changed. He instead recalled that Hawkins stayed at the party and played dominos while the others left. (19 RT 3145.) He also testified that two people, including Gallegos, got in the van, and one or two in Buick. (18 RT 3103.)

According to George Varela, who had also had discussions with attorney Angeloff, Hawkins was in the living room with the dominos players at the time the van and Buick left the parking lot in tandem. (25 RT 4576.)

The people who left in the two cars were gone some 15 to 30 minutes. They all returned together in Varela's van. (17 RT 2876; 16 RT 2697; 22 RT 3689.) After the van returned, Montes was variously described as acting distracted and agitated (17 RT 2765); the same as he had before he left (17 RT 2884); quiet (18 RT 3072); hyper, and happy. (32 RT 3942). Based on her experience as a methamphetamine user, Speck thought Montes appeared to be on methamphetamine. (21 RT 3462.)

Some time after the van returned, Angelina Avita, Varela's cousin and Arthur Arroyo's girlfriend, went into Sylvia Varela's bedroom to make a telephone call. (23 RT 4044, 4046, 4063.) Montes, Gallegos and Hawkins were in the room and using the telephone. (23 RT 4063.) The trio were in the room for some 20 minutes. (23 RT 4078.)

Another area where testimony diverged considerably had to do with the purchase of pizza at the party. The apparent inference was that pizza was purchased with the money taken from Mark Walker.

Several members of the Varela-Gallegos contingent testified that Montes bought pizza. According to Arroyo, around 9:00 p.m., Montes offered to buy pizza. (16 RT 2727.) Arroyo may have heard Montes say "Now I don't have much money left" after he paid. (16 RT 2728, 2755.) Arroyo did not actually see Montes pay for the pizza, nor did he see any pizza being delivered. (16 RT 2756.) Irma Eismann (the Varelas' aunt) said she had a piece of pizza around 9:00 p.m., and that Montes claimed he bought the pizza. (22 RT 3775.)

At trial, Marci Blancarte testified that she saw Montes pay for the pizza with two $20 bills which he pulled from a black wallet. This was the first time Marci had ever said this to anyone. (22 RT 3892, 3911-3912.) She had never mentioned this in multiple pretrial interviews or in her preliminary hearing testimony. (23 RT 3945-3946.) No one else at the party saw Montes with a black wallet. (25 RT 4504-4505.)

At trial, George testified that he gave Montes change for a $100 bill to buy the pizza.[21] (25 RT 4503-4504.) However, at the preliminary

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[21] When George made this statement about breaking the $100 bill, the police had already told him that Walker had been robbed. (2d Aug. CT, p. 76.) It was not explained why someone would need change to pay cash for pizza.

hearing, George said that Montes had maybe 50 bucks. (26 RT 4654.) George also testified that Montes had "a big wad" of money that night when he asked for change. (26 RT 4654.) George did not see a wallet. (25 RT 4504-4505.) During his trial testimony George denied telling Shedlock that Montes had no money and asked him to borrow some.[22] (26 RT 4645.)

Importantly, George told Detective Anderson that *Gallegos* obtained possession of Walker's wallet. He also said Gallegos told him there was around $100 in the wallet, and that it was Gallegos who bought pizza with the money. (33 RT 5973.)[23]

Kevin Fleming said there was pizza at the party before the Buick even arrived. Later on in the evening there was just left-over pizza. He did not see Montes order or pay for any pizza. (18 RT 3097.)

At various times during the evening, a number of partygoers observed firearms. One of them was a large black gun. This black gun was in the possession of Gallegos. (26 RT 4793, 4812, 4817, 4818-4819.)

George had previously told investigator Clark that the gun in Gallegos' possession the night of the party was the same one he had shown

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[22] There was also discrepancy about where the pizza came from. According to George, the pizza was delivered by Dominos. (25 RT 4503-4504.) Speck and Arroyo said the pizzas were from Pizza Hut. (16 RT 2728, 3394.)

[23] This testimony was only presented to the separate Varela jury.

George in the early morning. (26 RT 4793.) At trial, however, George testified variously that he could not remember if this was the black gun Gallegos had shown him the night before (26 RT 4791) and that he did not think this was the same gun. (26 RT 4732.)

Around midnight, Sal (and perhaps George) showed Arroyo a 9-millimeter, possibly nickel-plated, handgun which had been concealed under the bathroom sink. (16 RT 2719-2720; 23 4072, 4092.) Arroyo's girlfriend, Angie Avita, also saw this gun. She thought it was black. (23 RT 4072, 4117, 4128-4129.) Arroyo later told investigator Clark that the gun was not a Glock, but looked like Clark's Smith and Wesson. (17 RT 2820-2821.) Arroyo wanted to purchase the weapon. (16 RT 2720; 23 RT 4072.) Sal Varela told Arroyo that the gun was not his to sell, and that he would have to check on it. (17 RT 2820.) He also told Arroyo the gun had been fired, although Arroyo did not think it smelled like it had. (17 RT 2759, 2822-2833.)

Several people saw Montes with a small silver or nickel-plated .22 gun. (16 RT 2706-2727; 17 RT 2882-2883; 21 RT 3458; 3513, 3517; 22 RT 3898, 3931; 26 RT 4792.) Kim Speck testified that she also saw Montes in the bathroom with a larger black gun, showing it to Arroyo, and that he had this gun before the group left with the van. (21 RT 3458-3459, 3514.)

However, Speck admitted that she was confused in her recollections about this second gun. (21 RT 3637-3638.) For example, at the preliminary hearing Speck testified that she saw Montes and other people, including Hawkins, Gallegos and Varela, in the bathroom and that the larger gun was the focus of attention. (21 RT 3606-3607.) At that time she recalled that the gun in the bathroom was silver. (21 RT 3515-3516.) In an earlier statement Speck told Clark, Anderson and Mitchell that the gun in the bathroom had a colored handle on it. (21 RT 3629.)

At the preliminary hearing, Speck testified that the only gun she saw Montes with on Saturday night was the small .22. She did not see a black gun at the party. (21 RT 3515-3517, 3529.) At trial, Speck admitted that, while she was "sure" about seeing Montes with the smaller gun, she could be wrong about seeing him with the larger gun. (21 RT 3569.)

At some point between 10:00 p.m. and midnight, a group (including the Varela brothers, Kevin Fleming, Hawkins and Gallegos and Montes) left the party to play pool at a nearby facility. (18 RT 3089-3090; 25 RT 4447; 31 RT 5617-5618.) Montes and Hawkins had an argument at the pool hall during which Hawkins pulled a small derringer from his pocket. (25 RT 4452-4454.)

Hawkins and "Dodger Hat man" (Miguel Garcia) were eventually driven home by Eddie Montes (Joe Montes' cousin) around 1:30 or

2:00 a.m.[24] (21 RT 3460-3461; 22 RT 3877; 23 RT 3984; 31 RT 5624-5626.) George Varela left the party with a female companion after 1:30 and spent the night in Long Beach. (25 RT 4457, 4528.) The party broke up around that time. (17 RT 2892.)

Montes and Gallegos stayed at the Varelas' apartment all night. Sylvia testified that she, Gallegos and Montes smoked methamphetamine and played Nintendo games. (17 RT 2895, 2992-2994.) According to Sylvia, Montes made a number of telephone calls. (18 RT 3004, 3039; 31 RT 5505, 5509, 5512, 5541.) Montes said nothing about the killing during the entire night while he, Sylvia and Gallegos were up playing Nintendo and doing drugs. (18 RT 2985.)

E. EVENTS OF SUNDAY, AUGUST 28TH

Sunday morning, Sal and Kim went to a donut shop and purchased a newspaper. (20 RT 3401, 3406.) Sal located an article in the local section about a body being found in the trunk of a car off Palisades. (20 RT 3407; People's Exhibit 49.) Back at the apartment, the article was shown to Montes. This article described the victim of the shooting as a "man."[25]

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[24] There was a fair amount of testimony about Eddie Montes' comings and goings during the evening. Since it is not apparent how these activities were relevant to the charges, a detailed account is omitted.

[25] The article said: "The body of a man who had been shot to death was found inside the trunk of a car parked along the Corona road yesterday.

(21 RT 3594.) Montes denied committing the crime, saying: "Can you believe that they're trying to say that it's me?" "Man, I don't believe it, I didn't kill that guy." (21 RT 3504-3505, 3594.)[26]

At trial, Speck testified that Montes used the phone twice Sunday morning. According to Speck, when she got up, Montes was sitting in the kitchen talking on the phone. (20 RT 3402.) She heard him argue on the phone with his father, but did not hear him say anything about the shooting. (20 RT 3414.) Montes told Speck his father had said to be "ready to go 12 rounds" when he got home, and that his dad was real mad. (20 RT 3415.)

Speck also said she heard Montes say something about earning a stripe or a medal on his uniform. He did not make this comment over the phone. It was made about an hour after the phone conversation she thought Montes had with his father. (21 RT 3541.) The comment did not seem directed at anyone in particular. (21 RT 3500-3501.) Speck first mentioned hearing this "stripe" comment during an interview on August 30, 1994, with

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The man whose identity was unknown last night was found about 9:00 p.m. in the area of Green River Drive and Palasades Drive. Officers found the man in the open trunk of a Buick Regal while responding to the report of shots heard in the area. . . . The man was shot at least once in the upper torso. . . . Police had not made any arrests in connection with the death last night." (21 RT 3594.)

[26] Speck clarified that in this statement, Montes had used the word "guy" — not "kid" as she had testified earlier. (21 RT 3594.)

Anderson and Mitchell. (34 RT 6210.) This interview was right after her unrecorded conversation with Sal and George at the jail. (34 RT 6211.)

George's girlfriend Marci went to lie down in her room around 6:00 a.m. (22 RT 3917.) Marci said that when she got up on Sunday morning (between 9:00 and 9:30 a.m.) Montes was there with the newspaper clipping.[27] Sylvia had just walked out of the room. Montes said the clipping was about "some old man" who had been killed and found in the trunk of a car. (22 RT 3880-3882.) According to Marci, Montes said the person had been shot in the head. (23 RT 3966.) Montes folded the article and put it in his pants pocket. (22 RT 3882.) Marci testified that she overheard Montes tell someone over the phone that he had earned his stripes. (22 RT 3883.) After he was finished with his phone calls Montes said he would have to "go a few rounds" with his father at home. (22 RT 3884.)

Marci did not hear any conversation between Montes and Kim Speck concerning the article. (22 RT 3925.) She thought that the "stripes" comment was made when Montes was speaking to his mom over the phone. In her interview with Shedlock, Marci also said that she heard Montes tell his mom he had killed someone (23 RT 3982-3984), although at trial Marci

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[27] Marci was up from 8:30 a.m. on Saturday morning until 6:00 a.m. on Sunday, but she claimed that she used no drugs. (22 RT 3926.)

said she "wasn't for sure [she] heard that in an exact right way." (23 RT 3983.)

When Marci first spoke with the police, she did not say anything about Montes' phone calls, or about Montes supposedly saying the person had been shot in the head. (23 RT 4002-4003.) She also did not say anything to Detective Anderson about Montes' alleged statements. (24 RT 4298.) At the preliminary hearing Marci testified that Montes never admitted that he did the shooting. (23 RT 4006.)

Sylvia testified that Montes came into her room on Sunday morning, showed her the article, and said "I did this." (17 RT 2896-2899.) He told Sylvia not to tell anyone. (18 RT 2979.)

According to Sylvia, Montes used the phone in her bedroom to make phone calls Sunday morning after he showed her the article. The calls were made about 6:30-7:00 a.m. (17 RT 2903.) Sylvia said she heard Montes tell someone over the phone that he had earned a stripe. (17 RT 2902-2903.) After making some calls from her bedroom, the phone was moved into the living room, and Montes made more calls. (17 RT 2903.) Sylvia said that she told Marci about Montes' statements to her. (17 RT 2905.)

Sylvia also claimed that after one phone conversation Montes told her that he would have to "go rounds" with his dad. (18 RT 2980.) Sylvia

never mentioned this to either Shedlock or Clark. The first time she ever mentioned it was in court. (8 RT 3033.)

Kim Speck did not recall Sylvia being in the apartment when Montes made the "stripe" comment. (20 RT 3405, 3422; 21 RT 3495-3496, 3520-3521.) In fact, Speck did not recall seeing Sylvia at the apartment at all on Sunday while Montes was there.[28] (20 RT 3405; 21 RT 3495.)

Phone records showed that a number of phone calls were placed from the Varela residence on August 27th and 28th to phone numbers associated with Montes. (See e.g., 32 RT 5865-5872.) There were six very short phone calls from the Varelas' phone to Montes' home number. One for three minutes on Sunday, August 28th at 7:10 a.m. Two calls were made at 10:40 and 10:43 a.m., and another at 12:39 for one minute. There were two more one minute calls placed in the afternoon, one at 2:44 and one at 4:18 p.m. (32 RT 5869-5872.)

Other calls were made to George Hernandez[29] (32 RT 5869); Montes' wife Diane (30 RT 5503); and Montes' maternal grandmother. (30 RT 5509-5511.) Montes also called an old family friend, Linda Rodriguez. Montes told Rodriguez that he might be in trouble with the law

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[28] Marci thought Sylvia was at the apartment on Sunday. (22 RT 3887.)

[29] Hernandez was identified as a VBR gang member. (32 RT 5869.)

and asked if she would be a reference for him if he went to court. Rodriguez asked Montes if he was in trouble, and he told her it was nothing major. (31 RT 5542.)

People at the Varela apartment did not remember Gallegos saying anything at all. (22 RT 3886, 3934; 17 RT 2907.) According to Marci, Sal was in the bedroom all day sleeping (22 RT 3887), but Speck said that Sal was in the living room with her and Gallegos when Montes made the "admissions." (21 RT 3497.)

George Varela returned to the apartment Sunday afternoon. (20 RT 3404; 25 RT 4463.) At the residence, Marci told George that Montes had been talking about earning stripes. (25 RT 4611.) After taking a shower, George drove Montes and Gallegos back to Beaumont.[30] (26 RT 4464.) Montes sat in the front passenger seat and Gallegos sat in the back. (26 RT 4689.)

At trial, George testified that en route Montes removed a newspaper clipping from his pocket and told George that an old man from Beaumont

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[30] In an early interview with Detective Anderson, George at first said he drove only Montes home. He then acknowledged driving two people home, but claimed he did not know Gallegos' identity. (33 RT 5971-5972.)

had been killed.[31] (25 RT 4465-4466.) Montes said he had committed the crime, and described how he had fired the shots, pulling his sleeve down to cover his hand and protect him from blood spatter. Montes showed George "blood stains" on his shirt. (25 RT 4467-4469.) Montes used the small .22 derringer in his re-creation. (25 RT 4468; 26 RT 4656.) Montes told George that he did not know where he had shot the person, if it was in the back or in the stomach. Montes said nothing about shooting the person in the head. (26 RT 4821-4822.) Montes also told George that he had "jacked" the car. (26 RT 4701.)

According to George, Montes made the statement that, "he had to do it because he didn't want four vatos going down for one white guy." In his recorded interview with Shedlock, George said that Montes made this comment while they were in the car on the way home. (2d Aug. CT, p. 75.) At trial, however, George said that he had not told Shedlock the "whole facts right there exact" (26 RT 4694), and that the statement had actually been made inside Montes' house. (26 RT 4693.)

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[31] At first, George testified that Montes had told him the victim was an old man. (25 RT 4351, 4466.) Montes said he had killed some "old guy" — he never said anything about killing a kid. (26 RT 4821-4822.) Later, George said that Montes just referred to "someone dead from Beaumont." (26 RT 4691.)

In his interview with Detective Clark and DDA Mitchell, George told them that he and Gallegos had had some conversation in the car on the way back to Beaumont.[32] But he did not recall this at trial. (26 RT 4818.) Instead, in his trial testimony George said that he played loud music in the car on the way to Beaumont, so Gallegos probably could not have heard the conversation he had with Montes. (26 RT 4690.)

In Beaumont, George dropped off Gallegos at a liquor store near his home, then drove to the Montes residence. (25 RT 4470.) In his initial testimony, George said that Victor Dominguez was standing in the yard of the Montes residence. (25 RT 4471.) Dominguez told him, "You're riding with a 187." George and Montes then got out of the car. (25 RT 4472.) George did not order Montes out of his car; Montes got out after George got out. (25 RT 4473.)

Victor then said "let's go inside" — so George, Montes and Victor all went into the home. Montes' father was inside. (25 RT 4473.) Montes went into his room, changed clothes and returned. George said there were

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[32] In this interview, when asked if he knew what Ashley did with the gun he had shown George early Saturday morning, George responded: "No. 'Cause that's what, you know, on the way home he told me, well, I told him, what gun, you know, *what did you use*, and he told 'em, he showed what its called. He told me, well, you know, Joe took it away from me. And, I go what did you guys do with the gun. He goes oh man, I, I, I through [sic] it out, something like that." (2d Aug. CT, pp. 85-86.)

some words between Montes and his father when they first arrived at the residence, but he did not recall what they were. (25 RT 4474.) Then Montes' spontaneously said "I had to do it. I'm not going to let four vatos go down for one white boy."[33] (25 RT 4475.) According to George, Montes senior just shook his head and did not say anything. (25 RT 4476.)

George and Victor Dominguez left the Montes' home. As they did so, they saw a cop in the back with a gun. George and Victor jumped over the fence and went to Victor's residence. They stood there and watched while Montes was taken into custody. (25 RT 4477-4478.) Victor told George that the cops had been there earlier. (25 RT 4476.)

George Varela's version of events changed throughout his various statements to people.[34] In a recorded interview with Mr. Shedlock (his brother Sal's investigator) on September 9, 1994, George said that when he returned to his apartment around 3:00 p.m., he sat down on the couch next to Montes. At this time Montes showed him the news clipping about the

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[33] In his initial trial version, given the first day of his testimony, George stated that Montes' words were: "Fuck this. I ain't going to let four Vatos go down for a white boy." (25 RT 4353.) The next day, George testified differently regarding this purported statement. Now, according to George, Montes' exact words were: "I had to do it. . . ." (25 RT 4475.)

[34] George was also impeached with prior moral turpitude offenses. (26 RT 4561-4564; 33 RT 6084-6094.)

murder. (People's Exhibit 77B; 2d Aug, CT 75.) At trial, George denied telling this to Shedlock. (25 RT 4509, 4641.)

In his statement to Shedlock, George said that he told Montes to get out of the car after Dominguez made the "187" comment. George then parked his car at the Dominguez residence, and walked back to Montes' home. (2d Aug. CT, p. 76.) In his second day of testimony, after being confronted with the prior version he had given to Shedlock, George said that Shedlock's version now sounded more like what happened than what he testified to the day before. (26 RT 4658.) He also told Shedlock that he ran away from the Montes' residence through back yards when he saw the cops drive by because he did not want to get busted. (2d Aug. CT, p. 77.)

The first time George said anything about the "four vatos" comment was in his recorded Shedlock interview. (See 2d Aug. CT, pp. 71-89; 25 RT 4488.) George was interviewed twice by police before this, and again by Detective Clark and Mr. Mitchell after he spoke with Shedlock. George said nothing about the "four vatos" comment. (25 RT 4629-4630.) At the preliminary hearing, George was asked what kinds of things Montes said in the car on the way back to Beaumont. He said nothing about the "four vatos" comment. (25 RT 4630.) George admitted at trial that he had lied to Shedlock about some things because he was angry about what happened. (25 RT 4494.)

George also gave numerous conflicting accounts of statements he attributed to Montes concerning disposal of the 9-millimeter gun used to shoot Walker. At a 402 hearing George testified that when he asked Montes what became of the gun, Montes said he threw it away.[35] (26 RT 4685-4686; 25 RT 4351.) In his interview with Clark and Mitchell George said that, when asked, Montes replied, "don't even worry about it." (26 RT 4684.) Although he denied it at trial, George had also apparently told Mitchell that Montes said he did not know where the gun was. (26 RT 4819.)

George never said anything to either the police or Shedlock about Hawkins. In fact, he denied any knowledge of a "Huero" (Hawkins' moniker). (25 RT 4484, 4492.) In addition to his meeting with Hawkins' attorney Angeloff, George had a conversation with the Hawkins family (including Victor Dominguez) before he spoke with Shedlock. (26 RT 4779.)

Victor Dominguez contradicted much of George's testimony. Victor denied seeing Montes getting arrested on Sunday. In fact, he denied that he saw George Varela on Sunday. (27 RT 4862.) He did not go to Montes'

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[35] It should be recalled that George also said that he was told by Gallegos that he (Gallegos) threw the gun away. (2d Aug. CT, pp. 85-86.)

home on Sunday. He was not in the living room when Montes was arrested. (27 RT 4867.)

According to George, Montes took the .22 derringer inside the house with him when George dropped him off. (26 RT 4468, 4656.) Montes was arrested at 5:50 p.m. (24 RT 4269.) The police arrived between two and five minutes later. (24 RT 4262; 30 RT 5497.) The police did not find any gun or the newspaper article during their search of the residence. (24 RT 4269-4272.)

About two nights after Saturday the 27th, Refugio was awakened by Gallegos knocking at his bedroom window. Gallegos returned the .380 and Garcia stored the weapon in his closet.[36] (29 RT 5215-5216.) Refugio saw Gallegos the next day, and Gallegos advised him to get rid of the weapon. (29 RT 5216-5217.) Gallegos told Refugio about Walker. (29 RT 5221 5221, 5223, 5225; 32 RT 5852.) He said the .380 had not been used. (29 RT 5221.)

Refugio initially told the police that Gallegos said: "*I* carjacked the kid." and "*I* threw the gun away." (Emphasis added. 29 RT 5245-5246; 32 RT 5884. See also 32 RT 5915: "He [Gallegos] told me that — I remember that he told me *he* used it [the 9 mm] and they threw it into a lake

[36] Earlier, Refugio had told the police that he took the gun back to Gallegos' home. At trial, he said this had been a lie. (29 RT 5265.)

or something.") Gallegos was bragging when he made his admissions. (29 RT 5247-5248.) At trial, however, Refugio testified that Gallegos told him "they" had carjacked some kid and taken $200, and that "they" had killed the kid. Gallegos told Refugio that Walker was killed to get the $200. (32 RT 5857-5859, 5933.)

F. PHYSICAL EVIDENCE

Detective Ronald Anderson was assigned as case agent. (23 RT 4131-4132.) He arrived at the scene of the shooting around 9:00 p.m. (23 RT 4132.) Anderson surveyed the area with a flashlight and discovered tire tracks in a circular pattern crossing the dirt median separating the traffic lanes on that section of Palisades Road. (15 RT 2521; 23 RT 4146.) The tire tracks showed that a U-turn had been made with the vehicle heading east on Palisades. (15 RT 2519.) These tire tracks were later matched to co-defendant Salvador Varela's van. (16 RT 2606-2614.)

Inside the trunk, the taillight connection had been partially disassembled. (16 RT 2517; 24 RT 4191.)

Latent fingerprints were recovered from the hood of the Buick, and from the driver's window (People's Exhibit 46). (16 RT 2549-2550.) The latter prints, matched to Montes, were on the outside of the window, with the fingers pointing downwards. (16 RT 2553; 28 RT 5103.) One print matched Walker. The print from the hood of the car was not matched to

anyone. Other prints lifted from the car were comparable, but none of them were matched to anyone. (28 RT 5107, 5113-5118.)

Although Walker had been shot five times, the witnesses heard a maximum of four shots, and only four bullets were removed from Walker's body. (14 RT 2239, 2277, 2353; 15 RT 2416, 2434; 16 RT 2591.)

The bullets, shell casings and handgun were examined by a Department of Justice Criminalist. (24 RT 4304, 4318, 4321, 4326.) He determined that all four of the recovered projectiles were fired from the same gun. (24 RT 5133-5134.) A comparison with the Glock handgun discovered on Palisades Road determined that the casings were fired from the recovered weapon, and the bullets could have been discharged from the gun. (24 RT 4329-4330; 28 RT 5132-5134.)

The fifth wound (referred to in the proceedings as "wound number four") was a "through and through." The bullet which caused this wound was never found. (16 RT 2620-2623, 2630; 24 RT 4193; 30 RT 5475.) There were also no signs of ricocheting on the metal of the car (24 RT 2650) or strike marks in the trunk of the Buick. (24 RT 4196.) This wound could possibly have been inflicted by a different gun. (30 RT 5481.) According to the pathologist, Dr. Choi, this wound was consistent with a medium caliber weapon, including a 9 millimeter, a .38 or a .380 Walther. (30 RT 5475.)

Impressions were taken of shoeprints around the vehicle. (15 RT 2524-2533.) The shoeprint evidence was largely inconclusive. At least four different pairs of shoes made prints found at the scene. (31 RT 5561-5562.) Not every shoe would have made an impression, however, because of the terrain. (31 RT 5570.) Any mass-produced Vans shoe could have made some of the other impressions. (31 RT 5583.) According to Marci Blancarte, all four of the people who came to the party in the Buick were wearing Vans shoes that night. (23 RT 3947.)

Numerous articles of clothing were seized from the Montes home when he was arrested. Among them were a black sweatshirt (People's No. 26), a green shirt, blue Vans, white tennis shoes (People's No. 28), black jeans, a tank top T-shirt, and tan (khaki) pants with the legs cut off. (24 RT 4263-4268; 30 RT 5495-5496.) The black sweatshirt and green shirt were found in the clothes hamper and were wet. Montes appeared to have just taken a shower. (24 RT 4263.)

As with virtually everything else, witnesses at the party gave varying descriptions about the clothing Montes wore on Saturday and Sunday. According to Kim Speck, Montes arrived at the party wearing a black shirt with a zipper up the front. About ten minutes after the van returned, Montes removed this shirt and borrowed a white T-shirt from Sal. (21 RT 3543.) Speck identified the black shirt in People's Exhibit 26 as Montes'

black shirt. (17 RT 3616.) Marci also recalled that Montes was wearing a black sweatshirt when he arrived at the party. She thought that Montes was carrying this sweatshirt with him when he left the Varela residence on Sunday afternoon. (22 RT 3883, 3904; 23 RT 4002.) According to Marci, however, this black sweatshirt was not the same as the one in People's Exhibit 26. (23 RT 3964.)

George told Shedlock said that when he drove Montes home, Montes was wearing a white tank-top and khaki cut-off shorts. (26 RT 4782.) At trial, George testified that Montes was wearing Levis and a black sweater or sweatshirt. (26 RT 4782, 4816.) It was stipulated that Montes was seen by officer Martin walking up the driveway of his home on August 28, 1994, wearing a light-colored shirt and light khaki shorts. (25 RT 6081.)

The clothes seized from Montes were tested and found negative for human blood. (28 RT 5070, 5089, 5090; 31 RT 5591-5592.) The Vans shoes taken from Montes could not have made one of the impressions (in Exhibit 5-F). (31 RT 5554.)

According to Detective Anderson, stains noted on Hawkins' shoes appeared to be blood, but testing was unable to detect the presence of human DNA. (34 RT 6120, 6184-6185, 6186.) A shirt found about a half-mile from the crime scene had markings consistent with blood. (24 RT 4292, 4302.)

During her testimony, Judith Koahou was shown a green, blue and red plaid shirt (People's No. 17) found in the family's Buick. (13 RT 2017, 2562.) Afterward, a bailiff overheard Gallegos saying "What are they trying to say, I have an ugly shirt?" (32 RT 5828-5831.)

No personal property taken from Walker was ever recovered. (16 RT 2588-2589; 23 RT 4147-4148; 24 RT 4291.)

G. GANG EVIDENCE

Although there were no gang allegations in this case, Sergeant Scott Beard was permitted to testify about Beaumont gangs. The prosecutor sought introduction of this evidence to show societal association between the co-defendants. He also contended that the evidence was relevant to the issue of aiding and abetting (39 CT 7043-7049) and that it was relevant to explain the meaning of Montes' alleged "earning a stripe" comment. (39 CT 7049.)

According to Beard, two Hispanic gangs were active in the city of Beaumont during 1994, Vario Beaumonte Rifa ("VBR"), which claimed the south side of town, and Northside Beaumont, which regarded the other half of the city as its territory. (32 RT 5792-5793.)

Beard described Travis Hawkins and Miguel Garcia as VBR members. (32 RT 5819, 5822, 5824.) Ashley Gallegos and Eddie Montes were characterized as associates. (32 RT 5819-5820.) Joe Montes,

Salvador Varela and George Varela were not members of the gang. (32 RT 5809, 5823.)

Montes had a tattoo of "SUR XIII." (32 RT 5807.) This tattoo is tied to all Southern California Hispanic gangs. (32 RT 5809.) Just because someone is Hispanic and has a "SUR XIII" tattoo does not mean that person gets along with every other southern gang member. (32 RT 5815-5816.) In fact, it is not uncommon for there to be conflicts among various Hispanic gangs. (32 RT 5815.) If anything, Montes appeared to be (or have been) a member of a gang in Colton, the area where he lived before moving to Beaumont. (32 RT 5803-5805, 5810, 5814.) Beard was not familiar with Colton gangs. (32 RT 5805, 5810-5811.)

People in a gang will pick their own gang over family ties. A member's primary allegiance is to his own gang. (32 RT 5815.)

H. PENALTY PHASE EVIDENCE

1. Prosecution Case

The prosecution's penalty phase case focused largely on evidence about Mark Walker's life and the impact his death had on his family. The jury heard testimony from his mother, father, brother and step-father. Mark was described as a responsible young man and a caring son and brother.

His murder was devastating to his family and friends.[37] (41 RT 7326-7337; 42 RT 7360-7379, 7383-7426.)

The jury was also shown a 10-minute video tape comprised of 115 different photographs of Mark Walker and his family. The tape was set to music. It concluded with an image of a snow covered road, followed by a photograph of Mark's memorial plaque at the cemetery. (Exhibit P-12.)

During her testimony, Walker's mother described how upset she was upon discovering this memorial bench and plaque, donated by the football team in memory of her son, had been vandalized. (42 RT 7423.)

As factors in aggravation, the prosecution relied on Montes' prior conviction for burglary.

The prosecution also presented evidence that Montes had assaulted co-defendant Gallegos on September 8, 1996, while the two of them (together with 15-20 other inmates) were in a holding cell. Montes had allegedly used his waist chains to strike Gallegos. (41 RT 7270-7283.)

On September 11, 1996, correctional officers discovered a shank during a search of Montes' cell. (41 RT 7301-7306.) On July 23, 1996, Montes was discovered with a toothbrush which had a razorblade on the end. (41 RT 7312-7319.)

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[37] This evidence is set forth in more detail later in the brief.

2. Defense Evidence

Montes' evidence focused on his childhood and developmental disability.

When Montes was young, the family was very close, and there were strict rules. (42 RT 7485-7489.) The family attended church regularly. (42 RT 7489.) But the family situation deteriorated, culminating in the parents' divorce. (42 RT 7498-7501.) Following the divorce, the Montes family structure completely disintegrated. (44 RT 7735-7736.) This had a big impact on Montes. (42 RT 7512.)

Montes' mother developed personal problems after the divorce. (42 RT 7545.) She lost a lot of weight and was hospitalized at times. (42 RT 7560.) In the opinion of her brother, she neglected her children. (42 RT 7561.) She spent a lot of time away from the kids, spending most of her time with her boyfriend up in the mountains. (42 RT 7558.) She also developed a drinking problem. (44 RT 7747.)

After his parent's divorce, Montes lived with his grandfather off and on. At some point he went to live with his father. (42 RT 7541-7542.)

Problems began for Montes during his mother's pregnancy with him because she and the baby had different RH blood factors. (42 RT 7484.) As a child, Montes was very hyperactive. (42 RT 7491, 7550; 44 RT 7728.) Noticeable problems surfaced when he began school. Montes had a limited

attention span, and was unable to remain still. (42 RT 7491.) His parents consulted a doctor around the time Montes was in kindergarten or first grade. The parents were advised to put Montes on Ritalin, but his mother elected not to. (42 RT 7491.)

The school wanted to hold Montes back a grade beginning in kindergarten, and by second grade was insistent. (42 RT 7494.) Montes also had speech problems as a child, and he spent a year with a speech pathologist when he was in second grade. (42 RT 7496, 7529-7532.) His speech pathologist, Ms. Sorich, described Montes as "a slow child." (42 RT 7530, 7532.)

Because Montes seemed "slow," his mother took him out of public school and sent him to Colton Christian School. (42 RT 7496.) The school had a special seating arrangement, which seemed to help. The children at the school were able to work at their own level. Although Montes still struggled academically, he appeared happy. (42 RT 7497.)

Montes attended Colton Christian School from third to sixth grade, until his parent's separation. After he was re-matriculated into public school, Montes did not perform well. (43 RT 7618-7625.)

Childhood testing indicated that Montes had an I.Q. of 68 to 70. (42 RT 7533-7534.) While he was in custody awaiting trial, Montes was tested by Dr. Dean Delis, a clinical psychologist and professor of psychiatry

at UCSD Medical School. Dr. Delis administered the Wechsler Adult Intelligence Scale test. (43 RT 7635-7639.) According to Dr. Delis, Montes had a total I.Q. of 77, which meant that he was borderline mentally retarded.[38] (43 RT 7650.)

Two of Montes' first grade teachers, Janie Smith and Linda Morrow, remembered Montes as a slow student. (42 RT 7515-7516.) Leona Chouiniere, his second grade teacher, did not remember Montes herself. But his school records (Exhibits PD-36 and PD-37) showed that Montes did not do well. His performance was consistent with someone who had an I.Q of 77. (42 RT 7523.)

Anna Rangel, Montes' teacher at Colton Christian School in fifth and sixth grade, described Montes as always being in detention, always needing assistance, always in and out of his seat. (42 RT 7578-7579.) Montes struggled in school, and appeared to have a learning problem. In today's schools, he would have been placed in special education. (42 RT 7580.) Montes' school performance was consistent with him having an I.Q. of 77. (42 RT 7580, 7583.)

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[38] The designers of the test give it a margin of error of 2.6 points. So Montes' possible I.Q. range would be 74.4 to 79.6. However, the DSM-IV gives 4 to 5 points for variation in the test. This would mean a possible I.Q. range of 72 to 82. In Dr. Delis' view, an I.Q of 77 seemed accurate. (43 RT 7673-7674.)

A number of Montes' family members testified that his execution would have a devastating effect on them. (42 RT 7503, 7513, 7541, 7553; 44 RT 7730, 7744.)

To explain his possession of weapons in the jail, Montes presented evidence that he had been the victim of a stabbing while awaiting trial. (42 RT 7449-7458.)

3. Rebuttal

In its rebuttal case, the prosecution presented evidence that in 1994, Montes had been contacted by police and found in possession of an altered Phillips screwdriver. He was not arrested. (44 RT 7777-7778, 7781.)

PRETRIAL MOTIONS

INTRODUCTION: ISSUES REGARDING THE DEFENSE MOTION TO PRECLUDE THE RIVERSIDE DISTRICT ATTORNEY'S OFFICE FROM SEEKING THE DEATH PENALTY ON THE GROUNDS OF INVIDIOUS DISCRIMINATION, AND EFFORTS TO OBTAIN DISCOVERY IN SUPPORT THEREOF.

Montes moved to preclude the district attorney's office from pursuing the death penalty in his case on the ground that the decision to seek death had been influenced by invidious factors, specifically: race, and the status of the victim. To obtain additional support for this argument, Montes sought discovery by way of both *Murgia* and *Pitchess* motions. When his discovery motions were denied, Montes submitted his motion to preclude imposition of the death penalty on the only materials then available to him.

Herein, Montes urges this Court to find that the available record establishes discrimination in the capital charging decision in his case, warranting reversal of his death sentence. If this Court finds the record below is not sufficient to establish this claim, it was nevertheless error for the trial court to refuse to order the Riverside District Attorney's Office to provide discovery relating to its capital charging process.

This Court should therefore either reverse the death sentence, or remand the case with directions that the requested discovery be provided,

and for further proceedings, on both the *Murgia* discovery request and the *Pitchess* motion, as thereafter deemed appropriate.

ARGUMENT

I.

PROCEDURAL HISTORY: MONTES' EFFORTS TO OBTAIN DISCOVERY TO FURTHER SUPPORT HIS CLAIM OF INVIDIOUS DISCRIMINATION IN THE CAPITAL CHARGING DECISION; AND HIS MOTION TO PRECLUDE THE PROSECUTION FROM SEEKING THE DEATH PENALTY ON THOSE GROUNDS.

A. MONTES' DISCOVERY EFFORTS

1. *Murgia* Motions

Montes filed numerous pleadings, pursuant to *Murgia v. Municipal Court*, *supra*, 15 Cal.3d 286, seeking discovery of the capital charging practices in the Riverside District Attorney's Office.

On October 13, 1995, Montes filed a motion to discover the prosecution standards for charging special circumstances. (23 CT 6261-6267.) The motion was grounded on the Eighth Amendment, and on the due process and equal protection guarantees of the Fourteenth Amendment. (23 CT 6291, 6276, 6292-6295.)

The motion sought discovery relating to, among other things: the policies and procedures in the Office of the Riverside District Attorney since November 7, 1978, with respect to the charging of special circumstances and the decision to seek the death penalty; information

regarding each homicide case prosecuted by the Riverside District Attorney since 1978 in which special circumstances were alleged and the death penalty was sought, as well as those cases in which the prosecution sought only a penalty of life without parole; and, information about homicide cases in which special circumstances were not alleged. As part of the information sought for each of the above classes of cases, Montes requested discovery of information giving the race and ethnic background of each victim and defendant. Montes stated that this information sought was available only to the District Attorney's Office. (23 CT 6270.)

The motion set forth a factual basis in support of the discovery request. Specifically, this motion detailed numerous references in the investigation interviews conducted by Officers Anderson and Rasville and DDA Mitchell (the district attorney handling prosecution of the case against Montes and his co-defendants) in which Walker is referred to as "the white kid" and noting that Walker's father was a cop.[39] (See Montes' Motion to Compel Discovery, 3 CT 6281-6285.)

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[39] Mark's stepfather, Able Koahou, had been a police officer for a number of years, including nine years with the Banning Police Department. (41 RT 7326.) At the time of Mark's death, Mr. Koahou was no longer a city police officer, but he did continue to do security work. (41 RT 7327-7328, 7332.)

The motion was also supported by the Declaration of Dr. Edward Bronson.[40] (23 CT 6298-6311.) Appended to this declaration were two exhibits. Exhibit B was a table of Riverside prosecutions since 1978 in which the death penalty was known to have been sought. (23 CT 6319-6321.) Exhibit C was a table showing the race of the victim versus the race of defendant in 96 of these capital cases, for which that information was available. (23 CT 6322.)

On December 4, 1995, Montes filed another motion seeking to compel supplemental *Murgia* discovery. (23 CT 6402-6411.) This motion sought evidence of complaints made against the Riverside District Attorney's Office, and specifically requested any complaints made against Mr. Mitchell with regard to racial discrimination and/or racial slurs or other bias.

The prosecution filed papers in opposition to Montes' discovery motions. (23 CT 6419-6432.) The prosecution position was that Montes had failed to make the requisite showing needed to justify the "burdensome" task of obtaining and supplying the information sought. Attached to their pleadings was a study entitled: "Relationship of Offender and Victim Race to Death Penalty Sentences in California; a Declaration of

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[40] Dr. Bronson was a professor of public law, with a Ph.D. in political science as well as a two law degrees. His CV appears in the record at 23 CT 6312-6318.

Paul E. Zellerbach, Supervising Deputy District Attorney; and a declaration from the trial prosecutor, William E. Mitchell. (These latter items were added to the record as Exhibits L(a), (b) and (c) to Montes' Motion to Augment the Record, filed in this Court on June 14, 2007, and granted on August 15, 2007.) In their declarations, Mr. Zellerbach and Mr. Mitchell both disavowed that race (of the victim or the defendant) played any part in the capital charging decision. However, no case-specific reason for seeking a death sentence in Montes' case was provided in either declaration.

Montes' reply to the district attorney's opposition was filed on February 20, 1996. (23 CT 6450-6478.) In this pleading, Montes explained how his discovery request was also founded on the Eighth Amendment's proscription against cruel and unusual punishment. (23 CT 6450-6542.) This motion once again included excerpts from interviews conducted by Officers Anderson and Rasville and DDA Mitchell, in which they refer to Walker as a "white kid" and a "poor little white boy," and make note of the fact that Walker's father and other family members were cops. (23 CT 6452-6453.) A more complete transcript of this interview excerpt appears in the record at 23 CT 6376-6383.[41]

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[41] The transcript was filed in court by Montes on February 23, 1996, when the court took up argument on the *Murgia* and *Pitchess* discovery motions. These transcripts were intended to be considered as evidence in support of both of those motions. (3 PRT 679.)

Attached to Montes' reply was a supplemental declaration by Dr. Bronson detailing problems with the study "Relationship of Offender and Victim Race to Death Penalty Sentences in California" submitted by the prosecution. (23 CT 6471-6476.)

A supplemental pleading, filed March 15, 1996, contained additional statistical support (Department of Justice statistics from the years 1992 through 1994) for the defense contention that race had been a factor in the decision to seek the death penalty in Riverside. (24 CT 6630-6635.) The new figures indicated that the average percentage of white victims of willful homicide in Riverside County for these three years was 39.66 percent. (24 CT 6631-6632.) This was contrasted with Dr. Bronson's data providing information on the race of the victim for the 96 Riverside capital prosecutions in which the defense had that information. Of these 96 capital prosecutions, 78 (or 81.3 percent) of the crimes involved white victims. These statistics thus demonstrated that the Riverside District Attorney's Office selected cases for capital prosecution where the victim was white at twice the rate at which white people were the victims of homicide. (24 CT 6632.)

The district attorney's office filed supplemental opposition papers in response. (24 CT 6638-6641.) This pleading did not claim any specific inaccuracy in the figures cited by Montes.

The motion to compel discovery was argued on March 8, 1996. (3 PRT 677-719.) At the hearing, Montes' attorneys requested that the court listen to the tape containing excerpts of the interviews by the police and Mr. Mitchell referenced in the pleadings. The defense explained that the tone of voice in the tape excerpts was important to a resolution of the issue before the court.[42] (3 PRT 678-679.) Defense counsel explained that they were seeking discovery for purposes of presenting a defense demonstrating that the District Attorney's Office had a racially motivated reason for seeking the death penalty for Montes. (3 PRT 680.)

In response, Mr. Mitchell took issue with some of the statistical evidence cited in Montes' pleadings. Mitchell argued that the defense could have come up with some of the information on race of the victim or defendant in the "unknown" cases had they tried harder, and that inclusion of this information would have affected the outcome of the statistical showing. Mitchell also suggested that there were cases missing from Montes' list of capital prosecutions (in Exhibit B) noting that there had been 156 murders in Riverside County in just the past year. He also contended that some of the comments from the interviews cited to by the defense were

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[42] This tape has been included in the record. However, it does not appear that it was ever given an exhibit designation. The tape is labeled as: "People v. Montes Copy Excerpts Exhibits (Pitchess)"

taken out of context. Mitchell joined the defense request that the court to listen to the tape. (3 PRT 690-694.)

Finally, Mitchell stated that, in his opinion, race *did* play a factor in this case. According to Mitchell: "I think the young man here was killed because he was white. He was carjacked because he was white and vulnerable. He was a very young-looking white male." (3 PRT 695.)

The court stated it would listen to the tape, and also review transcribed passages submitted by the district attorney as "Attachment C," plus any corrections submitted by the defense. (3 PRT 697-699.)[43]

On March 19, 1996, following the hearing on the motion, Montes filed another supplemental pleading in support of the motion to compel *Murgia* discovery. (24 CT 6630-6637.) In this supplemental pleading, Montes pointed to the above comments by Mitchell regarding his belief that Walker's race was a factor in him being selected as a victim. (24 CT 6631.)

On March 26, 1996, the court issued a minute order ruling denying Montes' motion to compel *Murgia* discovery. The order states:

> To prevail on this motion for discovery the Defense needs to show that Prosecutorial discrimination was exercised with intentional and invidious discrimination. After review of

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[43] These items were included in the stipulated augmentation order signed by Judge McIntyre (see item No. 43 of stipulated order). However, they were never located by the clerk's office or otherwise included in the record on appeal.

> all evidence presented the filed points and authorities and the arguments of counsel the Court finds that the Defense has not shown plausible justification by direct or circumstantial evidence that the prosecution's discretion has been exercised with intentional and invidious discrimination in this case.
>
> Since no "plausible justification" for granting the defendant's extensive discovery order has been shown the Defense having failed to make the requisite threshold or prima facie showing the Defense motion for discovery will be denied.

(24 CT 6642.)

2. *Pitchess* Motion

As discussed more fully *infra*, (see Argument IV), Montes also moved for discovery of police personnel records pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531. (23 CT 6342-6361, 6384-6390.) Among other things, this motion sought information which might be relevant to Montes' prosecutorial discrimination claims. At the hearing on this motion, the court agreed to review the personnel records for Officers Anderson, Raasvild and Stewart, and held an in camera hearing from which Montes and his trial counsel were excluded. (3 PRT 647.)

Upon completion of its review of the records, the court indicated there were no citizen complaints regarding Sergeant Raasveld or Stewart. There were some complaints in Anderson's file, but the court concluded there was nothing of a discoverable nature. (3 PRT 645-653.)

B. MOTION TO DISMISS THE DEATH PENALTY ON GROUNDS OF INVIDIOUS DISCRIMINATION

Despite his inability to obtain the *Murgia* discovery he sought (see above), Montes still moved to preclude the district attorney's office from seeking the death penalty against him on grounds of invidious discrimination. Montes argued that the decision to seek the death penalty in his case was based on race (of the victim and defendant) and the social status of the victim, in violation of his right to equal protection of the laws. This motion incorporated his earlier pleadings seeking discovery in support of the invidious discrimination claim. (24 CT 6765-6784.) Opposition papers were filed by the prosecution. (25 CT 6852-6854.) The motion was submitted for decision on the pleadings (4 PRT 843) and was denied by the court on July 26, 1996. (25 CT 6938; 4 PRT 854.)

II.

MONTES WAS ENTITLED TO DISCOVER PROSECUTION STANDARDS FOR CHARGING SPECIAL CIRCUMSTANCES TO SUPPORT HIS CLAIM OF INVIDIOUS PROSECUTION IN THE CAPITAL CHARGING DECISION IN HIS CASE.

A. THE TRIAL COURT ERRED BY DENYING MONTES' *MURGIA* DISCOVERY MOTION

As discussed above, Montes claimed that the decision to seek a sentence of death in his case had been reached in violation of state and federal guarantees of equal protection and due process (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832) and the Eighth Amendment's proscription against the arbitrary and capricious infliction of the death penalty. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 310.) Specifically, Montes alleged that the death penalty was being sought in his case in part because of the race of the victim (white) and the race of the defendant (Hispanic). He also asserted that the status of the victim had been an improper consideration in the capital charging decision in his case.

In order to provide further support for his invidious discrimination claim, Montes sought discovery from various prosecutorial agencies. Disclosure of the requested information was important for establishing the defense's assertion of purposeful, invidious prosecutorial discrimination and as further evidence for the defense's contention that "a 'constitutionally

unacceptable' risk that an irrelevant and invidious consideration is systematically affecting the application of a facially valid capital sentencing scheme." (*People v. Keenan* (1988) 46 Cal.3d 478, 506.)

This Court has previously countenanced the right of an accused to obtain such discovery. Discovery of this sort is both appropriate and necessary because "evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved." (*People v. Gray* (1967) 254 Cal.App.2d 256, 266.)

In *Murgia*, this Court recognized "the established principle that in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense." (*Murgia*, *supra*, 15 Cal.3d at p. 293.) "[T]raditional principles of criminal discovery mandate that defendants be permitted to discover information relevant to such a claim." (*Id.* at p. 306; see also *People v. Edwards* (1991) 54 Cal.3d 787, 826.)

"A defendant seeking discovery is 'not required to meet the standard of proof requisite to the dismissal of a discriminatory prosecution.'" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171, quoting *People v. Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 748.) Thus, even if this Court finds that the showing of invidious discrimination made by

Montes' in the trial court was insufficient to preclude imposition of the death penalty in his case, (see Argument III, *post*) Montes nevertheless made a showing sufficient to have required the trial court to order the requested discovery.

In *United States v. Armstrong* (1996) 517 U.S. 456, the United States Supreme Court discussed the showing needed by a defendant who is seeking discovery of evidence in support of a claim of selective prosecution. According to *Armstrong*, a defendant must adduce "some evidence tending to show the existence of the discriminatory element." (*Id.* at p. 469.) This requirement, of "some evidence," means that a defendant must "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not. . . ." (*Id.* at p. 469.) "We think the required threshold — a credible showing of different treatment of similarly situated persons — adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution." (*Id.* at p. 470.)

This Court has held that "[a] motion for discovery must describe the requested information with at least some degree of specificity and . . . be sustained by *plausible justification*." (See, e.g., *Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306-307; *McPeters, supra*, 2 Cal.4th at p. 1170, emphasis added, citations and internal quotation marks omitted.) The

evidence needed to establish a "plausible justification" is less than what would be needed to establish a "prima facie" case of selective prosecution. "The showing of plausible justification can be made by general allegations which establish some cause for discovery other than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime. The showing need not be strong." (*People v. Ochoa* (1985) 165 Cal.App.3d 885, 888, internal citations and quotation marks omitted.)

A subsequent court of appeal decision, *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, has ruled that California's "plausible justification" standard was superseded by the United States Supreme Court's *Armstrong* decision. *Baez* did not discuss how *Armstrong's* requirement of "some evidence" differed from this Court's "plausible justification" standard. However, the opinion seemed to assume that *Armstrong*'s requirement of "some showing" required more. (*Id.* at p. 1191.)[44]

If this Court believes that *Armstrong* does in fact require a defendant to produce more evidence of discrimination before discovery will be

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[44] In any case, applying the *Armstrong* standard, the *Baez* court upheld the lower court's ruling granting the defendants' discovery request. (*Baez*, *supra*, 79 Cal.App.4th at p. 1191.)

ordered, Montes submits that it is for this Court, and not the court of appeal, to discard the "plausible justification" standard for use in California.

In any event, regardless of whether this Court finds the issue controlled by *Armstrong*, or instead applies the "plausible justification" standard, the evidence tendered in support of Montes' discovery motion surpassed the threshold showing required for the trial court to order the requested discovery. Montes provided statistical data disclosing a pattern in which the race of the victim played a significant factor in the decision to seek the death penalty in Riverside County.

Montes also provided case-specific evidence showing that the race and status of the victim was a factor in the minds of those persons involved in the investigation and prosecution of his case. Finally, Montes presented the expert opinion evidence from Dr. Bronson, which — based on the above evidence — rendered an opinion that race was a factor in the decision to seek the death penalty against Montes. Taken together, Montes' discovery request provided not only a "plausible justification" but also "some evidence" of discrimination. This evidence constituted a sufficient basis for granting the motion to provide the information sought. (See, e.g., *Griffin v. Municipal Court*, *supra*, 20 Cal.3d at p. 303, fn. 3.)

Because the requested discovery was not readily available to Montes, and there was good cause for disclosure, the trial court erred by refusing to

grant Montes' request to discover information relating to the capital charging practices of the Riverside District Attorney's Office. (See, e.g., *People v. Moya* (1986) 184 Cal.App.3d 1307, 1317; *Griffin v. Municipal Court*, *supra*, 20 Cal.3d at p. 306; *People v. Ochoa*, *supra*, 165 Cal.App.3d at p. 888.)

B. MONTES' DEATH SENTENCE SHOULD BE REVERSED

Reversal of the death verdict in this case is required because respondent cannot demonstrate that the error, which transgressed Montes' federal Constitutional rights, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

Alternatively, Penal Code section 1260 enables the Court to craft a remedy which is consistent with the error, so that the issue of discriminatory prosecution can be pursued. Under section 1260, the Court may "remand the cause to the trial court for such further proceedings as may be just under the circumstances."

Where, for example, the issue on appeal does not concern an alleged error at trial, the case may be remanded for resolution of the issue, with the possibility of reinstatement of the judgment if the issue is resolved against the defendant. (See, e.g., *People v. Minor* (1980) 104 Cal.App.3d 194, 199-200 [remand to permit further hearing on the defendant's reasons for

seeking to substitute counsel]; *People v. Ingram* (1978) 87 Cal.App.3d 832, [remand for hearing to determine what an informant's testimony would have been]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1031-1032 [remand to enable the prosecutor to state reasons for peremptory challenges after reversal for error in failing to find a prima facie case of prosecutorial discrimination].)

Accordingly, this Court should either reverse the death sentence imposed in this case, or at least remand the matter to the superior court with directions to provided the requested discovery, and to conduct further proceedings as might thereafter be had to challenge the decision to seek a sentence of death against Montes.

III.

<u>THE DECISION TO SEEK THE DEATH PENALTY FOR MONTES TRANSGRESSED HIS RIGHTS AS GUARANTEED BY THE UNITED STATES AND CALIFORNIA CONSTITUTIONS.</u>

A. THE DEATH PENALTY MAY NOT BE IMPOSED WHERE IT CAN BE SHOWN THAT INVIDIOUS DISCRIMINATION PLAYED A PART IN THE PROSECUTION'S DECISION TO SEEK DEATH

"The decision to prosecute may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. . . . [Citations.] Likewise, the decision to charge the death penalty cannot rest on criteria that offend the Constitution." (*Belmontes v. Brown* (9th Cir. 2005) 414 F.3d 1094, 1126, rev'd on other grounds *sub nom. Ayers v. Belmontes* (2006) 127 S.Ct. 469, citing, inter alia, *McCleskey v. Kemp, supra,* 481 U.S. 279, 293.)

Discriminatory prosecution violates the Equal Protection Clause of the Fourteenth Amendment, and article I, section 7, subdivision (a) of the California Constitution. (*Yick Wo v. Hopkins* (1886) 118 U.S. 356; *Murgia v. Municipal Court, supra*, 15 Cal.3d at p. 294.) "The unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or

purposeful discrimination." (*Baluyut v. Superior Court*, *supra*, 12 Cal.4th at p. 832.)

While broad discretion may be vested in government officers over whom to prosecute,[45] that discretion is not unfettered and may not be based on an unjustifiable standard. (*Wayte v. United States* (1985) 470 U.S. 598, 608.) "[A] denial of equal protection would be established if a defendant demonstrates that the prosecutorial authorities' selective enforcement decision 'was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (*Murgia*, *supra*, 15 Cal.3d at p. 302.)

As explained by this Court in *Murgia*, "the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." (*Murgia*, *supra*, 15 Cal.3d at p. 297.) The *Murgia* opinion continued:

> Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice.

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[45] "It is well established, of course, that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime." (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77. See also *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 364.)

> Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.

(*Murgia, supra*, 15 Cal.3d at p. 298, fn. omitted).

This rule applies in all cases. "[T]here is absolutely no support in any of the numerous discriminatory prosecution cases for the notion that the equal protection clause is inapplicable to the enforcement of 'serious' criminal statutes. . . . As we have explained, the constitutional mandate prohibits officials from utilizing their law enforcement discretion as a vehicle for intentional invidious discrimination; that prohibition applies to the misuse of any criminal law." (*Murgia, supra*, 15 Cal.3d at p. 303; see also *United States v. Armstrong, supra*, 517 U.S. 456.)

Although sometimes referred to for convenience as a "defense," a claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. (*Armstrong, supra*, 517 U.S. at p. 463; *Murgia, supra*, 15 Cal.3d at p. 293, fn. 4.) The defect lies in the singling out of persons for prosecution that is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." (*Oyler v. Boles* (1962) 368 U.S. 448, 456; see also *Armstrong, supra*, 517 U.S. at pp. 463-464

[a prosecutor's discretion is "subject to constitutional constraints" one of which is imposed by the equal protection clause].)

Regardless of equal protection consequences, a defendant's right to due process is violated by discrimination on the basis of the race of the victim. (*McCleskey v. Kemp* (1985) 753 F.2d 877, aff'd., *McCleskey v. Kemp, supra,* 481 U.S. 279.) This is so because such an application of the prosecutorial power if an "irrational exercise of governmental power." (*McCleskey v. Kemp, supra,* 481 U.S. at p. 291, fn. 8.)

Additionally, the Eighth Amendment protects against arbitrary and capricious decision-making in the capital charging decision. (*McCleskey v. Kemp, supra,* 481 U.S. at p. 310 ["This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race."].)

Thus, a defendant may challenge even the broad discretion exercised by decision-makers in a capital sentencing scheme on the basis of discriminatory enforcement. As this Court has observed in the context of a capital case:

> [A]n accused may show by direct or circumstantial evidence that prosecutorial discretion was exercised with *intentional and invidious discrimination in his case.* [Citations.] In theory, he may also show a 'constitutionally unacceptable' risk that an irrelevant and invidious consideration is systematically affecting the application of a facially valid sentencing scheme.

(*People v. Keenan, supra,* 46 Cal.3d at p. 506, emphasis in original.)

A discriminatory prosecution claim may be properly based not only on the race of the defendant, but also on the race of the victim. "[A] defendant may bring a selective prosecution claim based solely on the race of his victim. . . ." (*Belmontes v. Brown*, *supra*, 414 F.3d at p. 1126, fn. 12; see also *McCleskey v. Kemp*, *supra*, 481 U.S. at p. 292.)

B. MONTES PRESENTED SUFFICIENT EVIDENCE TO SUPPORT HIS CLAIM OF INVIDIOUS DISCRIMINATION IN THE DECISION TO SEEK DEATH IN HIS CASE

This Court has stated that it will not normally review the charging decisions of prosecutors, unless there is invidious discrimination in charging. (*People v. Pinholster* (1992) 1 Cal.4th 865, 971.) However, this Court has also recognized that an accused may show, by direct or circumstantial evidence, that prosecutorial discretion was exercised with intentional and invidious discrimination in his or her particular case. (*Keenan*, *supra*, 46 Cal.3d at p. 506.) Montes' case does raise an issue alleging invidious discrimination in the decision to seek the death penalty. This Court should therefore review the capital charging decision. This review will reveal that the decision to seek the death penalty against Montes was colored by invidious discrimination. As a result, the sentence of death must be set aside.

A defendant may challenge the decision to seek a sentence of death if he can offer proof that the decision was made in a discriminatory fashion. (*Oyler v. Boles*, *supra*, 368 U.S. at p. 456; *Keenan*, *supra*, 46 Cal.3d at p. 506; *Murgia*, *supra*, 15 Cal.3d at p. 290.) "To establish the elements of discriminatory enforcement, the defendant must prove: (1) 'that he has been deliberately singled out for prosecution on the basis of some invidious criterion'; and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.'" (*People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 348, quoting *Murgia*, *supra*, 15 Cal.3d at p. 298.)

A similar test was subsequently approved by the United States Supreme Court in its *Armstrong* decision. According to *Armstrong*, in order to prevail on a selective prosecution claim, the defendant must demonstrate both a discriminatory purpose and a discriminatory effect. (*Armstrong*, *supra*, 517 U.S. at p. 465.) A criminal defendant must produce "clear evidence" of each. (*Id.* at p. 464.)

In *McCleskey v. Kemp*, *supra*, 481 U.S. 279, the United States Supreme Court rejected the defense's claim of invidious discrimination in the capital charging decision. The defendant in *McCleskey* had relied on statewide statistics which indicated that defendants whose victims were white were 4.3 times more likely to receive a sentence of death. The study

cited by McCleskey, the "Baldus" study, looked at the disparity at the end of the process, following the sentence of death. McCleskey's claim of discrimination thus extended to every actor in the process, not just the charging entity. The *McCleskey* Court rejected the defense's challenge, ruling that the statewide statistics did not meet his burden of demonstrating that imposition of the death penalty in his own case was the result of purposeful discrimination. (*Id.* at pp. 292-293.)

The type of evidence which may support a claim of invidious discrimination was recently discussed in detail in *Belmontes v. Brown*, *supra*, 414 F.3d 1094. In *Belmontes*, as in the instant case, the defendant specifically claimed discrimination in the capital charging decision. Characterizing the defense's discriminatory prosecution argument as essentially a selective prosecution claim, the *Belmontes* court analyzed it under that rubric.

Belmontes began by noting the presumption of regularity in prosecutorial judgments. "Yet, there is a line the prosecution may not cross. Although prosecutorial discretion is broad, it is not unlimited. [Citation.] Rather, a prosecutor's discretion is subject to constitutional constraints. [Citation.] The decision to prosecute may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and

constitutional rights. [Citation.] Likewise, the decision to charge the death penalty cannot rest on criteria that offend the constitution." (*Belmontes, supra*, 414 F.3d at p. 1126. Citations and internal quotation marks omitted.)

At the threshold, the Ninth Circuit ruled that the defendant's statistical evidence regarding local capital charging practices could be relied on for proof of an invidious prosecution claim, rejecting the government's assertion that such evidence was "insufficient as a matter of law." (*Belmontes, supra*, 414 F.3d at p. 1127.) The *Belmontes* court noted that the statistical evidence provided by the defense in its case focused on the relevant charging entity (there the San Joaquin County District Attorneys Office). Belmontes thus "provided what the statistics in *McCleskey* lacked: information specific to the decision-maker in his case." (*Id.* at pp. 1126-1127, citing *United States v. Bass* (2002) 536 U.S. 862, which had approved of such a showing.)

This distinction was found to be crucial. "We conclude that statistics relating to the charging entity, such as those presented by Belmontes, are materially more probative of discrimination in capital charging than those considered by the Supreme Court in *McCleskey*." (*Belmontes, supra*, 414 F.3d at p. 1127.) Accordingly, *Belmontes* held that the proffered statistics could support a prima facie case of unlawful discrimination. (*Ibid.*)

Here, as discussed *infra*, Montes made a sufficient showing of invidious discrimination in the capital charging decision on two grounds: (1) race; and (2) the status of the victim. His death sentence should therefore be vacated.

1. Discrimination on the Basis of Race

Clearly, prosecutorial discretion cannot be exercised on the basis of race. (See, e.g., *McCleskey v. Kemp*, *supra*, 481 U.S. at p. 310, fn. 30 ["This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race."].)

As noted above, in addition to arguing discrimination on the basis of a defendant's own race, a defendant may also bring a selective prosecution claim based solely on the race of his victim. "[T]o establish a discriminatory effect in a race-of-the-victim case, he must show that similarly situated individuals whose victims were of a different race were not prosecuted." (*Belmontes v. Brown*, *supra*, 414 F.3d at p. 1126, fn. 12.)

a. Discriminatory Effect

Where, as here, the defendant is arguing that the decision to seek a death sentence was influenced by race (of the defendant or victim) the defendant must present prima facie evidence of a discriminatory effect, i.e., that the death penalty was not sought in the case of similarly situated

individuals of a different race, or whose victims were of a different race. (*Armstrong*, *supra*, 517 U.S. at p. 465.)

In the instant case, Montes presented evidence that race, of the victim and the defendants, did affect the discretionary decision to seek a death sentence in his case. Montes cited statistics demonstrating that race played a factor in the capital charging decision in Riverside County, particularly where the victim was white. (23 CT 6319-6322 [Exhibits B and C to the Declaration of Edward Bronson submitted in support of Montes' Motion To Compel Discovery]; see also 24 CT 6769-6772.)

Montes also provided figures from the California Department of Justice for the years 1992-1994. These figures indicated a three-year average of 39.66 percent for white victims. This compared to an 81.3 percent rate in capital prosecutions where the victim was white. The statistical evidence thus demonstrated that, among other things, the Riverside District Attorney's Office selected cases for capital prosecution where the victim was white at twice the rate at which white people were the victims of homicide. (24 CT 6632.)

Belmontes addressed the issue of whether this sort of statistical evidence could establish *Armstrong*'s requirements of a discriminatory effect and a discriminatory purpose. With regard to *Armstrong's* first requirement — of a discriminatory effect — the *Belmontes* court found

that the statistical evidence presented by the defense revealed that defendants whose victims were white were far more likely to be charged with a capital offense than those similarly situated defendants whose victims were non-white. (*Belmontes*, *supra*, 414 F.3d at p. 1127.) The court therefore found that Belmontes had established the requisite discriminatory effect. (*Ibid.*)

Not only did Montes present statistical evidence showing a pattern of discrimination in capital prosecutions in Riverside County, Montes also incorporated the declaration of Dr. Edward Bronson previously submitted by him in support of his motion for discovery of capital charging practices in Riverside. (See 23 CT 6298-6311.) In this declaration, Dr. Bronson stated he had reviewed studies showing that, in both California and the United States, the death penalty is disproportionally applied to people of color, and to those whose victims are white. (See 23 CT 6300-6307.) Dr. Bronson concluded that "the process [] discriminatorily penalizes those who kill whites." (23 CT 6307.)

In addition, Dr. Bronson stated that he had reviewed a list of 129 cases[46] from 1978 to 1996 in Riverside county (see 23 CT 6319-6322) and

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[46] Information on the race/ethnicity of the defendant and victim was available for only 96 of those cases. (23 CT 6308; see also Exhibit B to Bronson's Declaration, 23 CT 6319-6321.)

interviews by interrogators involved in this case. Dr. Bronson's conclusion was as follows: "The above data combined with my review of statements made by interrogators during the interviews of Joseph Montes, Ashley Gallegos, and Sal Varela shows a discriminatory pattern operating in Riverside County." (23 CT 6308-6309.)

As can be seen, Montes presented "clear evidence" that race, of the defendant and of the victim, had a discriminatory effect on the decision to seek the death penalty in his case.

b. Discriminatory Purpose

With regard to the second prong of *Armstrong*, the *Belmontes* court recognized that the defense had to also show that the charging entity acted with a discriminatory purpose, and that the decision to pursue a sentence of death in his case was due, at least in part, to the race of the victim. (*Belmontes, supra.* 414 F.3d at p. 1128.) According to *Belmontes*, the Supreme Court has not yet decided whether statistical evidence alone may establish a prima facie case of a discriminatory purpose in the capital charging decision.

The *Belmontes* court itself did not resolve this issue either, because it found that the defendant's claim had been adequately rebutted by the a

prosecution.[47] (*Belmontes, supra.* 414 F.3d at p. 1128.) However, the court did opine that the statistics concerning the disparity in charging capital offenses where the victim was white provided a "strong showing of intentional discrimination." (*Id.* at p. 1128.)

Montes contends that the statistical evidence he presented, by itself, provides a prima facie showing of a discriminatory purpose. But Montes provided even more evidence. In addition to the comparative statistical evidence and the professional opinion of Dr. Bronson, Montes also presented case-specific evidence that race played a part in the decision to seek the death penalty in his case. In this regard, in his pleadings and in the cassette tape admitted as evidence at the hearing on the motions, Montes pointed out that there had been repeated references by Officers Anderson and Rasville and DDA Mitchell to Walker as "the white kid." He also noted references to the race of the suspects in the case. (23 CT 6376- 6383; 24 CT 6772-6775, and cassette tape with interview excerpts.)

Additionally, Montes' pleading pointed to comments by the prosecutor, Mr. Mitchell, expressing an opinion that Walker was carjacked

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[47] Evidence was presented on various claims in federal court before the United States Magistrate judge. This evidence appears to have included a deposition by the prosecutor in which he provided case-specific reasons (another, uncharged, homicide) for seeking the death penalty in Mr. Belmontes' case. (*Belmontes, supra,* 414 F.3d at pp. 1111, 1128.)

and killed because he was white, although there was no evidence that the offense was racially motivated. (24 CT 6776; 3 PRT 695.) The significance of this comment was explained by Montes' counsel, Mr. Cotsirilos, at the hearing on the discovery motion:

> [MR. COTSIRILOS]: I was struck by that comment because I've received no information from counsel in any discovery, in any discussions that there's any evidence at all in this case that says anyone mentioned the race of the victim as their motivation for carjacking him. That appears in not one report or no tape. There's been no testimony, not one iota of evidence presented to this Court that any individual in this case ever mentioned, "We're going to kidnap Mark Walker because he's a white boy."
>
> The only person that has that thought in their mind is Bill Mitchell. The only person that seems to think that's important is the prosecutor in this case. There's no evidence to support that, and I don't think you can find a clearer window into the importance of race of a victim to these officers and to this prosecutor than in that statement.

(3 PRT 711.)

In sum, Montes provided sufficient evidence to establish that race was a factor in the decision to seek the death penalty in his case.

2. Discrimination on the Basis of the Victim's Status

Not only is charging discretion not to be exercised on the basis of race (of the victim or defendant) but the social status of the victim and/or the victim's family should play no role in deciding whether to seek the death penalty in a particular case. (See *Booth v. Maryland* (1987) 482 U.S.

496, 506, fn. 8, overruled in part in *Payne v. Tennessee* (1991) 501 U.S. 808, 830 ["our system of justice does not tolerate . . . distinctions" based on the perceived worthiness of the victim].)

In addition to presenting evidence that race was a factor in the capital charging decision in his case, Montes also pointed out evidence in support of his claim that the status of the victim and the victim's family was a factor in the decision to seek the death penalty in his case. The following are excerpts from investigation tapes submitted as evidence in support of the discriminatory prosecution claim:

> [Detective Anderson]: "You killed a cop's kid!"
>
> [¶] . . . [¶]
>
> [Detective Rasville or Anderson]: "That guy's [Walker's] dad used to be a cop. This kid you killed, he's got a couple of brothers that are cops. His dad's a high school football coach. He played football for his dad. He did. This poor little kid man, he's dead and his family's devastated, and they're gonna sit there and listen to your bullshit story lies."

(23 CT 6380, 24 CT 6775, and excerpt tape.)

> [Detective Anderson]: "Well he's got two brothers that are cops. There's a lot of pissed off angry people in Beaumont, in Banning about this thing. This is a big deal.
>
> [¶] . . . [¶]
>
> [DDA Mitchell]: Well, see Dale over here gets mad at stuff like this, I mean this was a cop's kid.
>
> [Gallegos]: Huh?

[Mitchell]: Mark's dad used to be a cop.

[Gallegos]: Uh-huh.

[Mitchell]: His brother's a cop.

[Gallegos]: I remember you saying that.

[Mitchell]: Yeah. He get mad about that stuff.

(23 CT 6383, and excerpt tape.)

Montes thus presented evidence specific to his case that a constitutionally irrelevant factor — the law enforcement connections of Walker's family — played an improper role in the decision to seek the death penalty in his case.

C. DISCRIMINATION IN THE CAPITAL CHARGING DECISION REQUIRES THAT THE DEATH SENTENCE BE REVERSED.

When a defendant establishes that he has been improperly singled out for prosecution on account of impermissible factors establishing discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the prosecution establishes a compelling reason for the selective enforcement. (*McLaughlin v. Florida* (1964) 379 U.S. 184, 193-196; *Murgia, supra*, 15 Cal.3d at p. 304.)

In the instant case, however, Montes did not — and is not — seeking dismissal of the action, or even the special circumstance allegations. Rather, Montes contends that his death sentence should be vacated because

the death penalty was sought on the basis of constitutionally irrelevant and invidious considerations, in violation of the Eighth and Fourteenth Amendments. (*McCleskey v. Kemp*, *supra*, 481 U.S. 279; *Booth v. Maryland*, *supra*, 482 U.S. 496; *Beck v. Alabama* (1980) 447 U.S. 625.)

IV.

APPELLANT REQUESTS THAT THIS COURT CONDUCT AN INDEPENDENT REVIEW OF THE IN CAMERA HEARING ON THE PITCHESS MATERIALS.

On December 1, 1995, Montes moved for discovery of police personnel records pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531. (23 CT 6342-6361, 6384-6390.) Among other things, this motion sought information for the purposes of making the showing necessary to obtain the discovery sought in Montes' previously-filed *Murgia* motion.

On December 8, 1995, a hearing was held on the *Pitchess* motion.[48] (3 PRT 631-655.) The hearings concerned official documents created and maintained by the City of Corona. The court agreed to review the personnel records for three police officers (Anderson, Raasvild and Stewart) and held an *in camera* hearing from which appellant and his trial counsel were excluded. (3 PRT 647.) The transcripts of the *in camera* hearing were sealed. (See notation on 3 PRT 647.)

Upon completion of its review of the records, the court indicated there were no citizen complaints regarding Sergeant Raasveld or Stewart.

[48] This motion was heard before a judge other than Judge McIntyre. The minute order for this date lists Judge McIntrye. (2d Aug. CT, p. 14.) However, it is clear from the reporter's transcripts that the matter was heard by some other judge. The name of that judge is not mentioned in the transcripts, however. (3 PRT 629-655.)

There were some complaints in Anderson's file, but the court concluded there was nothing of a discoverable nature. (3 PRT 645-653.)

Following the hearing, the court returned the records it had reviewed to the Corona Police Department. From the surrounding transcribed proceedings, it does not appear that any copy of the records was made by the trial court. (See 3 PRT 646.) Appellant does not know if the court made any written or oral notes listing the documents it reviewed.[49]

Pursuant to *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232, Montes is entitled to have an appellate court review what the trial court considered in deciding whether any material in the officers' files was discoverable. Montes therefore requests that this Court conduct an independent review of the reporter's transcript of the in camera hearing and any records reviewed by the superior court, to determine for itself whether any police personnel records were incorrectly withheld. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221 [A trial court's decision on the

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[49] As part of his record completion motions, Montes made numerous requests for permission to review the sealed in camera proceedings on the *Pitchess* motion in order to ascertain if there was even a record sufficient to permit meaningful review by this Court. (See, e.g., Montes Motion to Correct and Augment the Record on Appeal, filed in the superior court on September 17, 2002, found at 4th Aug. CT, pp. 1-139; and Montes' Motion to Augment the Record, filed in this Court on February 9, 2004.) These requests were denied by the trial court on December 5, 2003 (2d Aug. CT, p. 240), and by this Court in its order of March 17, 2004.

discoverablility of material in police personnel files is reviewable under an abuse of discretion standard].)

There is no mention in the present record that the court made copies of the materials it reviewed. If no copies exist, Montes requests that this court order the record augmented to include the materials so that the court may review them. (*Mooc*, *supra*, 26 Cal.4th at p. 1228.)

Should this court's independent review of the record reveal that any documents were improperly withheld from the defense, or that the record is not sufficient to permit meaningful appellate review, Montes requests that this court order appropriate relief. Particularly, if any evidence was improperly withheld which might have provided further support for Montes' *Murgia* motion to discover information about the capital charging practices in Riverside, Montes requests that this Court either reverse his sentence of death, or remand to the trial court for further proceedings on that discovery motion.

V.

THE TRIAL COURT ERRED BY REFUSING TO ORDER A SEPARATE TRIAL FOR MONTES. THE JOINT TRIAL DENIED MONTES HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL; DUE PROCESS OF LAW; AN IMPARTIAL JURY; EFFECTIVE ASSISTANCE OF COUNSEL; AND A RELIABLE PENALTY DETERMINATION, IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CORRESPONDING STATE COURT CONSTITUTIONAL PROVISIONS.

A. INTRODUCTION TO SEVERANCE ARGUMENTS

Montes brought several motions seeking severance. These motions presented a number of reasons why Montes should have a trial separate from the other three co-defendants. In addition, Montes also specifically sought severance from his cousin, Travis Hawkins. All Montes' severance motions were denied.[50]

In support of his motions, Montes requested that the court read and consider sealed declarations. The trial court refused to read the declarations, but eventually agreed to lodge them in the record to permit later appellate review of the issue.

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[50] The court did ultimately decide to empanel a separate jury to decide Varela's case because of the incriminating statement he gave to the police. (3d Aug. CT, p. 161.) With the exception of Varela's statement, however, all the same evidence was heard by both juries.

The joint trial deprived Montes of his rights to a fair trial, an impartial jury, due process of law, effective assistance of counsel and a reliable penalty determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the California Constitution (Cal. Const., art. I, §§ 1, 7, 15, 16 and 17; *Beck v. Alabama, supra*, 447 U.S. 625; *O.G. v. Florida* (1977) 430 U.S. 349; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

B. PROCEDURAL HISTORY OF SEVERANCE ISSUES

Montes' first motion, filed on or about February 22, 1996, sought either severance or separate juries. This motion was brought on the grounds that a joint trial with the other three co-defendants would violate Montes' federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as related rights guaranteed by the state constitution. (23 CT 6479-6546.) The motion listed four primary grounds for severance: (1) *Aranda/Bruton* because of the statements of Montes' co-defendants; (2) a joint trial could prevent a reliable individual penalty determination for Montes; (3) a joint trial would preclude fair consideration of conflicting defenses; and finally (4) a joint trial would unnecessarily prejudice the jury against Montes because he was the only one facing the death penalty. (23 CT 6530.) Although noting these four different grounds

for severance, this first motion only discussed the *Aranda/Bruton* grounds. (See 23 CT 6530-6545.)

In his second set of pleadings, filed on or about February 23, 1996 (24 CT 6551-6566), Montes addressed his three other grounds for severance. First, Montes argued that a joint trial would violate his constitutional right to an individualized penalty determination, since the jury would be likely to judge Montes in comparison to his co-defendants against whom a death sentence was not being sought. In this regard, Montes specifically pointed to the danger (which was realized at trial) that the evidence presented by his co-defendants would seek to paint Montes as being "worse" or "more responsible" than the others involved in the offense. (24 CT 6558.)

Montes also argued that he and his co-defendants had irreconcilable defenses. In support of this contention, Montes tendered a sealed declaration by his counsel. (24 CT 6558.) This declaration was subsequently lodged with the court. (See Exhibit K to Appellant's Augment Motion filed in this Court on June 14, 2007, and granted on August 15, 2007.)

Finally, Montes argued that it was constitutionally improper to join his capital trial with the non-capital trial of his co-defendants. (24 CT 6561-6563.) As pointed out by Montes, this procedure gave the appearance

that the district attorneys office was vouching to the jury that Montes was the more culpable person, i.e. the actual shooter and/or that something about either Montes' involvement in this case or his background justified him being subject to the more severe penalty. As explained by Montes, the prejudice from such apparent vouching was particularly damaging to his case because the identify of the person who shot Mark Walker was unknown.

As an alternative to complete severance, Montes requested that the court at least empanel a separate jury to hear and decide his case at the same time as the other defendants. (24 CT 6564.)

In another motion, filed February 23, 1996, Montes more specifically sought severance from his co-defendant and cousin, Travis Hawkins. (24 CT 6567-6622.) This motion was brought on the grounds that a joint trial with Hawkins would violate his state and federal rights to due process of law and a fair trial (5th Amend.); effective representation by counsel (6th Amend.); and a reliable determination of penalty (8th & 14th Amends.).

In his motion seeking severance from Hawkins, Montes' counsel explained that a joint trial with Hawkins was creating difficulties in their ability to investigate and prepare a penalty phase defense for Montes. A particular problem was the reluctance of family members on Montes'

father's side of the family to help Montes at the possible expense of Hawkins.

The motion to sever from Hawkins was supported by declarations from a number of experienced trial attorneys, providing details of problems they had encountered in capital trials where relatives were being jointly tried. (See CT 6578-6621.) These declarations described difficulties in securing the cooperation of their clients where there was any perceived threat to the defense of the relative co-defendant. The declarations also described impairment in the ability to investigate and present a penalty phase defense where relatives were reluctant to say or do anything to help one defendant if it might be at the expense of the other. Several of the declarations also described problems related to disagreements with co-defendants about jury selection.

Also tendered in support of the motion were two more sealed declarations from Montes' attorneys, both signed February 23, 1996. (24 CT 6570; 1st Aug. CT, pp. 7-10 and 11-12.)

The district attorney's opposition to Montes' severance motions, filed March 27, 1996 (24 CT 6643-6678), incorporated its earlier opposition to severance motions filed by Gallegos and Varela. (24 CT 6664-6677.) In addition, the prosecution specifically objected to the court considering any declarations filed under seal. (24 CT 6644-6649.)

The issue of whether the court could consider sealed declarations in support of the severance motions took on a life of its own. On April 3, 1996, Montes filed a memorandum of law in support of the court's in camera review of the sealed materials. (24 CT 6690-6704.) The prosecution's supplemental opposition papers were filed on April 4, 1996. (24 CT 6705-6710.)

On April 5, 1996, the court heard argument on whether to accept and consider the sealed declarations by Montes' counsel in support of his severance motions. (3 PRT 746-763.) In a subsequent written ruling, the court denied Montes' request to consider any in camera offers of proof in support of the severance motions. (See Exhibit I to Appellant's Augment Motion filed in this Court on June 14, 2007, and granted on August 15, 2007.)

Following a hearing held May 10, 1996, the court denied Montes' motions for severance or for separate juries. It also again denied his request to file declarations under seal. (24 CT 6725; 4 PRT 777-812.) However, the court did allow the defense to lodge the declarations and supporting investigation reports with the court in order to permit subsequent appellate review of the issue. (See 24 CT 6724; 4 PRT 808.)

In denying Montes' request for severance from all his co-defendants, the court indicated that it did not believe that Montes' due process rights

would be unduly prejudiced or compromised as a result of a joint trial. The court also indicated that any *Aranda/Bruton* issues could be dealt with by way of redaction, or exclusion, if necessary. (4 PRT 810.)

The court further ruled that severance was not appropriate on the basis of Montes' concerns about irreconcilable differences with his co-defendants or on the ground that Montes was the only one facing the death penalty. Finally, the court denied the request for separate juries. (4 PRT 811.)

With regard to Montes' separate motion seeking severance from Hawkins, the court stated its belief that Montes could receive a fair trial at a joint trial. (4 PRT 811.)

On August 21, 1996, Montes moved to join all severance-related issues and asked the court for a renewed ruling to permit writ review. (25 CT 6983-6985.) The court agreed to permit Montes to renew his severance issues, and on August 23, 1996, again denied all the motions. (25 CT 6995; Augmented RT of Pretrial Proceedings held August 23, 1996, at p. 34.)

On August 30, 1996, after the court's denial of his renewed severance-related motions, Montes petitioned the court of appeal for a writ

of mandate (case No. E018956). On September 3, 1996, the court of appeal summarily denied the petition.[51]

Severance motions were also filed by Montes' co-defendants. Varela's severance motion was filed on February 15, 1995. (3d Aug. CT, pp. 36-42.) In a motion filed February 25, 1995, Gallegos sought severance from Montes. (22 CT 6194-6205.) Opposition papers were filed by the district attorney. (22 CT 6214-6228.) The court denied both Gallegos and Varela's motions on March 19, 1995. (3d Aug. CT, pp. 46, 50.) It again denied them when it ruled on Montes' severance motions on May 10, 1996. (4 PRT 811.) However, on August 23, 1996, the court did order a separate jury empaneled to hear evidence in the Varela case as a means of addressing *Aranda/Bruton* issues arising from introduction of Varela's statement to the police. (3d Aug. CT, p. 161; Aug. RT of proceedings held August 23, 1996, at p. 44.)

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[51] Montes repeatedly requested that the record on appeal include the writ petitions and the rulings, copies of which should have been, but were not, located in the superior court file. Montes therefore requests that this Court take judicial notice of the court of appeal files in E018956.

C. SEALED DECLARATIONS AND REPORTS SUBMITTED BY MONTES IN SUPPORT OF SEVERANCE

1. Contents of the Declarations Proffered to the Court

Although the court refused to consider any declarations filed under seal, for purposes of appellate review it did agree to have the sealed declarations and the investigation reports placed into the record.

The first declaration, submitted in support of the general motion to sever from all co-defendants, revealed defense investigation and strategy. The declaration specifically noted evidence indicating that both Hawkins and Gallegos knew Walker, and thus had motives for killing him to prevent their identification. The declaration also stated counsel's belief that the other defendants would seek to show that Montes was the actual killer. As a result, there were irreconcilable differences between the defenses in the case. (See Exhibit K to Appellant's Augment Motion filed in this Court on June 14, 2007, and granted on August 15, 2007.)[52]

Montes also proffered two declarations and a supporting investigation report in support of his separate request to sever his trial from Travis Hawkins. The first of these declarations detailed the family

[52] By order of this Court, this exhibit was filed under seal pending a motion by appellant to unseal. Concurrent with the filing of his opening brief, appellant is filing a motion to unseal both Exhibits K and R.

dynamics which hindered Montes' counsel's ability to conduct a penalty phase investigation and obtain cooperation of potential penalty phase witnesses from Montes' father's side of the family (the Dominguez/ Hawkins family). Counsel also expressed concern that Montes was not communicating candidly with them about Hawkins' role in the case because of concern for his family's reaction (1st Aug. CT, p. 9.) In sum, counsel for Montes explained that joinder with Travis Hawkins was damaging their ability to effectively investigate the circumstances of the crime, and also to investigate and prepare a penalty phase defense for Montes. (1st Aug. CT, p. 10.)

The second declaration (a supplement to the other one) stated that investigator Crompton had spoken with Arty Granados, whose family had had an ongoing, well-known feud with the Dominguez family. Granados was a close friend of Eddie Montes (defendant's cousin). According to Granados, defendant Montes was getting a lot of pressure from the Dominguez-Hawkins family to take the blame for the offense so that Travis Hawkins could get off. Also, the joinder with Hawkins was putting a great deal of pressure on the relationship of Joseph Montes senior with other members of his family, including his own mother. In fact, Montes' paternal grandmother, Emily Dominguez, blamed Montes for her grandson Travis Hawkins' predicament. (1st Aug. CT, p. 12.)

In addition to these declarations, counsel for Montes submitted the investigation report by Thomas Crompton which formed the factual basis for their declarations. (Exhibit R to Appellant's Augment Request, filed June 14, 2007.)[53]

2. The Trial Court's Refusal To Consider the Information Submitted Under Seal

Consideration of the sealed declarations and supporting reports was necessary to protect Montes' Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320-1321.) Moreover, the trial court's refusal to consider this information prevented Montes from adequately presenting his grounds for severance, and thereby denied him due process of law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [liberty interests protected by the Due Process Clause arise from two sources, the Due Process clause itself and the laws of the states]; and *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522, cert. den. 127 L.Ed.2d 685, (1994).)

Appellant has not found any decisions which directly address the issue of whether or not a factual basis in support of a motion for severance may be made by way of a sealed declaration or in camera offer of proof.

[53] See footnote 52, *ante*, re: unsealing of exhibit.

However, appellant notes that many trial courts have apparently utilized this procedure. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 167; *People v. Odle* (1988) 45 Cal.3d 386, 403; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 344.) Perhaps the willingness of other trial courts to consider in camera offers of proof is the reason this issue has not presented itself at the appellate level. In any case, it is clear that many courts view this approach as a reasonable means of allowing a defendant to present the necessary factual showing for a severance motion, while at the same time preventing the revelation of defense work product and strategies.

The use of in camera offers of proof has been approved of in other contexts, such as pretrial discovery. For example, in *Alford v. Superior Court* (2003) 29 Cal.4th 1033, this Court stated that the prosecution need not be served with any affidavits or other information in support of a *Pitchess* motion. The *Alford* opinion also stated that, in the context of a subpoena duces tecum, "the defense is not required, on pain of revealing its possible strategies and work product, to provide the prosecution with notice of its theories of relevancy of the materials sought, but instead may make an offer of proof at an in camera hearing." (*Id.* at p. 1045.)

Sealed declarations may also be submitted in support of a search warrant affidavit to prevent disclosure to the defense of information which

may reveal the identity of a confidential informant. (*People v. Hobbs* (1994) 7 Cal.4th 948, 963.)

In the context of discovery proceedings, the court of appeal in *People v. Superior Court (Barrett), supra*, 80 Cal.App.4th at p. 1320, commented: "[I]t would be inappropriate to give [defendant] the Hobson's choice of going forth with his discovery efforts and revealing possible defense strategies and work product to the prosecution, or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary." Certainly the same must be true in the context of a pre-trial severance motion.

In *People v. Cook* (2006) 39 Cal.4th 566, 583-584, the Court declined to address a similar contention because there was no mention of a defense request for such a hearing. "Absent some evidence the defense requested an in-chambers hearing and articulated the harm defendant might suffer from a hearing at which the prosecution was present, we cannot say that the trial court erred when it did not exclude the prosecution from the hearing on defendant's severance motion." (*Id.* at p. 584.)

Here, the defense made specific requests and tendered both declarations and investigation reports detaining the information they did not wish to have revealed to the prosecution. Not only did the court refuse to consider the declarations in its ruling denying the severance motions, the

court refused to even *read* them to determine if the information contained therein was something which needed to be kept confidential.

In other contexts, this Court has recognized the need for a court to balance an accused's interests in protecting privileged information against an opposing counsel's right to challenge the motion. As this Court explained in the context of a *Pitchess* motion: "In ruling on a request to file under seal, a trial court must carefully weigh these competing concerns." (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72.)

City of Alhambra v. Superior Court (1988) 205 Cal.App.3d 1118 (hereinafter *Alhambra*) sets forth a procedure for balancing the rights of a criminal defendant against the needs of the prosecution for notice and an opportunity to contest a defense motion. The procedure outlined in *Alhambra* would have been appropriate in Montes' case.

The defendant in *Alhambra* filed a formal discovery motion for third party suspect police reports along with a sealed affidavit, and requested an in camera inspection of the affidavit to establish good cause. The prosecution complained that the sealed affidavit forced them to speculate about the discovery's purpose, and resulted in an unfair hearing. (*Alhambra*, *supra*, 205 Cal.App.3d at p. 1130.)

The Court of Appeal upheld the in camera proceeding. According to the court, "[t]o preserve a defendant's claim of confidentiality at the time of

any discovery motion, declarations and other supporting evidence may be submitted to the trial court for in camera examination so that the court may decide if the claim of confidentiality is justified and, if so, to what extent." (*Alhambra, supra*, 205 Cal.App.3d at p. 1130.) In this regard, the *Alhambra* court noted that a defendant's constitutional right against self-incrimination prohibits the compelled discovery of any defense information which might conceivably lighten the prosecution's burden in proving their case-in-chief. (*Id.* at p. 1130, fn. 13.)

During this in camera review, the trial court's initial inquiry should go to ascertaining how much, if any, of the submitted material must remain confidential. (*Alhambra, supra*, 205 Cal.App.3d at p. 1131.)

> The trial court should then make a clear finding, on the record, that it has received and considered such papers and that it finds or does not find that the in camera procedure is both necessary and justified by the need to protect a constitutional or statutory privilege or immunity.
>
> The court's decision should be based upon an evaluation of all the facts in light of the need to answer two critical questions: Will disclosure to the prosecutor "conceivably" lighten the People's burden or will it serve as a "link in a chain of evidence tending to establish guilt?" Is the information which the defendant seeks to protect subject to some constitutional or statutory privilege or immunity? *If the answer to either question is yes then disclosure should not be made.*

(*Alhambra, supra*, 205 Cal.App.3d at p. 1131, emphasis added.)

Following this preliminary in camera inspection, a court can determine what portions, if any, of a defendant's moving papers can be disclosed and which must remain under seal. The trial court should then proceed to the merits of the defendant's motion. (*Alhambra*, *supra*, 205 Cal.App.3d at p. 1132.)

In Montes' case, the trial court's refusal to even read the submitted declarations means that it did not engage in any sort of weighing process whatsoever. Appellant contends that the court lacked discretion to refuse to read the declarations so that it could engage in the necessary weighing process to decide whether the information could be considered in support of the severance motion even without disclosure to the prosecution. This was strictly an error of law, and as such, the proper standard is review de novo. "Issues of law are reviewed de novo." (*Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 849.)

However, even assuming that the court's actions are reviewed for abuse of discretion, error must be found. "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 358, pp. 406-407, citing

Bailey v. Taaffee (1866) 29 Cal. 422, 424; *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

The trial court's refusal to even read, let alone to consider, the declarations and reports submitted in support of Montes' motions for severance was undoubtedly an abuse of discretion, particularly given that this was a capital case and there was a heightened need to afford the defense full procedural protection.

As to the prejudice to Montes from this error, Montes contends herein that because the trial court refused to consider the declarations, the court's decision denying his severance motion cannot be reviewed for abuse of discretion, as no informed discretion was ever exercised. (See subsection F of this argument, *post*.)

D. GROUNDS FOR GRANTING SEVERANCE

Penal Code section 1098 provides in pertinent part: "[w]hen two or more defendants are jointly charged with any public offense, . . . they must be tried jointly unless the court orders separate trials." Section 1098 expresses a legislative preference for joint trials. (*People v. Boyde* (1988) 46 Cal.3d 212, 231.)

The preference for joinder is not a mandate, however, for section 1098 contemplates separate trials when a court so orders. (*People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Turner* (1984) 37 Cal.3d 302, 312.)

In fact, the practical considerations underlying section 1098 — the desire to conserve state funds, the inconvenience to witnesses and public authorities, and avoidance in delay in punishing the guilty — "must be subordinated when they run counter to the need to ensure fair trials and to protect fundamental constitutional rights." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 554-555; *People v. Aranda, supra*, 63 Cal.2d at p. 530.)

The process of determining the prejudicial impact of joint trials and balancing other considerations is a "highly individualized exercise." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 452.) But while each case must turn on its own facts, certain criteria have been used by the courts to evaluate the need for separate trials pursuant to section 1098. Accordingly, a court *should* separate the trial of codefendants in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1230; *People v. Massie* (1976) 66 Cal.2d 899, 917; see also *People v. Pinholster, supra*, 1 Cal.4th at p. 932.) Existence of any one of these factors should be enough to tip the balance of the court's discretion in favor of granting severance.

Severance should be also granted where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539.)

Social science research establishes the prejudicial problems arising from joint trials. (See Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence* (1994) 21 CACJ Forum 52.) Moreover, "[j]oinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor . . . joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary." (*Zaifro, supra*, 506 U.S. at pp. 543-544, Stevens, J. concurring.)

Finally, no case has held that the factors enumerated in *Massie* are the exclusive grounds for granting severance. (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938.) In fact, in *Zafiro v. United States, supra*, 506 U.S. 534, 539, the United States Supreme Court, examining a severance motion made pursuant to Federal Rules of Criminal Procedure, rule 14, opined that severance should be granted where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro* specifically acknowledged that a defendant might suffer

prejudice from joinder "if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." (*Id.*, 506 U.S. at p. 539.)

Here, the basis for Montes' request for a separate trial from his cousin Hawkins was that his defense team was being hampered in its ability to investigate and present a penalty phase defense because of the reluctance of Montes to share with his counsel facts about the offense which might be damaging to Hawkins, and because of the reluctance of family members on Montes' father's side to even speak with members of Montes' defense team — let alone do anything to help with Montes' defense. The separate motion seeking severance from Hawkins thus presented a further compelling ground for a separate trial.

E. REVIEW OF SEVERANCE-RELATED CLAIMS OF ERROR

There are two levels of review when a defendant alleges prejudicial error in the denial of a motion to sever. (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 343.) The first level of review determines whether the trial court abused its discretion in denying the motion. (*Ibid*; *People v. Ochoa* (1998) 19 Cal.4th 353, 409 [On appeal, propriety of ruling on motion to sever is judged by information available when motion is heard.].) Review of a trial court's denial of severance for abuse of discretion is thus

determined on the facts as they appeared at the time the court ruled on the motion. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 167.)

If there was no abuse of discretion, the next level of review determines whether the failure to sever resulted in gross unfairness which denied the defendant a fair trial or due process. (*United States v. Lane* (1987) 474 U.S. 438, 446, fn. 8 [improper joinder rises to the level of a constitutional violation when it results in prejudice which denies a defendant a fair trial]; *People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 343; *People v. Turner*, *supra*, 37 Cal.3d at p. 313 ["After trial, of course, the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law"]; *People v. Bean* (1988) 46 Cal.3d 919, 940 [court examines "evidence actually introduced at trial" to determine whether constitutional violation has occurred].)

Thus, the first level of review focuses on what was presented to the trial court at the time it made its decision. The second level of review focuses on what actually happened in the joint trial. (*Greenberger*, *supra*, 58 Cal.App.4th at p. 343.)

Severance motions in capital cases should receive heightened scrutiny for potential prejudice. (*People v. Smallwood* (1986) 42 Cal.3d 415, 430-431; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.) It is

therefore especially important that this Court examine the record for unfairness from the joint trial in this case.

F. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MONTES' SEVERANCE MOTIONS

In the instant case, the trial court's denial of severance was necessarily an abuse of discretion because the trial court refused to consider Montes' offers of proof in support of the motions.

> 'Where fundamental rights are affected by the exercise of discretion by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.' (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; *People v. Davis* (1984) 161 Cal.App.3d 796, 802-803.) To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. (*People v. Davis, supra*, 161 Cal.App.3d at p. 804.) A court which is unaware of the scope of its discretionary powers can no more exercise informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348.)

(*People v. Lara* (2001) 86 Cal.App.4th 139, 165-166.)

Much of the case-specific information justifying severance was contained in the sealed declarations and investigation reports which, as discussed above, the court incorrectly refused to consider. Because the trial court intentionally avoided this information when making its ruling on the

severance motions, it cannot be said to have truly exercised any discretion that this Court can review.

Further, even if this court should review for abuse of discretion, it is apparent that the trial court abused its discretion when it denied appellant's severance motion. Although lacking in factual specificity (because of the court's refusal to consider *ex parte* offers of proof) Montes motions still apprised the court of the basic grounds for severance, including concerns about conflicts with his co-defendants and the impact on his ability to investigate and present a penalty phase defense.

Under these circumstances, particularly because of the fact that Montes alone was facing a penalty of death, the trial court's refusal to grant Montes a separate trial was an abuse of discretion.

G. THE JOINT TRIAL DENIED MONTES HIS RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL AND PENALTY DETERMINATION

Viewed from the perspective of what actually occurred at trial, it is very clear that the effect of the joint trial was to deny Montes his rights to due process; a fair trial; effective assistance of counsel; and a reliable penalty determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the California Constitution (Cal. Const., art. I, §§ 1, 7, 15, 16 and 17.) (*Beck v. Alabama*, *supra*, 447 U.S. 625; *O.G. v.*

Florida, *supra*, 430 U.S. 349; *Woodson v. North Carolina*, *supra*, 428 U.S. 280.)

1. Motion To Sever From Co-Defendants Generally

Montes' concerns about efforts by the co-defendants to taint him as the one responsible for Walker's death were borne out during the joint guilt trial. As explained at the outset of this brief, there were strong family and friendship connections among the other defendants, particularly Varela and Gallegos. As a result, there were numerous and blatant efforts by many witnesses to shield their family and friends from blame by making Montes out as the one most culpable.

The efforts to tarnish Montes were especially noticeable in certain areas. For example, testimony by people at the Varela house made it appear as though Montes was the one desperate for a ride to the party. In fact, Marci, Sylvia, and George all claimed that during Saturday afternoon Montes repeatedly called and paged people at the apartment seeking a ride to the party for himself and Gallegos. (17 RT 2887, 2943; 22 RT 3866, 3870; 25 RT 4411-4417; 26 RT 4646, 4822.) But phone records showed no calls from Montes' residence to the Varela apartment any time in August. (32 RT 5873.) Nor did they show a single collect call from Banning or Beaumont to the apartment on August 27th. (18 RT 3037.) There were, however, five calls from the Varela residence to Gallegos' home number

(845-9587)[54] the afternoon of August 27th, some in apparent response to pages received from Gallegos. (17 RT 2912-2913; 18 RT 2952; 25 RT 4520-4521; 32 RT 5876.)

Another area where witnesses strove at trial to make Montes appear more culpable included the various accounts of Montes paying for pizza at party — the implication being that the money used had come from Walker. For example, Marci Blancarte testified for the first time at trial that she saw Montes pay for the pizza with two $20 bills which he pulled from a black wallet. (22 RT 3892, 3911-3912.) She had never mentioned this in multiple pretrial interviews or in her preliminary hearing testimony. (23 RT 3945-3946.) No one else at the party saw Montes with a black wallet. (25 RT 4504-4505.)

Several other members of the Varela-Gallegos contingent testified about Montes buying pizza. At trial, George testified that he gave Montes change for a $100 bill to buy the pizza[55]. (25 RT 4503-4504.) However, at the preliminary hearing, George said that Montes had maybe 50 bucks. (26 RT 4654.) George also testified that Montes had "a big wad" of money that

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[54] In his testimony, George said that he believed the 845-9587 number belonged to Montes. (25 RT 4520.) In fact, as noted, it was Gallegos' number.

[55] It was never explained why someone would need change to pay cash for a pizza.

night when he asked for change. (26 RT 4654.) During his trial testimony George denied telling Shedlock that Montes had no money and asked him to borrow some. (26 RT 4645.)

Importantly, George told Detective Anderson that Gallegos obtained possession of Walker's wallet. He also said Gallegos told him there was around $100 in the wallet, and that it was *Gallegos* who bought pizza with the money. (33 RT 5973.)[56]

It was also clear that there was a concerted effort to minimize Gallego's participation. For example, Sylvia Varela, Chris Eismann, and George Varela all testified that Gallegos left in the van with Sal. (17 RT 2872; 22 RT 3687; 25 RT 4438.) Arthur Arroyo changed his testimony from what he gave at the preliminary hearing, and at trial claimed that Gallegos had gone in the van with Sal. (16 RT 2709-2710; 17 RT 2872; (17 RT 2761; 17 RT 2841.)

That these witnesses were intentionally lying to protect Gallegos was confirmed by Kim Speck, who testified that she had been specifically instructed to say that Gallegos went in the van with Salvador, when in fact this was not true. (21 RT 3435-3426, 3466.)

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[56] This testimony was only presented to the separate Varela jury.

In addition, Montes' concern that counsel for his co-defendants would act as second prosecutors in the case against him was fully realized. For example, counsel for Sal Varela elicited testimony that George Varela had come to believe that Montes was the one who shot Walker. (26 RT 4737. See Argument VI, *post.*) Perhaps the most extreme example was in the closing argument of Hawkins' attorney, Mr. Angeloff. The predominant theme of Angeloff's closing argument was placing all blame for Walker's murder on Montes.[57] (See 37 RT 6651-6676; 38 RT 6680-6707.)

In addition, because of the joint trial, Montes was precluded from introducing evidence that Gallegos knew Walker and had played football with him for several years before the crime.[58] (33 RT 6062-6066. See Argument XVII, *post.*)

Clearly, the joint trial not only introduced additional prosecutors into the case in the form of counsel for his co-defendants, but also impaired Montes' ability to present relevant exculpatory evidence on his own behalf.

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[57] The tenor of this argument was such that counsel for Montes moved for a mistrial, or alternatively requested 10 minutes for rebuttal. Both requests were denied. (38 RT 6678.)

[58] This evidence was offered pursuant to Evidence Code section 1220, as evidence of a possible motive for Gallegos being the actual killer. It was excluded by the court on Evidence Code section 352 grounds after Gallegos objected to introduction of the evidence.

Additionally, most of the witness in the case had much closer ties to Montes' co-defendants, especially Gallegos and Varela. Because of the joint trial, many of these witnesses bent over backwards, at times going so far as to present obviously perjured testimony, in an effort to save Gallegos and Varela by painting Montes as the one responsible for Walker's death.

The joint trial therefore deprived Montes of his rights to due process of law and a fair trial.

2. Motion To Sever From Hawkins

For other reasons, the joint trial with Hawkins impaired Montes' ability to investigate and present a penalty phase defense. Here, it is the notable *absence* of evidence which reveals the harm to Montes' penalty defense from the joint trial with Travis Hawkins.

No one from Montes' father's side of the family testified as a witness on Montes' behalf at either the guilt or the penalty phase. As detailed in the sealed materials proffered to the court, the Montes defense team had encountered significant resistance in obtaining information from this side of the family because of their closer ties to Travis Hawkins. Montes' grandmother on his father's side even paid for private counsel for Hawkins, while refusing to cooperate in investigating a penalty defense for Montes. (Exhibit R to Montes' Motion to Augment the Record filed in this Court on June 14, 2007, and granted on August 15, 2007.)

An entire half of Montes' family was alienated from participating in Montes' trial for his life because of the joinder with Hawkins, to whom most of them had much closer ties. Under these circumstances, the joint trial with Hawkins transgressed not only Montes' rights to due process and a fair trial, but also trammeled his rights to the assistance of counsel and a reliable penalty determination.

H. IT IS REASONABLY POSSIBLE THAT THE PENALTY DETERMINATION IN MONTES' CASE WAS ADVERSELY AFFECTED BY THE JOINT TRIAL

1. Standard of Prejudice For Error Affecting The Penalty Determination

Montes' concern is with the negative impact the joint trial had on the penalty determination in his case. Accordingly, it is immaterial whether the complained-of error is viewed as one of federal constitutional magnitude, or of state law alone. In either case the error is reversible unless it can be found harmless beyond a reasonable doubt.

The test for state law error at the penalty phase is whether there is a reasonable possibility the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Transgression of federal constitutional rights is evaluated in accordance with the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, *supra*, 386 U.S. 18. As this Court has repeatedly recognized, these two standards are the same in

substance and effect. (See, e.g., *People v. Gonzalez* (2006) 38 Cal.4th 932, 961; *People v. Jones* (2003) 29 Cal.4th 1229, 1264 and fn. 11 [state "reasonable possibility" standard utilized for review of errors at penalty phase is the same as federal "harmless beyond a reasonable doubt" standard of *Chapman v. California, supra,* 386 U.S. at p. 24]; *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

As discussed *infra*, in the circumstances of the instant case it is reasonably possible that had Montes been tried separately the result of the penalty determination would have been different. Because the error cannot be found harmless beyond a reasonable doubt, reversal of Montes' death sentence is required.

2. <u>It Is Reasonably Possible That The Error In Denying Montes A Separate Trial Influenced The Penalty Verdict</u>

The following discussion is concerned with the effect of the error in denying Montes' request for a trial separate from all his co-defendants. But it is also germane for evaluating the effect of other errors raised throughout this brief. This section is therefore referred to wherever the issue of prejudice is addressed.

A verdict of death for Montes was by no means a foregone conclusion. This Court has previously recognized how hard it can be to

conclude that there is no reasonable possibility that a substantial error could not have affected the outcome of a capital trial:

> [T]he jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.

(*People v. Hines* (1964) 61 Cal.2d 164, 169, overruled on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40.)

In Montes' case, any significant error which may have influenced the penalty determination cannot be found harmless beyond a reasonable doubt.

To begin with, the prosecution never proved which one of the defendants personally killed Mark Walker. In the guilt phase where this determination would otherwise have been made, the prosecutor specifically argued that it was unknown who actually shot Mark Walker, and expressly told the jury they were not being asked to resolve that question. (E.g., 36 RT 6519-6520; 37 RT 6557.)

At the penalty phase, the prosecution took the position that it was Montes who shot Walker. But this theory was never put to the test since the prosecution specifically elected not to seek a jury finding on that point at the guilt phase. As a result, the jury's guilt verdict necessarily established

only that Montes was an aider and abettor to the carjacking of Walker, who acted with reckless disregard for human life. This puts Montes at the very lowest threshold for which a death sentence may constitutionally be imposed. (*Tison v. Arizona* (1987) 481 U.S. 137, 157.)

In fact, there is a significant "lingering doubt" as to which of the defendants shot Mark Walker. There was some evidence, in the form of "oral admissions" attributed to Montes, that Montes was the person who shot Walker. In general, evidence of oral admissions must be viewed with caution. (CALCRIM 358; CALJIC Nos. 2.70, 2.71.) Here, the evidence was especially suspect as it all came from people closely associated with Sal Varela and Ashley Gallegos. It is also noteworthy that no mention was made about these admissions in people's initial statements to police. It was only after George Varela and Kim Speck met with Sal in the jail (and no doubt learned that Montes was responsible for Sal's arrest) that accounts about Montes' "admissions" began to surface.

For example, Kim Speck first mentioned hearing the "earning a stripe" comment during an interview on August 30, 1994, with Anderson and Mitchell. (34 RT 6210.) This interview was right after her unrecorded conversation with Sal and George at the jail. (34 RT 6211.)

Marci Blancarte did not mention anything about overhearing Montes' phone calls or his alleged statements to the police when she first spoke with them. (23 RT 4002; 24 RT 4298.)

The first time George said anything about Montes' "admission" regarding the crime was in his recorded Shedlock interview. (See 2d Aug. CT, pp. 71-89; 25 RT 4488.) George was interviewed twice by police before he gave his interview to Shedlock. In neither of those interviews did he mention anything about the "four vatos" comment. (25 RT 4628.) George was also interviewed by Detective Clark and Mr. Mitchell after he spoke with Shedlock. George did not say anything to them about the "four vatos" comment either. (25 RT 4629-4630.) At trial George admitted that he had lied to Shedlock about some things because he was angry about what happened. (25 RT 4494.)

In addition, the witnesses' accounts about the supposed "admissions" were inconsistent. For example, George Varela's several versions variously placed Montes in the Varela home (People's Exhibit 77B – 2d Aug. CT, p. 75); in the car on the way to the Montes' residence (25 RT 4465-4467; 2d Aug. CT, p. 75); and inside the Montes residence (26 RT 4693) at the time Montes supposedly made incriminating statements about the killing.

George also testified that Montes showed him the cut out news article in the car, and used the derringer in demonstrating how he had fired

the shots. But police arrived at the Montes' residence within minutes after Montes returned there, and found neither the article nor the gun. (24 RT 4262, 4269-4272; 25 RT 4468; 26 RT 4656; 30 RT 5497.)

A review of the testimony thus makes it clear that several of the key witnesses made every effort to paint Montes as the person most responsible to protect other defendants, even to the point of altering statements and testimony. (See also discussion of testimony in subsection G.1, *ante*.) In addition, because Montes was responsible for leading authorities to Sal Varela, revenge was a likely motivating factor in the Varela family's skewed testimony.

Not only did witnesses skew their testimony to hurt Montes, a number of witnesses also lied to protect Gallegos, claiming that he went in the van with Sal, when in fact he left the party in the Buick. (21 RT 3435-3426, 3466.) An obvious reason to lie about Gallegos' activities would be to cover for him, particularly if he were the one who had committed the murder. And there was significant evidence that it was in fact Gallegos who shot Walker. Even the prosecutor, during his guilt phase argument, acknowledged that Gallegos may have been the shooter. (36 RT 6519.)

Gallegos was known to be in possession of the 9 millimeter gun with which Walker was shot. (29 RT 5203-5205.) Montes was known to be in possession of a different gun, a .22 derringer. (16 RT 2706-2727; 17 RT

2882-2883; 21 RT 3458, 3513, 3517; 22 RT 3898, 3931; 23 RT 4070-4071; 26 RT 4792.) No explanation was offered for why Montes would use Gallegos' gun to shoot Walker, when he had his own weapon ready and available. In addition, Gallegos made self-incriminatory statements to Rufugio Garcia when he told him that "he [Gallegos] used the gun" (32 RT 5915) and that "I threw it [the gun] away." (29 RT 5245-5246.)

Although witness accounts varied (because some witnesses lied about Gallegos going in the van, and because of Mr. Angeloff's interference with other witnesses) reliable accounts placed *four* people — including Gallegos — in the Buick when it left the party. (22 RT 3824-3825 [testimony of Richard Brown]; 2d Aug. CT, pp. 96-97 [initial statement of Kevin Fleming].) Out on Palisades Road where Walker was shot, Alex Silver and the Esquedas saw *three* males behind the open trunk to the Buick when they looked over the fence after hearing the shots fired. (14 RT 2354-2356, 2245-2248; 15 RT 2439.)

Ms. Esqueda saw these three males run around the van to the passenger side. (14 RT 2354-2356.) Right after the males ran around the back of the van, "everything went black." (15 RT 2413.) The headlights from the Buick and the ones shining on the back of the van[59] went off van,

[59] It should be recalled that the witnesses testified that light shining on the back of the van made it appear that a third, unseen, vehicle was behind it. (14 RT 2263, 2355, 2371; 15 RT 2397, 2427, 2436; 16 RT 2605.)

and Ms. Esqueda saw no further movement. (14 RT 2357-2358, 2363, 2369; 15 RT 2385, 2395.) From that point on, the only other light was a dome light in the Buick.[60] (15 RT 2413-2414.)

Montes was seen by a number of witnesses driving the Walkers' car when it left the party. (16 RT 2709; 17 RT 2778, 2872.) Ms. Esqueda was clear that the Buick's headlights went out as the three people behind the Buick were running to the van. As explained during the defense closing penalty phase argument, this indicates that the driver (Montes) remained in the driver's side of the Buick when Walker was shot, and turned the car lights off immediately afterwards. (See 44 RT 7964-7969.)

A significant doubt thus remains about who shot Mark Walker. Where, as here, the state does not prove that the defendant sentenced to death is the one who did the shooting, error affecting the penalty determination is particularly likely to warrant reversal of a death sentence. (See *Shurn v. Delo* (8th Cir. 1999) 177 F.3d 663, 667; see also *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [whether or not defendant was the actual shooter is important to a determination of penalty].)

In addition, the aggravating evidence relating to Montes was not overwhelming. It consisted of one prior burglary conviction, and evidence

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[60] Probably because the trunk remained open.

that Montes assaulted Gallegos while they were together in a holding cell. (41 RT 7270-7283.) Also, on two occasions, jail personnel had discovered Montes in possession of homemade weapons.[61] (41 RT 7301-7306, 7312-7319.) In its rebuttal case, the prosecution presented evidence that in 1994, Montes had been found in possession of an altered Phillips screwdriver, but was not arrested. (44 RT 7777-7778, 7781.)

This evidence in aggravation, "although serious, was not overwhelming." Montes had no prior convictions for crimes of violence. He had never used his "shanks" to assault another person in the jail. The evidence in aggravation was comparable to that introduced in *People v. Gonzalez, supra*, 38 Cal.4th at p. 962, in which this Court concluded that although the crime (a gang motivated murder of two people where defendant was the actual shooter) was egregious, a death verdict was not a foregone conclusion. "The aggravating evidence of defendant's other crimes (possession of an assault weapon, two assaults on inmates, and possession of a shank in jail), although serious, was not overwhelming."

Moreover, at 20 years of age, Montes was quite young at the time of the crime. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [noting the

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[61] To explain his possession of weapons in the jail, Montes presented evidence that he had been the victim of a stabbing while awaiting trial. (42 RT 7449-7458.)

young age of the defendant in that case, who was at least 20 years old, as a factor to be considered in concluding that a death sentence in that case was not a "foregone conclusion"].)

Not only was Montes chronologically young, he also presented evidence that he was borderline mentally retarded, with an I.Q. of 77. (43 RT 7635-7639.) The lesser culpability of persons with limited mental faculties is now well accepted. (*Atkins v. Virginia* (2002) 536 U.S. 304, 319.)

The length of deliberations at the penalty phase provides an objective demonstration of the close nature of the penalty decision is this case. This Court has held that jury deliberations of almost six hours are an indication that the issue of guilt is not "open and shut." (See *People v. Woodard* (1979) 23 Cal.3d 329, 341.) And in *People v. Cardenas* (1982) 31 Cal.3d 897, 907, this Court found that deliberations lasting 12 hours were a "graphic demonstration" of the closeness of the case. Here, the penalty deliberations lasted closer to twelve than six hours, as they lasted all of one day, and part of another.[62] Moreover, in his post-trial interview, Alternate

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[62] The penalty decision was submitted to the jury on December 11, 1996, at approximately 4:00 p.m. (28 CT 7553.) The jury deliberated the following day, from 9:30 a.m. until 4:00 p.m. (28 CT 7554.) Deliberations resumed on December 16th, and the penalty verdict was read in court that day at 1:40 p.m. (28 CT 7624.)

Juror No. 3 said that the jury was pretty split for awhile on the penalty decision. He thought the first vote was 50/50. (28 CT 7652.)

In Montes' case, the scales balancing life and death were not clearly weighted towards death. This was a single crime with a single victim. The identity of the actual killer was never established. Certainly, as to his personal characteristics, Montes cannot be described as "the worst of the worst." In fact, there were a number of significant mitigating factors supporting a verdict of life. In this situation, it is reasonably possible that any error may have tipped the balance in the minds of the jurors.

The effect of the joint trial on the testimony and proceedings (discussed in subsection G.1, *ante*) makes it reasonably possible that had severance been granted, the outcome of the penalty determination would have been different.

3. <u>It Is Reasonably Possible That Had Montes Been Tried Separately From Hawkins The Penalty Phase Verdict Would Have Been Different</u>

It is also reasonably possible that, had Montes been able to secure cooperation from members of his family on his father's side, he would have been able to present more evidence on his own behalf.

The prejudice to Montes from the lack of such evidence was heightened by the argument of the prosecutor. The prosecutor highlighted the absence of the father's testimony in his closing arguments in both the

guilt and penalty phases. Specifically the prosecutor made several references to Montes' failure to call his father as a logical witness to rebut George Varela's testimony. In the guilt phase, he argued:

> [MR MITCHELL]: George Varela told you that a statement was made at that house by Joseph Montes in front of his father. He shook his head in disgust. He did it because he didn't want four guys going down for one white guy. How easily it would be to refute that. How easily it could have been done by an available witness.

(38 RT 6790.)

> Failure to call a logical available witness whom a defendant could be expected to call if that witness's testimony would be favorable leads to one conclusion, the testimony would not be favorable, the testimony would be adverse, or else they would have called those people and asked them those questions. And you can consider that.

(38 RT 6791.)

In the penalty phase the prosecutor again drew the jury's attention to the lack of any testimony by Montes' father, and specifically urged this as a basis for rejecting the defense lingering doubt argument.

> [MR MITCHELL]: Now, they didn't call Joseph Montes, Sr. in the guilt phase. I commented on that in my argument. I told you that you were allowed to consider their failure to call a logical witness in your determination of whether you should believe George Varela's testimony regarding the defendant's statements. And these statements are damning, condemning evidence if you believe they were made, ladies and gentlemen.
>
> The evidence supports the fact that the defendant made those statements. It really has been unrebutted. If they could

> rebut George's testimony with his father, they could and would have called him and they didn't. You can infer from that failure to call that logical witness that has not been shown to be unavailable that his testimony would have been adverse to the defendant's position.
>
> Now, the argument can be made that during the guilt phase George Varela's testimony was significantly impeached and that they were relying on the state of the evidence and the failure of the People to prove that George Varela was telling you the truth.
>
> It wasn't necessary to rebut it by calling his father in who was present during the conversation, and as I argued before why would George Varela set him up to be contradicted or impeached by someone who is kin to the defendant by saying that the father was there. . . .
>
> [T]here may have been a valid tactical reason not to call the father to rebut that statement in the guilt phase based upon the impeachment evidence of George Varela. There can be done in this phase, though. No valid reason not to call him in this phase and then get up and argue lingering doubt to you. . . .
>
> [A]nd they can't even produce the one witness who could so easily, if it weren't true, rebut that damning, condemning evidence to you. It can't be done. That is why. There is no lingering doubt.

(45 RT 7906-7907.)

Obviously, any testimony by Montes' father rebutting George Varela's story would have undermined the suggestion that Montes was the one who shot Walker, and been helpful to the penalty determination.

It seems more than a mere coincidence that Montes sought severance from Hawkins due to lack of cooperation from family members on his

father's side — and then not one witness from that side of the family testified as a witness for Montes. In fact, as revealed in the second sealed declaration of defense investigator Crompton (1st Aug. CT, p. 12), divided loyalties on the Hawkins/Montes side of the family placed a tremendous strain on the relationship between Montes' father and other members of his family, especially his own mother, Emily Dominguez.

Without the pressure of a joint trial it might have been possible to secure more cooperation from that side of the family, including Montes' father. It is therefore reasonably possible that, had Montes been tried separately from Travis Hawkins, the penalty verdict would have been different.

VI.

MONTES' RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WAS TRANSGRESSED BY THE IMPROPER DESTRUCTION OF EVIDENCE.

A. INTRODUCTION

Montes filed a motion seeking some kind of sanction or ameliorative instruction because the police failed to obtain a blood sample from appellant following his arrest. The blood test would likely have shown that Montes had ingested methamphetamine within the past 72 hours, which included the time frame of the crimes. (25 CT 6856-6871; see also Montes' supplemental pleadings, 25 CT 6971-6982.)

On September 5, 1996, the court held a hearing on the motion. (3 RT 372-402.) Following the hearing the court ruled that the police had no obligation to collect this evidence, and denied the motion in its entirety. (3 RT 401-402.)

Montes' contention is that the court should have given some kind of instruction to the jury to address his concern that the failure to collect this evidence deprived him of important penalty phase mitigation evidence. The standard on review is whether substantial evidence supports the court's ruling. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1022.)

B. LAW ENFORCEMENT HAS A DUTY TO PRESERVE MATERIAL EXCULPATORY EVIDENCE

There is a duty on the part of law enforcement, pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord *People v. Beeler* (1995) 9 Cal.4th 953, 976.) An accused's right to due process of law is also guaranteed by article I, section 7 of the California Constitution.

Evidence is material, in a constitutional sense, when the evidence possesses an exculpatory value that was apparent before the evidence was destroyed, and the evidence is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*Trombetta, supra*, 467 U.S. at pp. 488-489.)

Although not as strong as the duty to preserve evidence already obtained, in some situations the police also have a duty to obtain exculpatory evidence. (See *People v. Webb* (1993) 9 Cal.4th 494, 520; *People v. Daniels* (1991) 52 Cal.3d 815, 855; *People v. Hogan* (1982) 31 Cal.3d 815, 851.) The state's bad faith failure to collect potentially exculpatory evidence, like the bad faith failure to preserve such evidence,

violates due process. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58; *Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1120-1121.)

The evidence at issue must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*People v. DePriest* (2007) 42 Cal.4th 1, 41; *Trombetta, supra*, 467 U.S. at p. 489; *Beeler, supra*, 9 Cal.4th at p. 976.) The permanent loss of evidence by the police or prosecution which is only "potentially exculpatory" will constitute a denial of due process if the accused is able to demonstrate bad faith. (*Arizona v. Youngblood, supra*, 488 U.S. at p. 57.) The intentional failure to preserve relevant evidence evinces bad faith by the police. (*United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, 647.)

C. IN THE PRESENT CASE, LAW ENFORCEMENT OFFICIALS INTENTIONALLY FAILED TO PRESERVE MATERIAL EXCULPATORY EVIDENCE CONCERNING APPELLANT'S INTOXICATION AT THE TIME OF THE OFFENSES

Appellant was arrested by Detectives Anderson and Stewart at approximately 6:00 p.m. on August 28, 1994 (less than 24 hours after the murder). (3 RT 384.) He was then transported to the Beaumont police department where he was interviewed by Detective Anderson and the prosecutor, Mr. Mitchell. (3 RT 391.)

During the interview, Montes said he had been using methamphetamine the night before, on August 27, 1994.[63] (3 RT 395.) Montes was also speaking so quickly that Anderson had to tell him to slow down, a possible sign of being under the influence of methamphetamine. (3 RT 392-393.) A blood test could have been obtained within a half hour. (3 RT 395.) Anderson knew that Montes would not have contact with an attorney for a couple of days, and that after 72 hours the drugs could be gone from his system. (3 RT 397-398.) Anderson viewed all homicides as potential death penalty cases. (3 RT 391.)

According to Detective Stewart, "[t]he only reason you take blood at the time when the murder occurred is to alleviate a defense of incapacitated ability or something like that." (3 RT 381.) Stewart testified that, in his opinion, a blood sample taken 24 hours after an offense was irrelevant, even though he acknowledged that methamphetamine is detectible more than 72 hours after ingestion. (3 RT 380-381.) He agreed that a blood test was the best way to determine if a person was under the influence of a drug. (3 RT 383.)

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[63] There was also testimony by Kim Speck that, based on her experience as a methamphetamine user, Montes appeared to her to be on methamphetamine the night of incident. (21 RT 3462.)

In a sworn declaration, appellant's trial counsel, Karla Sandrin, stated that Mr. Mitchell had told her that appellant was "flying" at the time he was interviewed by Mitchell. (25 CT 6974.) Also, that Mr. Mitchell had previously been involved in a death penalty case and was therefore aware of the significance of evidence of a defendant's intoxication at both the guilt and penalty phases. Further, in that previous case, *People v. Bridges* (CR-37250) Mr. Mitchell argued the lack of evidence of the defendant's intoxication at the penalty phase.

It is clear from the evidence presented to the trial court that the law enforcement officers involved in the investigation of the offense at the crucial time in question intentionally failed to preserve evidence which had an apparent exculpatory value regarding Montes' intent, as well as being a statutory factor in mitigation. Further, there was no way for Montes himself to obtain this evidence. And by the time he was appointed counsel (who would have been able to take steps to secure a blood test) it was too late as the drugs would have been gone from his system.

D. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO IMPOSE SOME SORT OF SANCTION, SUCH AS THE AMELIORATIVE INSTRUCTION REQUESTED BY APPELLANT.

Where a violation of *Trombetta* is found, the court must tailor sanctions to compensate the accused for the wrong done by the police or

prosecution, and for the purpose of assuring the accused a fair trial and further deterring prosecutorial efforts to defy or circumvent judicial authority. These sanctions should give the accused "the approximate equivalent of the destroyed [evidence]." (*People v. Zamora* (1980) 28 Cal.3d 88, 103.)

A sanction in the nature of an adverse finding and a tailored jury instruction are appropriate where it will adequately compensate the accused for the exact wrong done. (*Zamora*, *supra*, 28 Cal.3d at p. 103.) This type of instruction should note that the jury should draw any conflicting inferences regarding the lost evidence in favor of the defendant and that the jury should view the prosecution's evidence, as it relates to the lost or destroyed evidence, with distrust. (*Id.* at pp. 102-103.)

Here, the failure to obtain a blood sample deprived appellant of potentially mitigating penalty phase evidence. Furthermore, the prosecutor unfairly used this lack of evidence (for which he was at least partially responsible) to his own advantage.

In his supplemental points and authorities in support of the motion (25 CT 6971-6982) Montes pointed out the potential relevance at the penalty phase of evidence of impairment due to intoxication (25 CT 6973-6974). He also specifically noted his concern that the prosecutor in this

case would argue to the jury during penalty phase that there was no evidence of appellant's intoxication (factor (h)). (25 CT 6973.)

Montes' concern that the lack of this evidence would be used against him was realized during the prosecution's penalty phase argument.

> [Mr. Mitchell]: This factor impairment from intoxication, no evidence whatsoever that he was intoxicated to the point of being impaired at the time of the crime. Nothing in this factor assists you. Even though you may have heard some evidence of alcohol consumption, perhaps methamphetamine, where is the evidence of what was occurring at the time of the crime?
>
> We have no evidence whatsoever that the defendant lacked the capacity to appreciate the criminality of his conduct, lacked the capacity to conform his conduct to the requirements of law, was impaired by the result of mental disease or intoxication.

(44 RT 7894.)

In this situation, the trial court erred by refusing to give the jury an ameliorative instruction at penalty phase relating to intoxication as a mitigating factor, an instruction which at least would have prevented the prosecution from making its argument based on a lack of such exculpatory evidence. Montes' right to due process of law (U.S. Const., 5th & 14th Amends.; Cal. Const., art I, § 7) was thereby abridged, and the reliability of the penalty decision was undermined. (U.S. Const., 8th Amend.) The judgment of death should be reversed.

E. BECAUSE THE ERROR MAY HAVE AFFECTED THE PENALTY DECISION IN THIS CASE, THE DEATH SENTENCE MUST BE REVERSED

As discussed more fully in Argument V, subsection H.2, any error which may have impacted the jury's decision to impose a penalty of death cannot be found harmless beyond a reasonable doubt. Here, the prosecution's failure to preserve evidence which the jury would have been instructed to consider as mitigating evidence, together with the prosecution's argument that evidence of intoxication was absent, prevented the jury from making a reliable penalty determination. The judgment of death must be reversed.

VII.

THE TRIAL COURT ERRONEOUSLY ORDERED MONTES TO WEAR A SHOCK BELT DURING THE ENTIRE TRIAL, VIOLATING THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CORRESPONDING CALIFORNIA CONSTITUTIONAL GUARANTEES.

A. INTRODUCTION

From September of 1994 through the completion of jury selection on September 17, 1996, Montes appeared in court on numerous occasions. Throughout the entire jury selection process (from September 3, 1996, through September 17, 1996) he attended court without any restraints. (4 PRT 951.) At no time had Montes ever been disruptive in court. In fact, the judge initially denied the request for physical restraints during trial, expressly stating that "[M]r. Montes has never done anything in this courtroom that has indicated that he intends to act violent. He has not reacted hostilely. He has behaved himself as a gentleman the whole time." (*Ibid.*)

Nevertheless, on September 19, 1996, after denying the prosecution's first request, the court ordered that Montes be physically restrained with the REACT shock belt[64] during the entire trial. (11 RT

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[64] Appellant refers to the belt as a "shock belt" because it is designed to deliver a 50,000 volt shock, causing incapacitation and severe pain. (See

1805-1848.) The order was made over Montes' constitutional objections. (*Ibid.*)

In a post-trial interview, Alternate Juror No. 3 told a defense investigator he had noticed that Montes was wearing "some kind of belt" during the trial, and that one of the bailiffs had a box with a button on it. (28 CT 7665.)

B. PROCEEDINGS ON THE ISSUE OF PHYSICAL RESTRAINTS, IN WHICH THE COURT ORDERS MONTES TO WEAR A SHOCK BELT DURING TRIAL

1. The Trial Court Denies The First Request For Physical Restraints During The Trial

The request that Montes be ordered to wear restraints during trial was first raised by the prosecution on August 29, 1996, before the commencement of jury selection. The initial request was for Montes to at least be fitted with leg restraints. (4 PRT 950-951.) Discussed at this time as grounds supporting the use of physical restraints were the prior incident in which Montes allegedly assaulted Ashley Gallegos while they were together in a holding cell, and Montes' possession on July 26, 1996, of a homemade stabbing device ("shank") in his cell. The prosecutor also

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Gonzalez v. Pliler (9th Cir. 2003) 341 F.3d 897, 899.) The current from the belt will put a person "on the ground." (11 RT 1833.) Given the design and purpose of the belt (delivering an electric shock) more euphemistic terms for this device, such as a "REACT" belt, or even a "stun" belt seem inadequate.

pointed to the animosity between Montes and Sal Varela, owing to the fact that Montes was the one who had directed authorities to Varela.[65] (*Ibid.*)

The court declined to order restraints at this time.

> [THE COURT]: I'm sure Mr. Montes realizes any act of violence would never go to his benefit in giving the district attorney additional reason to, you know, argue that he's a violent person. What we have here, and I understand your concerns, but at this point, Mr. Montes has never done anything in this courtroom that has indicated that he intends to act violent. He has not reacted hostilely. He has behaved himself as a gentleman the whole time.
>
> I do understand your concerns, but at least at this point I don't even see the shackling would be necessary, unless you have evidence that he intends to commit an assault perspectively [sic] upon anybody or that he intends to escape.

(4 PRT 951.)

In response to the prosecutor's concerns about Montes having been found in possession of a weapon in the jail, the court ordered that Montes and the holding cells be thoroughly searched before the defendants were brought into the courtroom. (4 PRT 951-952.) It was also decided that additional deputies would be assigned to the courtroom during the trial. The court was concerned about the potential visibility of leg restraints. But it indicated it would reconsider its ruling "if other things come up," and stated that, if additional evidence was presented it would consider a

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[65] On March 5, 1995, Varela attacked Montes. Montes did not strike him back. (11 RT 1826.)

"graduated scale of restraint" but, based on the current state of affairs, did not think restraints would be appropriate. (4 PRT 953-954.)

2. Following A Second Request For Physical Restraints, The Trial Court Orders That Montes Be Required To Wear A Shock Belt During The Entire Trial

Apparently at the request of a new court bailiff, Deputy Fitzpatrick (11 RT 1809), the issue of restraints was revisited on September 19, 1996.[66] At that time, the prosecutor asked the court to order that Montes be restrained with either a leg brace or an electric shock belt. (11 RT 1805-1806.) The court held a formal hearing on the request.

Deputy Fitzpatrick was the principal witness at this hearing. She had been working as a bailiff for approximately one month, and had been assigned to Judge McIntyre's court for the trial. (11 RT 1910.) At the time of the hearing, Fitzpatrick had been in contact with Montes about 10 times, including the five days during jury selection during which time he was unrestrained. During that time Fitzpatrick had been sitting at a table three feet from where Montes was seated. At no time did Montes make any attempt to lunge for her. She had also been involved in placing and removing Montes' waist chains (in court, and outside the presence of the

[66] According to Judge McIntyre, he was approached by Deputy Fitzpatrick about her desire for physical restraints. The judge directed her to get any reports pertaining to the request, and said he would hold a full hearing. (11 RT 1842.)

jury). At no time had Montes offered any resistance. Montes had never said anything verbally to her in the form of a threat. She had never seen Montes threaten any of the other co-defendants, either physically or verbally. (11 RT 1820-1821, 1926.)

When Fitzpatrick was first assigned to the courtroom she spoke with Deputy Young, a bailiff who had been in contact with the defendants for the past two years. Deputy Young had had no problems with the defendants during the entire two years either. (11 RT 1822.)

On her own initiative, Fitzpatrick obtained incident reports from the jail to support the request for restraints on Montes. (11 RT 1822.) Fitzpatrick did not obtain reports for any of Varela's five assaults. (11 RT 1822.) Fitzpatrick's testimony was in the form of hearsay based on the information contained in the jail incident reports.

The most recent incident testified to by Fitzpatrick was September 11, 1996. Her testimony was based on a report by Deputy Couchman (People's Exhibit A) and concerned the discovery of a handmade "shank" (a broken piece of plastic with a handle) in Montes' one-person cell. This object was located under the TV during a search conducted while Montes was in court. Montes was questioned about the object, and said he did not know anything about it. (11 RT 1812-1813.)

Fitzpatrick also testified, based on a report by Deputy Herson (People's Exhibit B) that on July 23, 1996, Montes was observed holding a toothbrush with 3 razor blades attached to the end. Herson told Montes to put the object down, but Montes threw it into the toilet instead. (11 RT 1813-1814.) A photo of the toothbrush was admitted as Exhibit B-1. (11 RT 1814; 2d Aug. CT, pp. 38-45.)

Based on a report prepared by Officer Espinoza (People's Exhibit C) from the county jail staff, Fitzpatrick testified about the alleged assault by Montes on co-defendant Gallegos. This took place on September 8, 1995, while the two defendants were in a holding cell with 19 other inmates. Montes was found with his waist chains off and in front of his body. Gallegos had blood on his face and head, and required stitches. Montes had blood on his chains and clothes. (11 RT 1814-1815; 2d Aug. CT, pp. 33-37.)

A report (People's Exhibit D) was submitted to document an incident on October 7, 1994, in which an inmate named Isais Rodriguez Cardenas was assaulted. (11 RT 1815-1816; 2d Aug. CT, p. 41.) Finally, another incident report (People's Exhibit E) concerned an assault on an inmate named Leroy Hernandez, which took place on October 5, 1994. (11 RT 1816; 2d Aug. CT, p. 44.)

These last two incidents involved fist fights during which numerous individuals were present. In both occurrences the person allegedly assaulted had been placed in the "wrong cell" by mistake. (11 RT 1824.) Montes was not identified as having been personally involved in either altercation.[67] (2d Aug. CT, pp. 41, 44.) No prosecution was pursued on either incident.

According to Fitzpatrick, on the previous afternoon she was told by the court reporter, Karen Cavin, that Montes watched her as she walked around the room. (11 RT 1817-1818, 1826.) Fitzpatrick had seen that when attractive females came into the courtroom, Montes would stare at them. It was stipulated that Deputy Fitzpatrick was an attractive female. (11 RT 1827.) Fitzpatrick began to watch Montes, and it was her opinion that he was looking at Deputy Young's gun. (11 RT 1818.) Fitzpatrick's opinion was that Montes should be restrained during the trial. (11 RT 1818-1819.)

Fitzpatrick was not familiar with leg restraints (the type which fit under the clothes). She believed that a "REACT" belt was the most appropriate restraint, because she was concerned that Montes might lunge towards one of the three bailiffs. (11 RT 1819.)

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[67] Montes was observed to have a small amount of smeared blood on his hand following the Hernandez incident. (2d Aug. CT, p. 44.)

The features of the "REACT" belt were described by Deputy Tapia. A 6" wide belt is strapped around a person's waist, under their clothes. Attached to the belt is a 6-by-2-inch box. The belt has a 50,000 watt voltage. The shock is activated by a remote control device. (11 RT 1829.) The box "provides the option for threatening inmates with electric shock." (11 RT 1830.)

As described by Tapia, when activated the shock from the belt puts a person "on the ground." It also causes the person subjected to the shock to lose control of bodily functions. (11 RT 1832.) Administration of the shock is supposed to be preceded by a warning beep. An inmate would be warned if they failed to obey any verbal command. (11 RT 1833.) Use of the shock belt requires that one deputy be assigned to give full attention to the inmate wearing the belt. (11 RT 1833-1834.)

Tapia was aware of the belt having been used in two other cases in Riverside county. In one of those prior instances, the belt had been accidentally activated. (11 RT 1834-1835.)

At the suggestion of the court, Deputy Young was also called as a witness. (11 RT 1837-1838.) Up until about a month ago, Young had been assigned to that courtroom (Dept. 53) for the preceding year and a half. (11 RT 1838.) Young's opinion was that Montes should be restrained. Part of the reason was the nature of the offense, the other was because of the

prior jail incidents. (11 RT 1839-1840.) In Young's opinion, the most effective form of restraint was the REACT belt. Young's knowledge about the REACT belt came from what he had learned in court that morning. He had also "read a little bit about it in police magazines and stuff." He had never seen it actually used. Young believed that the REACT belt was similar to a taser, which were used all the time. (11 RT 1840.)

At the request of the judge, Deputy Young was being reassigned to Department 53 for the duration of the trial. (11 RT 1840.) Deputy Young had never had any problems with Montes, and in fact had a sort of joking relationship with all the defendants. (911 RT 1984.)

One justification proffered by the district attorney for restraining Montes was the animosity between the defendants, evidenced by Montes' alleged attack on Gallegos, and Varela's attack on Montes. (11 RT 1808.) In Varela's attack on Montes, which took place in the jail on March 5, 1995, Varela had run up and begun punching Montes in the face. Montes did not hit Varela at all. (11 RT 1826.) At the time this incident took place, Montes was serving food in his capacity as a jail trustee. (11 RT 1837.) Although Montes and Gallegos had been in court together on numerous occasions since the September 1995 assault, there had been no other problems between them. (11 RT 1825.)

Montes' counsel, Mr. Cotsirilos, objected to the use of the shock belt. The objection was specifically grounded on the Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as corresponding state Constitutional guarantees. (11 RT 1845.) He was also concerned because it was likely that Montes would already be the focus of the jury as he was the only capital defendant. Cotsirilos had prior experience with the shock box, and explained that the jurors did notice the bulk created by the box. Cotsirilos was worried that Montes' jurors would also notice the box.

Finally, Mr. Cotsirilos emphasized that, throughout all the prior court proceedings, Montes had been polite and cooperative with court staff and counsel. There had never been any problems with him in court. (11 RT 1845.)

Montes' other attorney, Ms. Sandrin, gave an explanation for Montes' jailhouse possession of shanks. According to Ms. Sandrin, there had been considerable problems in the 2-A area of the jail where Montes was housed, including numerous instances of violence in which the deputies were unable to protect the inmates from being stabbed. Montes himself had been the victim of a jail stabbing on July 23, 1996. (11 RT 1823.)

The court began its ruling by pointing out that other forms of restraint were *not* being considered.

> [THE COURT]: First of all, let's talk about what we're not considering. We're not talking about shackles, not talking about chaining Mr. Montes to his chair. We're talking about a different kind of restraint, which is the belt, and that's what we discussed.

(11 RT 1847.)

The court ruled that Montes would be required to wear the shock belt.

> [THE COURT]: Based upon the testimony — testimony and the evidence that's been presented here today, the Court believes there has been shown a manifest need to use the react restraining device described by the witnesses. And the Court does believe there's clear, convincing, and compelling evidence that convinces the Court that the control belt needs to be used based upon Mr. Montes — and it is necessary in part due to the past and current threats, his action of violence against co-defendants, his actions involving weapons, and the other actions that have been shown here today.
>
> The Court bases — finds, based upon all the evidence that was presented and the opinions attached thereto, that there exists a real potential that violence will occur and that this action is necessary to minimize the likelihood of court violence. The Court finds that the control belt is totally unobtrusive and worn under the clothing and is not visible to the jurors. The Court finds that it is necessary under the circumstances and will order that the control belt be used at all future court appearances on Defendant Montes.
>
> If there are any additional — if there's any additional evidence that needs to be presented during the course of the trial, either for additional restraints or this restraint is in some way inappropriate, I'll be glad to hear any further evidence that's presented. Thank you.

(11 RT 1847.)

C. THE TRIAL COURT ERRED BY ORDERING THAT MONTES BE PHYSICALLY RESTRAINED WITH THE SHOCK BELT DURING TRIAL

A trial court may not require that a criminal defendant be subject to physical restraint of any kind during trial unless there is an on-the-record showing of a "manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) In addition, even where restraints are appropriate, a trial court must authorize the "least obtrusive or restrictive restraint that effectively will serve the specified security purpose." (*People v. Mar* (2002) 28 Cal.4th 1201, 1226.)

In *Mar*, this Court held that "before the compelled use of . . . a stun belt can be justified for security purposes, the general standard and procedural requirements set forth in *Duran* must be met." (*People v. Mar, supra*, 28 Cal.4th at pp. 1219-1220.) Accordingly, before a defendant may be compelled to wear a shock belt the judge must find (Prong 1) "a manifest need" for physical restraints and (Prong 2) that the stun belt is the least "onerous" or "restrictive" restraint available to provide the needed restraint. (*Id.* at pp. 1226-1228; *People v. Duran, supra*, 16 Cal.3d at p. 291.)

This restriction on the use of physical restraints applies at least equally to the penalty phase of a trial. (*Deck v. Missouri* (2005) 544 U.S. 622.) In *Deck*, the United States Supreme Court reversed a death sentence because a capital defendant was shackled during the penalty retrial. The

Court held that "the Constitution forbade use of visible shackles during the penalty phase, as it forbade their use during the guilt phase, *unless* that use is 'justified by an essential state interest' — such as the interest in courtroom security — specific to the defendant on trial." (*Id.* at p. 624, (emphasis in original), quoting from *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569.)

Although a trial court's decision to order restraints is subject to deferential review for abuse of discretion, this Court has recognized that this discretion is "relatively narrow." (*People v. Cox* (1991) 53 Cal.3d 618, 651.) In the present case, there was no manifest need for any physical restraints. Further, the shock belt was not the least restrictive restraining devise available. The trial court therefore abused its discretion by ordering Montes to be shackled with a shock belt throughout the entire trial.

1. <u>There Was No "Manifest Need" For Physical Restraints In The Absence Of Any Evidence Of Escape Risks or Unruly Courtroom Behavior By Montes</u>

As noted above, this Court's decisions require a showing of "manifest need" before any type of physical restraint may be ordered. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1226-1228; *People v. Duran*, *supra*, 16 Cal.3d at p. 291.) Similarly, the United States Supreme Court requires that the imposition of restraints be justified by an "essential state

interest." (*Deck v. Missouri*, *supra*, 544 U.S. at p. 624; *Holbrook v. Flynn*, *supra*, 475 U.S. at pp. 568-569.)[68]

The *Duran* opinion listed a number of cases illustrating circumstances which could justify the need for physical restraints. (*Duran, supra,* 16 Cal.3d at p. 291.) These cases all involved either disruptive *courtroom* behavior, or evidence of planned escape. (*Ibid*; see also *State v. Finch* (1999) 137 Wash.2d 792, 852 [975 P.2d 967] [the decision whether to physically restrain a defendant depends on evidence "which indicates the defendant poses an imminent risk of escape, that the defendant intends to injure someone *in the courtroom*, or that the defendant cannot behave in an orderly manner *while in the courtroom.* To do otherwise is an abuse of the trial court's discretion."] Emphasis added.)

The record in Montes' case does not disclose a "manifest need" for the use of physical restraints during his jury trial. For two years (from September of 1994 through the completion of jury selection on September 17, 1996) Montes had attended numerous court appearances. During this entire time he had been completely compliant with the decorum of the

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[68] Although the point does not appear to have been directly addressed, it would appear that this Court views the "manifest need" and "essential state interest" standards as requiring basically the same showing. (See *People v. Seaton* (2001) 26 Cal.4th 598, 651; see also *Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 901, fn. 1.)

court. Montes had also sat, unrestrained, during five days of jury selection without any problem whatsoever. Although there had been a few incidents outside the courtroom, Montes' appropriate in-court demeanor was expressly noted by the judge when he first denied the request for restraints. (4 PRT 951.)

The incidents outside the courtroom did not provide any "manifest need" for physical restraints during the trial. The incident with co-defendant Ashley Gallegos was the only one involving someone who was to be present in court during the trial, and this had taken place a year earlier. Since that time Montes and Gallegos had gone to court together on numerous occasions without any problems. There was no evidence that steps had even been taken to keep the two of them separated while in holding cells awaiting court appearances.[69] It should also be recalled that Varela had previously assaulted Montes, but no request was ever made to have Varela placed in restraints. (11 RT 1826.)

The discovery of the two "shanks" also did not justify physical restraints in the courtroom. The judge adequately addressed this issue when he first denied the request for shackling by ordering that Montes be

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[69] There was also no evidence about what had prompted this altercation. And while Gallegos ended up getting the worst of it, witnesses described seeing both Montes and Gallegos on the ground struggling. (2d Aug. CT, p. 36.)

thoroughly searched before being brought into court. Additional bailiffs were also being assigned to be present during the trial. (4 PRT 953-954.)

Moreover, Montes' possession of shanks in an area of the jail prone to inmate assaults (which included an assault upon Montes himself) did not translate into a "manifest need" for courtroom restraints. This is particularly true since there were no reports that Montes had never used such weapons against another person, or that had he ever tried sneaking weapons into the courtroom.

Finally, evidence was presented at the hearing concerning two fist fights in jail holding cells. Both of these incidents took place in October of 1994, nearly two years before the start of the trial. In each incident there were a number of other people in the cell besides Montes, and Montes' personal involvement in the altercations was not established.[70] (People's Exhibits C and D – 2d Aug. CT, pp. 38-45.) The evidence concerning these fights consisted entirely of hearsay contained in sheriff's reports. (*Ibid.*)

In assessing the sufficiency of the evidence justifying the order for the shock belt it is worthwhile to contrast the information available to the court when it first denied the request for restraints, with the additional information provided at the later hearing. Importantly, when it initially

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[70] The prosecution did not present evidence of either of these "incidents" as evidence in aggravation at the penalty phase.

denied the request for restraints the court was aware of the Gallegos incident, and was also aware that Montes had been found in possession of a "shank" at the jail.

The additional "evidence" presented at the hearing concerning the inchoate suspicions of the bailiffs did not add anything of significance to establishing a "manifest need" for physical restraints in the courtroom. Deputy Fitzpatrick conceded that Montes had always been cooperative with her, as he had been for the previous two years with Deputy Young. Montes had never made any physical or verbal threats towards Fitzpatrick or any other member of the courtroom staff. Fears and speculation aside, the evidence of Montes' actual courtroom behavior was that he had never said, or done, anything which might have justified restraints.

In fact, the most compelling evidence, which clearly demonstrated that physical restraints were not required, *was* Montes' in-court behavior. Quite simply, he had behaved himself as a gentleman throughout all previous court appearances. (4 PRT 951.) This good behavior included all the days of jury selection during which time he had been unrestrained. There is simply nothing in the record to suggest that Montes' posed a threat in the courtroom. (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1222.) Furthermore, as pointed out by the court when it denied the initial request

for restraints, Montes was certainly aware that any act of violence in front of the jury would be extremely detrimental to his case. (1 PRT 951.)

On the record of this particular case, it is apparent there was no showing of a "manifest need" for any form of physical restraints. And there was certainly no showing of a manifest need for the use of a device as onerous as the shock belt.

2. Even If This Court Finds That The Record Supported Imposition Of Some Form Of Restraints, The Trial Court Erred By Selecting The "REACT" Belt In Lieu Of Other, Less Onerous, Forms Of Restraint

As noted at the outset, "even when the record in an individual case establishes that it is appropriate to impose some restraint upon the defendant as a security measure, a trial court properly must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purpose." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) Thus, to properly exercise his discretion under *Duran*, the judge was obligated to require an on-the-record showing that the shock belt was the least onerous or restrictive means available under the circumstances. (See generally *People v. Mar*, *supra*, 28 Cal.4th at p. 1222.) "[I]t is the function of the court, not the prosecutor, to initiate whatever procedures the court deems sufficient in order that it might make a due process determination of record

that restraints are necessary." (*People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 12.)

Here, the issue of restraints was first broached by the prosecutor, who requested only a leg brace. The trial court initially refused to order even this relatively minimal level of restraint. Even when the issue was raised for the second time, the prosecutor said he was asking for either a leg brace or the REACT belt. The request by Deputy Fitzpatrick, however, was that the judge order the shock belt. Deputy Fitzpatrick was apparently so new to her courtroom assignment that she was not even familiar with leg restraints. (11 RT 1819.)

Deputy Young also opined that the shock belt would be his restraint of choice. Young's knowledge about the REACT belt came from what he had learned in court that morning, and from reading "a little bit about it in police magazines and stuff." He had never seen the shock belt actually used. Young believed that the REACT belt was similar to tasers, which were used all the time. (11 RT 1840.)

Despite the preference by the court bailiffs for the shock belt, there is no record evidence in this case demonstrating that the stun belt was the least onerous or restrictive way to restrain Montes. One example would have been a leg brace, as requested by the prosecutor. In addition, the record establishes that there were to be additional bailiffs present in the courtroom

throughout the trial. This included Deputy Young, who the judge specifically asked to have reassigned to the courtroom for the duration of the trial.

As this Court has recognized, it should not be assumed that the use of the REACT belt is by any means the least onerous form of restraint. "[A]ny presumption that the use of a stun belt is always, or even generally, less onerous or less restrictive than the use of more traditional security measures is unwarranted." (*People v. Mar, supra*, 28 Cal.4th at p.1228.) In fact, the decision to restrain a defendant with a REACT belt during trial raises issues beyond those implicated by "ordinary" shackles. (See generally *People v. Mar*, *supra*, 28 Cal.4th 1201; see also *Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 900.)

a. <u>The Judge Failed To Give Consideration To Other Methods Of Restraint</u>

This Court has recognized that, "although the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as a general matter, be less debilitating or detrimental to the defendant's ability fully to participate in his or her defense than would be the use of more traditional devices such as shackles or chains." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.)

In the present case, as in *Gonzalez v. Pliler*, the judge focused only on the visibility of the belt and completely failed to consider other factors, such as the psychological impact of the shock belt from Montes' perspective. The judge erroneously assumed that the shock belt was a less onerous or restrictive restraint so long as the jury could not see it, and therefore gave no consideration to less invasive means of restraints. (11 RT 1847.)[71] And therefore, as in *Pliler*, "the trial court clearly failed to meet even minimal constitutional standards applicable to the use of physical restraints in the courtroom." (*Pliler*, *supra*, 341 F.3d at p. 902.) Consequently, the order directing use of the shock belt was an abuse of discretion.

b. The Judge Failed To Consider The Psychological Impact Of The Stun Belt On Montes

Before ordering that a defendant be shackled with a shock belt, the judge must "take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and

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[71] [THE COURT]: "First of all, let's talk about what we're not considering. We're not talking about shackles, not talking about chaining Mr. Montes to his chair. We're talking about a different kind of restraint, which is the belt, and that's what we discussed." (11 RT 1847.) See also the Court's comments that: "The Court finds that the control belt is totally unobtrusive and worn under the clothing and is not visible to the jurors. (*Ibid.*)

give considerable weight to the defendant's perspective in determining whether traditional security measures — such as chains or leg braces — or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1228; see also *id.* at p. 1222; cf., *People v. O'Dell* (2005) 126 Cal.App.4th 562 [failure to consider the facts and special circumstances of the defendant's case provided insufficient evidence to support his involuntary medication].)

There is nothing in the record of the present case which indicates that the trial judge took into account the potential psychological impact on Montes from having to wear the shock belt during the trial. Instead, it appears that the court was only concerned with the potential visibility of the belt. Since the judge never even considered this crucial aspect of the shock belt, the ruling requiring Montes to wear one throughout the entire trial was not a proper exercise of the court's discretion.

c. The Court Failed To Consider Whether The Activating Devise Would Be Visible To The Jury

Although the court seemed to be of the opinion that the belt would not be visible to the jury (even though it was six inches wide and had a 6-by-2-inch box attached to it) the court never even considered whether the remote control box with the switch on it, attended to by a bailiff who no

doubt kept his or her attention directed towards Montes at all times, might be noticed by the jury. (See *Gonzalez v. Pliler, supra*, 341 F.3d 897, 903 ["The trial court did not make any findings about whether the activating device was visible to the jury"].) And, in fact, as discussed *post*, both the belt and the box *were noticed* by at least one juror. (28 CT 7664-7666.)

d. Even If Stun Belt The Had Been Justified, There Was No Showing Or Finding That The Design Of The Belt Used On Appellant Was Necessary To Restrain Him

"[A] trial court's assessment of whether the stun belt proposed for use in a particular case is the least restrictive device that will serve the court's security interest must include a careful evaluation of [the belt's] design. . . ." (*People v. Mar, supra*, 28 Cal.4th at pp. 1229-1230.) For example, consideration should be given to whether "a 50,000 volt shock lasting 8-10 seconds, that cannot be lowered in voltage or shortened in duration [] is necessary to achieve the court's legitimate security objectives, or whether instead a different design, perhaps delivering a much lower initial shock and equipped with an automatic cutoff switch, is feasible and would provide adequate protection." (*Id.* at pp. 1229-1230.)

In the present case the judge failed to conduct any such evaluation and, therefore, the stun belt order was an abuse of discretion.

D. EVEN IF THE USE OF A SHOCK BELT WAS JUSTIFIED DURING THE GUILT PHASE OF THE TRIAL, IT SHOULD HAVE BEEN REMOVED FOR THE PENALTY PHASE

The ruling of the trial court was that Montes would be required to wear the belt during the entire trial. (11 RT 1847.) The court never made any distinction in the need for restraints between the guilt and penalty phases. Notwithstanding its announced intention that Montes wear the belt during the rest of the trial, the court retained the power and the duty to control the trial proceedings. (Pen. Code, § 1044.) The Judge should therefore have revisited the issue after the conclusion of the guilt phase (particularly as there had not been even a suggestion of misbehavior by Montes at any time during the guilt trial).

Even were this Court to find no abuse of discretion in ordering Montes to wear the shock belt during the guilt phase of the trial while his co-defendants were present in the courtroom, any such need vanished when he was tried alone at the penalty phase. Circumstances changed substantially between the guilt and penalty phases. At the penalty phase there was no longer a risk of any hostilities between the co-defendants erupting in court. There were also six fewer trial participants, and at least 12 fewer jurors present in court.

Further, the harm to the defense was most acute at the penalty phase, especially since (as discussed herein) the prosecutor expressly argued that Montes' in-court demeanor evidenced a lack of remorse. Particularly as Montes had never once misbehaved himself in the courtroom, there was no manifest need for him to be restrained with the shock belt during the penalty trial in his case.

It was incumbent on the trial judge, as the one with the power and the duty to control the proceedings, to ensure that there was a continuing "manifest need" for Montes to be subject to physical restraints, especially a shock belt, during the trial for his life.

E. THE ERROR IN ORDERING MONTES SHACKLED WITH A STUN BELT VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

The judge's erroneous stun belt order abridged Montes' state and federal constitutional rights to due process, fair trial by jury, personal presence during trial, confrontation, compulsory process, assistance of counsel and against self incrimination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 and 17.) These rights were abridged due to the strong possibility that the stun belt impaired Montes' ability to defend himself in several ways.

First, the stun belt effectively denied Montes his right to be personally present at his trial. This in turn impaired his ability to

effectively participate in his defense; to confront the witnesses against him; to respond and react to the evidence; and to consult with counsel. The United States Supreme Court has consistently held that due process (14th Amend.) and confrontation (6th Amend.) principles guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*United States v. Gagnon* (1985) 470 U.S. 522, 526-527; *Illinois v. Allen* (1970) 397 U.S. 337, 338; *Snyder v. Mass.* (1934) 291 U.S. 97, 105-106, overruled on other grounds *Malloy v. Hogan* (1964) 378 U.S. 1, 2.)

It is true that Montes was physically present in the courtroom. However, "[p]resence at trial is meaningless if the defendant is unable to follow proceedings or participate in his own defense. Mandatory use of a stun belt implicates this right, because despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense." (*United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1306, fn. 7.)

> Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of

> shackles may significantly affect the trial strategy [the defendant] chooses to follow. [Citation.] A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.

(*Durham*, *supra*, 287 F.3d at p. 1306.)

Montes' fear of receiving a shock from the belt was likely heightened, as he would have learned at the hearing that the belt had been accidentally activated on one of the only two previous occasions it had been used. (11 RT 1834-1835.)

Second, the stun belt abridged Montes' state (art. I, § 15) and federal (6th Amend. and 14th Amend.) constitutional right to counsel. "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial — including those movements necessary for effective communication with counsel." (*Durham, supra*, 287 F.3d at p. 1305; see also *Hymon v. State* (2005) 111 P.3d 1092, 1098.) "[R]equiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may . . . interfere with the defendant's ability to assist his or her counsel. . . ." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1205; see also *Riggins v. Nevada* (1992) 504 U.S. 127, 137 [side effects of forced medication during trial may have impacted "the substance of [defendant's] communication with counsel"].)

Third, the stun belt abridged Montes' state (art. I, §§ 7 and 15) and federal (5th, 6th and 14th Amends.) constitutional rights against self incrimination, to due process, to trial by jury and to confront the witnesses against him by adversely affecting appellant's demeanor in the courtroom. As this Court observed in *Mar*, "The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or unintentionally) . . . in many instances may impair the defendant's ability to . . . maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226; see also *Gonzalez v. Pliler, supra*, 341 F.3d 897, 900 [stun belt "chills" the defendants inclination to make "any movements" during trial]; *United States v. Durham, supra*, 287 F.3d at p. 1305 [same].)

And, even though Montes did not testify, his in-court demeanor was important because it is a reality that the jurors will observe and consider the demeanor of a non-testifying defendant during trial. (See e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1226, fn. 26; *People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *Riggins v. Nevada, supra*, 504 U.S. 127 [impact of compelled use of anti-psychotic drugs on, inter alia, the defendant's "courtroom appearance" impaired his constitutional rights].)

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the

> defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [Citation.]. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.

(*Riggins v. Nevada*, *supra*, 504 U.S. at p. 142, Kennedy, J., concurring.)

Furthermore, by affecting his demeanor, the use of the shock belt also impaired Montes' ability to exercise his Sixth Amendment confrontation rights. (*Riggins*, *supra*, 504 U.S. at p. 142, citing *Coy v. Iowa* (1988) 487 U.S. 1012, 1016-1020 [emphasizing the importance of face-to-face encounter between accused and accuser].)

Finally, the "chilling effect" of the shock belt "obviously prejudices a defendant's Sixth Amendment guarantee of a fair trial." (*Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1239-1240.)

The error also abridged the Cruel and Unusual Punishment Clauses of the Eighth Amendment because the jurors' consideration of demeanor is especially crucial in a capital case:

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding,

> assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]

(*Riggins v. Nevada*, 504 U.S. at pp. 143-144, Kennedy, J., concurring.)

Thus, by impairing Montes' ability to maintain a positive demeanor during trial, the error undermined his Eighth Amendment right to a fair, nonarbitrary and reliable determination of guilt and penalty. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *Saffle v. Parks* (1990) 494 U.S. 484, 493, and cases cited therein [pointing to the longstanding recognition that capital sentencing must be reliable, accurate and nonarbitrary].) The impact on demeanor is of particular concern in the instant case, as the prosecutor expressly argued that Montes' in-court demeanor demonstrated a lack of remorse, and that this was a factor in aggravation supporting imposition of a death sentence. (See Argument XXXVII, *post*.)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Pen. Code, § 1044.) The violations of Montes' state created rights abridged the Due Process Clause (14th Amend.) of the United States Constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.)

In sum, the stun belt violated appellant's state and federal constitutional rights by "confus[ing] and embarrass[ing] his mental faculties, and thereby materially . . .abridg[ing] and prejudicially affect[ing] his constitutional rights of defense. . . .]" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1219, internal citations and quote marks omitted.)

F. THE ERROR IN REQUIRING MONTES TO WEAR THE SHOCK BELT DURING TRIAL MANDATES REVERSAL

1. The Error Is Reversible Per Se

The United States Supreme Court recognizes two categories of constitutional error: "structural error" and "trial error." (*Arizona v. Fulminate* (1991) 499 U.S. 279, 307-308.) The prejudicial effect of "trial error" can be determined from a review of the record. By contrast, structural errors "defy analysis by harmless error standards because they affec[t] the framework within which the trial proceeds, and are not simply an error in the trial process itself. [Citations.]" (*United States v. Gonzalez-Lopez* (2006) 126 S.Ct. 2557, 2563-2564, internal quotation marks omitted.) Accordingly, structural errors require reversal without resort to the impossible task of assessing prejudice. (*Arizona v. Fulminate*, *supra*, 499 U.S. at pp. 307-308; *Gonzalez-Lopez, supra*, 126 S.Ct. 2557.)

Importantly, notwithstanding use of the term "trial errors," the Supreme Court has made clear that it is the characteristic of the claimed

error, including the difficulty of assessing its effect, which determines whether an error is subject to review for harmlessness. (*Gonzalez-Lopez, supra,* 126 S.Ct. at p. 2564, fn. 4.) Because it is virtually impossible to ascertain the prejudicial effect of an error such as the one claimed herein, the error must be deemed "structural" and found to be found reversible per se. (Cf. *Riggins v. Nevada, supra*, 504 U.S. at p. 137.)

In *Riggins* the defendant challenged his convictions on the ground that he had been forced to take an antipsychotic drug during his trial. Because the state court had failed to make sufficient findings to support the drug's forced administration, the United States Supreme Court reversed, and did so without requiring Riggins to demonstrate record-based prejudice. As the *Riggins* Court recognized,

> [E]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams* (1976) 425 U.S. 501, 504-505, or of binding and gagging an accused during trial, see [*Illinois v. Allen* (1970) 397 U.S. 337, 344], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Riggins, supra*, 504 U.S. at p. 137.)

As recognized by this Court, *Riggins* raised "some of the same concerns" as compelled stun belt use. (*Mar, supra*, 28 Cal.4th at p. 1228.)

Specifically, this Court found it significant that *Riggins* also dealt with "concerns that arise from the circumstances that the state's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to conduct a defense at trial." (*Id.*, 28 Cal.4th at p. 1228.)

Montes submits that, as it is impossible to determine the effect on him from being shackled with a "control belt" carrying a 50,000 watt charge, the entire judgment against him must be reversed.

Structural error analysis is particularly apt for the penalty phase in light of this Court's pronouncement that the penalty trial decision is "normative" and not subject to a burden of proof. (Cf. *People v. Brassure* (2008) 42 Cal.4th 1037, 1067 ["No instruction on burden of proof is required in a California penalty trial because the assessment of aggravating and mitigating circumstances required of penalty jurors is inherently normative, not factual and, hence, not susceptible to a burden-of-proof quantification." Internal quotation marks and citation omitted.].)

As recognized by the Washington Supreme Court, when it reversed a death sentence because the defendant was required to wear visible shackles throughout the trial, "[a]t sentencing, however, the inquiry is not the same [as at the guilt phase]. Unlike the guilt phase, the prejudice to the Defendant during a special sentencing proceeding cannot necessarily be overcome by objective and overwhelming evidence. . . . The evidence

considered during the special sentencing proceeding is of a more subjective nature dealing with not only the nature of the crimes involved but also with personal history and the character of the Defendant. [Citations.]" (*State v. Finch*, *supra*, 137 Wash.2d at pp. 862-863 [975 P.2d 967].)

As discussed above, a large concern from shackling a defendant with a shock belt is the very significant risk that it may impact the defendant's demeanor. Any effect on Montes' demeanor had the potential to subtlety influence the jury's decision making process at the penalty phase. It is impossible to divine from a transcript of the trial proceedings what effect the shock belt had on either Montes' internal mental processes or the jurors' perception of his demeanor. Reversal per se is therefore required.

2. The State Cannot Prove That Requiring Montes To Wear A Shock Belt At The Penalty Phase Was Harmless Beyond A Reasonable Doubt

Even if the error in requiring Montes to wear a shock belt during the penalty phase of the trial is judged in accordance with *Chapman*'s "harmless beyond a reasonable doubt" standard, reversal of the death sentence is required. All the concerns discussed above were heightened when considered in the context of the jury's penalty phase determination, particularly the impact of the shock belt on Montes' demeanor in front of the jury.

Furthermore, at least one juror noticed that Montes appeared to be wearing some kind of belt, and also noticed the bailiff who had control of a box with a button on it. In other words, at least one juror noticed that Montes was subjected to some form of physical restraint.

a. At Least One Juror Noticed The Shock Belt

An interview with Alternate Juror No. 3 (who was seated as a juror at the penalty phase) was submitted in evidence in connection with Montes' new trial motion. In interview the juror told the defense investigator that he had noticed Montes wearing what looked like a belt. He also noticed one of the deputies with a box which had a switch on it. (28 CT 7665-7666.) The following is an excerpt from that post-trial interview.[72]

> [KS][73]: Okay. Let's see. (pause) (talking in background still going on) Anything about the security in the courtroom that attracted your attention at any time during the course of the trial? Security meaning the bailiff's, the way Joey or Travis or Ashley was treated or the configuration of how we sat or any of that.

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[72] Alternate No. 3's observations, including his observation regarding Montes' in-court demeanor, is admissible evidence. (Evid. Code, § 1150, which authorizes evidence as to "[c]onduct, conditions, or events occurring within or without the jury room." As descriptions of conditions or events open to "sight, hearing and the other senses" Alternate No. 3's observations concerning the belt and Montes' in-court demeanor are properly considered by this Court. (See, e.g., *People v. Steel* (2002) 27 Cal.4th 1230, 1261; *People v. Danks* (2004) 32 Cal.4th 269, 302.)

[73] "KS" stands for Montes' trial attorney Karla Sandrin.

[Alt. No. 3]: No, I just and I know that uh . . . I watched the bailiff's so . . . quite a bit, especially the one sitting behind uh . . . Joe . . . Joseph Montes. . . .

[KS]: Uhm.

[Alt. No. 3]: . . . and uh . . . it looked to me like he was there to do his job and um . . . I do notice there was one flat-top . . . crew-top um . . . bailiff there one time and uh . . . I'm only um . . . looked like my . . . I di . . . I don't know, cuz I still to this day, don't know what it was but. . . .

[KS]: Uhm.

[Alt. No. 3]: . . . *it looked like Joseph was wearing some kind of belt.*

[KS]: Uhm.

[Alt. No. 3]: *And it . . . and it looked like uh . . . it . . . it looked like uh . . . the one crew-top guy had a box*, you know. . . .

[KS]: Uhn.

[Alt. No. 3]: . . . *with . . . maybe it was like a button on it or something.*

[KS]: Uhm.

[Alt. No. 3]: And uh . . . I know the hispanic um . . . bailiff. . . .

[KS]: Uhm.

[Alt. No. 3]: . . . was just sitting in a chair. . . .

[KS]: Uhm.

[Alt. No. 3]: . . . not like he was um . . . like on guard or something.

[KS]: Uh-huh.

[Alt. No. 3]: You know.

[KS]: Uh-huh.

[Alt. No. 3]: But th . . . it . . . I don't know if he was a rookie or whatever, but he looked like he was more on guard than . . . than the rest of 'em. But everybody else in the courtroom looked pretty laid back.

[KS]: Uhm.

[Alt. No. 3]: Like they weren't worried about anything.

[KS]: Any discussions during deliberations about . . . you said you thought maybe Joe had a belt on . . . any discussions, during deliberations about any of that?

[Alt. No. 3]: No. This is just somethin' . . . I still don't know. I' just . . . it . . . *to me, I just . . . to this day I wonder, you know . . . I've never seen anything, but it just . . . from my point, where the way he was sitting. . . .*

[KS]: Uhm.

[Alt. No. 3]: . . . *it looked like he was wearing a belt.*

[KS]: Uhm.

[Alt. No. 3]: I . . . I don't . . . I didn't and I . . . I . . . I don't know whether uh . . . what it was.

[KS]: Uhm.

[Alt. No. 3]: Um . . . anything that um . . . anything that I was afraid that I knew that I could not ask . . .

[KS]: Uhm.

> [Alt. No. 3]: . . . I didn't say, cuz I was afraid to not . . . to say something that I wasn't suppose to say.
>
> [KS]: Uh-huh.
>
> [Alt. No. 3]: So if the judge said certain things that I was . . . that you could talk about, then if I felt very good . . . that I didn't have to think about it then I knew that I could probably talk about it. But if I even thought . . . wonder if I can say this, then I didn't say it.
>
> [KS]: Okay.
>
> [Alt. No. 3]: So I don't know to this day . . . I don't know if you can tell me or . . . was it a belt?
>
> [KS]: I don't know.

(28 CT 7664-7666.)

Shackles are "inherently prejudicial" because they are "unmistakable indications of the need to separate a defendant from the community at large." (*Holbrook v. Flynn, supra*, 475 U.S. at pp. 568-569.) "Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial." (*Finch, supra*, 137 Wash. at p. 845, citing *Estelle v. Williams* (1976) 425 U.S. 501, 506.)

Of particular concern is the impact of visible controls on the question of future dangerousness. "It is undisputed that placing the defendant in restraints indicates to the jury that the Defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security." (*State v. Finch*,

supra, 137 Wash.2d at p. 864 [975 P.2d 967] [defendant's appearance in physical restraints mandated reversal of his death sentence].)

As can be seen, the present record establishes that at least one juror noticed the belt Montes was required to wear, and also noticed that one of the bailiffs had a box with a button on it. This is enough to require reversal of the death verdict. (*In re Personal Restraint of Davis* (2004) 152 Wash.2d 647, 704-705 [101 P.3d 1, 38] [following *Finch*, and concluding that one juror's brief glimpse of the defendant in restraints during the guilt phase was sufficient to require reversal of the penalty phase verdict].) Prejudice results if even one juror sees the defendant in restraints. (*Dyas v. Poole* (9th Cir. 2002) 317 F.3d 934, 937.) A defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." (*Parker v. Gladden* (1966) 385 U.S. 363, 366.)

b. <u>It Cannot Be Determined Beyond A Reasonable Doubt That The Shock Belt's Effect On Montes' Demeanor Did Not Adversely Affect The Penalty Verdict</u>

Moreover, the shock belt also adversely affected Montes' ability to "maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.) As particularly relevant to the penalty trial, the belt likely impaired Montes' ability to "react and respond to the proceedings and

to demonstrate remorse or compassion." (*Riggins v. Nevada, supra*, 504 U.S. at pp. 143-144, Kennedy, J., concurring.)

"The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]" (*Riggins v. Nevada, supra*, 504 U.S. at pp. 143-144, Kennedy, J., concurring.)

It is well recognized that a defendant's demeanor at trial can have a profound effect on the juror's decision-making, particularly on the decision whether vote for life or death. (See, e.g., *Atkins v. Virginia, supra*, 536 U.S. at pp. 320-321 [demeanor of mentally retarded defendant "may create an unwarranted impression of lack of remorse for their crimes"]; *People v. Williams* (1988) 44 Cal.3d 883, 971-972 [trial judge may cite defendant's "calm" trial demeanor as weighing against modification of death judgment]; Eisenberg, Garvey & Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing* (Sept. 1998) 83 Cornell L.Rev. 1599 [The defendant's demeanor during trial also influences jurors' beliefs about remorse]; Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty* (1998) 83 Cornell L.Rev. 1557 [The primary source of the juror's

perceptions concerning the defendant's remorse . . . appeared to be the defendant's demeanor and behavior during trial. What repeatedly struck jurors was how unemotional the defendants were during the trial, even as horrific depictions of what they had done were introduced into evidence.].)

Jurors' perceptions concerning the defendant's remorse, or lack thereof, are primarily molded by the defendant's demeanor during trial. (Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty* (1998) 83 Cornell L.Rev. 1557.) Thus, it can be especially prejudicial to the defense for the defendant to remain passive while horrific descriptions of the crime are put in evidence. (*Ibid.*) Hence, any impact the stun belt may have had on Montes' demeanor was critical.

In the instant case there is no need for speculation about juror perception of Montes' demeanor, because some description of it appears in the record. At a couple of points in this post-trial interview, Alternate Juror No. 3 told the investigator he had noticed that Montes hardly ever changed his expression. (28 CT 7646.) He specifically commented on Montes' demeanor, noting that he was "always in control" (28 CT 7647) and his expression did not change. (28 CT 7663.) In addition, the prosecutor expressly commented on Montes' in-court demeanor, arguing that it demonstrated a lack of remorse, warranting a death sentence. (See Argument XXXVIII, *post.*)

As discussed in Argument V, subsection H.2, *ante*, the penalty trial was closely balanced, and there is a reasonable possibility that, but for the error, one or more jurors would not have voted for death. (*Chapman v. California*, *supra*, 381 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.) Montes' death sentence must therefore be reversed.

JURY SELECTION ISSUES

VIII.

THE TRIAL COURT ERRED BY EXCUSING THREE PROSPECTIVE JURORS FOR CAUSE, THEREBY DENYING MONTES HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 7, 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

A. A PROSPECTIVE JUROR MAY NOT BE DISMISSED FOR CAUSE SOLELY BECAUSE OF A PERSONAL OPPOSITION TO THE DEATH PENALTY. RATHER, THE PROSPECTIVE JUROR'S VIEWS MUST BE SUCH AS WOULD "SUBSTANTIALLY IMPAIR" THE PERSON'S ABILITY TO SERVE AS A JUROR IN THE PARTICULAR CASE.

Over Montes' objection, the trial court granted the prosecution's challenge, and excluded three prospective jurors for cause, finding that they were unwilling or unable to impose the death penalty. The court's improper excusal of these jurors violated Montes' rights to due process of law and to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the California Constitution (art. I, §§ 7, 15 & 16).

Both the federal and the state Constitutions guarantee a criminal defendant a trial by an impartial jury (*People v. Garceau* (1993) 6 Cal.4th 140, 173-174; see *People v. Mickey* (1991) 54 Cal.3d 612, 683; *People v.*

Stankewitz (1990) 51 Cal.3d 72, 104; *People v. Bonin* (1988) 46 Cal.3d 659, 679) made up of jurors who will not automatically vote for the death penalty, but who will consider the mitigating evidence presented. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729, 733-736; accord *Penry v. Lynaugh* (1989) 492 U.S. 302, 319.)

Further, both this Court and the United States Supreme Court have established that a prospective juror may be excused for cause based upon his or her views regarding capital punishment only if those views would "prevent or impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*Rodrigues*, *supra*, 8 Cal.4th at p. 1146.) "Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." (*Uttecht v. Brown* (2007) 127 S.Ct. 2218, 2225, 2229, 2230.)

It is not enough that a prospective juror would find it "very difficult" to impose the death penalty. In fact, such a juror is "entitled — indeed,

duty bound— to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart* (2004) 33 Cal.4th 425, 446.) "Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt*. [Citations.]" (*Stewart*, *supra*, 33 Cal.4th at p. 446.) In fact, even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Ibid.*, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

In assessing a juror's qualification, it must be determined whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.* (*People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Hill* (1992) 3 Cal.4th 959, 1003.) The qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty. (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 726-728.)

On appeal, reviewing courts will accord deference to a trial judge's assessment of credibility. (*People v. DePriest, supra,* 42 Cal.4th at p. 20.) Where a prospective juror gives confusing or conflicting answers concerning his or her ability to serve, the trial court's ruling will be upheld if it is supported by substantial evidence. (*People v. Lancaster* (2007) 41 Cal.4th 50, 79; *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Dennis* (1998) 17 Cal.4th 468, 545.) In evaluating a trial court's decision to grant a challenge for cause, court may also take into account whether the defense objected to, or acquiesced in, the challenge. (*Uttecht v. Brown, supra,* 127 S.Ct. 2218, 2225, 2229, 2230.)

In *People v. Heard* (2003) 31 Cal.4th 946, applying the above standard, this Court reversed the death penalty. After recounting the specific details of voir dire with a juror erroneously dismissed for cause, the *Heard* decision noted that it was clear from the juror's answers that he would not "automatically" vote for either penalty. In fact, *Heard* pointed out that the prospective juror had indicated he would do "whatever the law states." (*Id.* at pp. 964-965.) This court concluded that the record did not provide an adequate basis for the trial court's dismissal of the juror for cause.

In the present case, the court and counsel conducted individual voir dire with several individual jurors based upon their answers to the

questionnaires regarding capital punishment. (See procedure referred to at 4 RT 462.) Montes takes issue with the court's dismissal for cause of three prospective jurors based on their views regarding capital punishment. The court erred in dismissing these three jurors as the record does not support a finding that their views would have prevented or impaired the performance of their duties as defined by the court's instructions and the juror's oath.

B. THE TRIAL COURT IMPROPERLY DISMISSED THREE JURORS FOR CAUSE

1. Prospective Juror S.G.

The trial court erred in dismissing Prospective Juror S.G. for cause as he maintained that he would keep an open mind and follow the court's instructions on the law. The prospective juror provided honest answers regarding his personal views in opposition to the death penalty, but consistently answered that he would listen to all the evidence presented and deliberate based on the law as provided by the court.

Montes' trial counsel, Mr. Cotsirilos, first questioned S.G. about whether he would accept that life without the possibility of parole meant just that. (4 CT 571.) He also questioned S.G. regarding his ability to consider both penalty options:

> [MR. COTSIRILOS]: Can you make the decision in the courtroom when the time comes to decide should I vote for — if you ever have to reach this decision. I don't mean to suggest you will by answering these questions.

[PROSPECTIVE JUROR S.G.]: Sure.

[MR. COTSIRILOS]: If you have to make that decision, could you vote for life without parole or the death penalty at that time, accepting that they mean those things?

[PROSPECTIVE JUROR S.G.]: Absolutely. If those are the two options, then I have no problem.

[MR. COTSIRILOS]: You could accept them with — taking into account the full responsibility of what each sentence would mean?

[PROSPECTIVE JUROR S.G.]: Certainly.

(4 RT 572)

S.G. was then questioned by the prosecutor, Mr. Mitchell.

[MR. MITCHELL]: You're against the death penalty, aren't you?

[PROSPECTIVE JUROR S.G.]: For the most part, yes.

[MR. MITCHELL]: Philosophically, morally.

[PROSPECTIVE JUROR S.G.]: Yes.

[MR. MITCHELL]: And it's against your religion; correct?

[PROSPECTIVE JUROR S.G.]: Yes, it is.

[MR. MITCHELL]: You know what the charges are in this case?

[PROSPECTIVE JUROR S.G.]: Correct.

[MR. MITCHELL]: Can you see yourself realistically sitting as a juror in this case and imposing a death penalty sentence on Mr. Montes?

[PROSPECTIVE JUROR S.G.]: To be quite honest, the only reason at all that I have any sort of inkling toward the death penalty is because, as I mentioned in the questionnaire, about my sister's rape. And only because of that one particular situation that had hit close to home, that's the only reason I can't say for certain that — that I would not impose the death penalty.

[MR. MITCHELL]: Do you think your views on the death penalty are such that it's — it would be very difficult for you to realistically consider that as an option here?

[PROSPECTIVE JUROR S.G.]: It would.

[MR. MITCHELL]: Because it's against your religion and against all your moral beliefs?

[PROSPECTIVE JUROR S.G.]: Yes.

[MR. MITCHELL]: In any event, if you got to the penalty stage, it's more than likely you're going to vote for life without parole?

[PROSPECTIVE JUROR S.G.]: Correct.

[MR. MITCHELL]: And that's based upon your religious and moral beliefs, doesn't matter what the evidence is?

[PROSPECTIVE JUROR S.G.]: Yes. Yes.

(4 RT 572-573.)

After the questions posed by the prosecution, Mr. Cotsirilos questioned the prospective juror about his ability to separate his personal

beliefs from his duties as a juror. The following is an excerpt of that interchange:

> [MR. COTSIRILOS]: Just briefly. We — we have all sorts of people who are going to sit on this jury. We have people who — who are totally for the death penalty for any killing, people who say that's their point of view but they're going to put it aside and consider both. You can still philosophically be against the death penalty and still sit on the jury if you can tell the Court, I understand my obligations are to consider the Court's instruction and consider both options, okay. If you disagree with the law in our country, you're supposed to express that at the voting booth.
>
> [PROSPECTIVE JUROR S.G.]: Absolutely.
>
> [MR. COTSIRILOS]: If you sit on this jury, will you listen to the evidence and consider both options as the Court instructed you to do
>
> [PROSPECTIVE JUROR S.G.]: I will listen to both options as the Court instructed; however, my understanding of the death penalty is basically it does eventually come down to whether or not you believe in this particular situation a person should be put to death. And — as my religious and moral beliefs state, that everyone basically deserves an opportunity for reform. And so given that situation, I would say that it would be extremely difficult for me to impose the death penalty
>
> [MR. COTSIRILOS]: Okay. But would you listen to the evidence?
>
> [PROSPECTIVE JUROR S.G.]: I would listen.
>
> [MR. COTSIRILOS]: If in fact evidence was presented to you that this person had opportunities for reform in the past and had not benefited from that, would you be able to put aside your personal views, consider the evidence, and if it was there, if it led you down that path, would you realize

> this person's had opportunities, not taken advantage of them, might be a continuing threat to the community, would you be able to follow the law if the other 11 jurors felt this is a death penalty case? Would you be able to put your views aside and —
>
> [PROSPECTIVE JUROR S.G.]: Perhaps. Just because of the fact that somebody had an opportunity for reform previously does not mean that they still don't deserve, you know, time — I have a very good friend who is a Catholic priest and done some time with juveniles where he's a chaplain. And he said sometimes it takes years before they reform themselves. And it's against my moral standards to say we should put a particular person to death and then — when maybe 20 years from now they would have turned around and said, he, even though they're spending the rest of their life in prison, said — taken the opportunity to reform themselves.
>
> [MR. COTSIRILOS]: But your opinion is open to the possibility?
>
> [PROSPECTIVE JUROR S.G.]: It is. There is a small possibility.

(4 RT 573-574.)

The defense argued that it was clear from S.G.'s statements that he was open to consideration of the death penalty, and this was sufficient under the law. The defense also pointed out that S.G. indicated enough of a possibility of considering the death penalty that he was appropriate to remain on the jury. (4 RT 575.)

In response, the court stated, "I think he was lying. I don't think he can impose the death penalty." (4 RT 575-576.) Further, the court found

that S.G.'s views "would be sufficient to impair — substantially impair his ability to perform his duties as a juror in this case." (Ibid.) Subsequently, the court dismissed Prospective Juror S.G. pursuant the prosecution's challenge for cause.

Montes contends that Prospective Juror S.G. was erroneously dismissed by the trial court for cause. S.G.'s answers to questions from both sides were candid and thoughtful. He was extremely frank about his personal views about the death penalty. In addition, he provided consistent answers regarding his ability to consider all of the evidence and deliberate as to both possible penalty options despite his personal view. S.G.'s responses to pointed questions as to whether or not he could decide to impose the death penalty repeatedly provided that he would not "automatically" (in other words, "no matter what the evidence showed," *Heard*, *supra*, 31 Cal.4th at p. 964) decide for life under all circumstances.

The trial court therefore erred by concluding that S.G.'s personal views would prevent him from performing his duties as a juror.

2. Prospective Juror C.J.

The court also erred in dismissing Prospective Juror C.J. for cause pursuant the prosecution's challenge. In his questionnaire, C.J. circled number 2, which meant that he was against the death penalty, although not "strongly" against it, as he did not circle option number 1. (5 RT 803.) C.J.

indicated that he was personally against the death penalty because "It don't serve no purpose at all, because you have criminals right now on death row for 40 years. They're still there. It's like they're just there, like on a vacation basis."

In answers to questions posed by Mr. Mitchell, C.J. responded that he would automatically give life without parole, and would never impose the death penalty. (5 RT 804.)

The defense next asked C.J. several very pointed questions regarding his ability to serve as a juror. In particular, the defense asked whether he could put aside his personal views as a juror and impose the death penalty. To this question, C.J. answered in the affirmative, "Yes, I can do that."

The following is a lengthy exchange between defense counsel and Prospective Juror C.J., further delineating the difference between his personal beliefs and his ability to perform as a juror.

> [MR. COTSIRILOS]: The law of the state is that there is a death penalty. Okay? And if you don't like the laws, the way we change the laws is we go and vote for different people to change the laws. Okay?
>
> [PROSPECTIVE JUROR C.J.]: Yes.
>
> [MR. COTSIRILOS]: We're going to have an election in a little while here, Mr. Clinton and Mr. Dole, and people express their views and vote. We don't want people dropping out of the country if they don't win the election.

If the Court asked you to serve on this jury, could you put aside your personal views and listen to the rules that the Court gave you regarding what are the rules of this country?

[PROSPECTIVE JUROR C.J.]: Yes.

[MR. COTSIRILOS]: The Court, as you know, is going to tell you the rules of the country right now are that if you convict Mr. Montes of murder and special circumstances, kidnapping, robbery, carjacking, then there will be a penalty phase. And the two choices there will be life without parole or the death penalty.

Okay? You accept that as the law?

[PROSPECTIVE JUROR C.J.]: Yes.

[MR. COTSIRILOS]: In the penalty phase, if the Court told you you could consider both those penalties, if the Court told you that was your obligation —

[PROSPECTIVE JUROR C.J.]: Yes.

[MR. COTSIRILOS]: You don't know the facts of this case. You don't know where this is going to take you. Could you tell the Court that if the Court said one option you have to consider is the death penalty — can you consider that?

[PROSPECTIVE JUROR C.J.]: Yes, I have to.

[MR. COTSIRILOS]: If the evidence took you there, if you're sitting with the other jurors in a room like this and they're saying the evidence shows this is a death penalty case, could you reach that decision if they persuaded you that was the right decision under the law as it exists today?

[PROSPECTIVE JUROR C.J.]: I'd give my opinion first, and I'd say if this is the way we have to go at it, I have to go at it. But my opinion, okay — this is my opinion — if the Court said I have to pick one of those, I'd pick.

> [MR. COTSIRILOS]: Those are the only two choices the Court will give you, life without parole or death penalty.
>
> [PROSPECTIVE JUROR C.J.]: I'd have to pick one of them.
>
> [MR. COTSIRILOS]: Could you be persuaded by the other jurors that the death penalty is right under the law as the Court gives it to you?
>
> [PROSPECTIVE JUROR C.J.]: It would be kind of hard. Yes . . .
>
> [MR. COTSIRILOS]: You could come back and agree with the other jurors that death was the appropriate penalty?
>
> [PROSPECTIVE JUROR C.J.]: I'd have to think about it. Yes. But it would be against my —
>
> [MR. COTSIRILOS]: Your personal view. But if it's correct under the law, you could do that?
>
> [PROSPECTIVE JUROR C.J.]: Yes . . .

(5 RT 805-808)

Following this exchange, the prosecution questioned Prospective Juror C.J. regarding his personal views as to the death penalty. Below is an excerpt of the prosecution's interaction with Prospective Juror C.J.:

> [MR. MITCHELL]: You would go against your Christian beliefs, your opinion? You'd have to decide this case for yourself. Do you understand that?
>
> [PROSPECTIVE JUROR C.J.]: Yes.
>
> [MR. MITCHELL]: Would it be difficult and would it impair your ability to be a fair juror to both the People and the

> defense because of your views on the death penalty, you don't think you could impose it?
>
> [PROSPECTIVE JUROR C.J.]: I could be a good juror. But come to the death penalty, I just have to try to live with it. I mean, I don't like it. It's against my morals. But if I have to break one of my morals, I just have to break one of them.

(5 RT 809.)

In granting the prosecution's challenge, and dismissing C.J. for cause, the court stated: "I don't believe he was being particularly candid. I notice he tried to evade certain of the questions. The Court does find that the juror's views on capital punishment, religious and otherwise, would substantially impair his performance of his duties as a juror in this case. . . ." (5 RT 809.)

In the foregoing exchange, Prospective Juror C.J.'s replies give every indication that he understood a difference between his personal views and his duty as a juror. In providing his answers, C.J. spoke honestly about the conflicting nature of performing as a juror on a death penalty case, but he never indicated that he could not impose the death penalty or that he would automatically choose life in every instance. Rather, C.J. provided that he would find the decision to impose the death penalty a difficult decision. Perhaps Prospective Juror C.J.'s responses lacked eloquence, but

in plain terms he stated that he would be able to perform the required duty of a juror.

Throughout the voir dire process, Prospective Juror C.J. indicated that he would listen to the evidence presented and deliberate as per the law provided by the court. Consequently, C.J. was not prevented or impaired by his personal views in such a manner that would have prohibited him from following the law as provided by the court. The trial court's dismissal based upon C.J.'s stated personal religious beliefs was therefore not supported by substantial evidence.

3. <u>Prospective Juror O.G.</u>

Finally, prospective Juror O.G. was erroneously dismissed for cause, following a challenge by the prosecution. During the voir dire process in chambers, the following exchanges took place:

> [MR. MITCHELL]: Good afternoon. I got the impression from one of your answers that you might have changed your mind about the death penalty.
>
> [PROSPECTIVE JUROR O.G.]: Yes. Well, let me tell you I just have mixed emotions on that. I think that the death penalty could apply in some cases. But I'm not sure that I'm the one to say someone should die.
>
> [MR. MITCHELL]: We appreciate you bringing that forward. Actually, you know, if we pick you as a juror, we need somebody up there who can make that type of decision. If your views on the death penalty or your views of your own abilities tell you can't do it, you have to tell us you don't think you can.

> [PROSPECTIVE JUROR O.G.]: I don't think I can.
>
> [MR. MITCHELL]: If it came down to it, and you were put in the situation where you had to choose life without parole or death —
>
> [PROSPECTIVE JUROR O.G.]: Yes.
>
> [MR. MITCHELL]: — you would always go for life without parole?
>
> [PROSPECTIVE JUROR O.G.]: I would.
>
> [MR. MITCHELL]: Regardless of what the evidence was?
>
> [PROSPECTIVE JUROR O.G.]: Right.
>
> [MR. MITCHELL]: You don't want to ever sentence anybody to death?
>
> [PROSPECTIVE JUROR O.G.]: No.

(7 RT 1281.)

Prospective Juror O.G. was then questioned by counsel for Montes, Mr. Cotsirilos. Mr. Cotsirilos first reviewed with O.G. the fact that she had previously indicated that she would not automatically vote for life without parole, and that she had indicated she was willing to put her personal feelings aside and do her duty as a juror, which included imposing the death penalty in an appropriate case. (7 RT 1282.) O.G. responded that since she had filled out the questionnaire, she had prayed about this issue, and had become convinced that she should not be the person who said whether

someone should live or die. (7 RT 1282-1283.) The following exchange then ensued:

> [MR. COTSIRILOS]: Okay. Now, we don't want to put you through something that's going to be personally horrible for you. You understand that for all the citizens out there who serve, it's going to be hard. These cases — anyone who comes in here and says it's going to be easy for me, let me on the jury, I think all of us would be a little worried about that person. Okay?
>
> [PROSPECTIVE JUROR O.G.]: Yes.
>
> [MR. COTSIRILOS: Knowing it's part of your civic responsibility to try and — try and do what's right under the law, okay —
>
> [PROSPECTIVE JUROR O.G.]: Yes.
>
> [MR. COTSIRILOS]: If you convict Mr. Montes, the Court will tell you you don't have to impose the death penalty. You have to listen to evidence and consider both penalties. And if you morally think it's appropriate, only then impose the death penalty. Okay? Working with 11 other people. Do you think you could do that?
>
> [PROSPECTIVE JUROR O.G.]: I really don't know. I've said things — well, maybe I shouldn't say this. But when it comes right to it, I don't know if I could. I really don't know, if it came right to the moment. That's what we're talking about. When it came right down to it, could you do it? Could you actually — and I have doubts that I could impose the death penalty.
>
> [MR. COTSIRILOS]: What do you think you would do if you're in a penalty phase and you've found beyond a reasonable doubt that the person charged committed a murder, in this case a kidnap, robbery, carjacking murder, and you discussed the evidence with 11 other people, and the evidence points towards the death penalty, and they all say, look, this is

> a death penalty case, Miss O.G., and you agree with them? What do you think you would do at that point? What would be your reaction?
>
> [PROSPECTIVE JUROR O.G.]: Honestly, I don't know. I really don't know. I don't know if I could see that I could do it myself. I don't know if I could do that. But I always pray for answers. That's where I would be at that moment.
>
> [MR. COTSIRILOS]: All right. Thank you very much for bearing with me.

(7 RT 1283-1285.)

The prosecution declined to question any further and challenged the prospective juror for cause. In its challenge, the prosecution stated, "I think her views on the death penalty are such that she can't see herself imposing it. She couldn't tell us that she'd consider it as a viable alternative." (7 RT 1285.) Further, the prosecution argued that the prospective juror should be dismissed because she seemed really uncertain." (*Ibid.*)

In opposition to the challenge for cause, defense counsel observed, "[she] is obviously a very sensitive person . . . [b]ut I don't think her views prohibit her from serving." (7 RT 1286.) Following this argument, the court granted the prosecution's challenge, and dismissed the prospective juror. In doing so, the court remarked, "I watched her very closely, and I think that her statement that she would not impose the death penalty under any circumstances is probably closer to the truth." (*Ibid.*)

Montes disagrees with the court's characterization of O.G.'s responses. In response to a leading question by Mr. Mitchell, she said that she would choose life without parole over death. But O.G. never stated that she "would not impose the death penalty under any circumstances." In questioning by Mr. Cotsirilos, O.G. expressed what she termed, her "mixed emotions," stating that she believed that "the death penalty could apply in some cases," but that she was not sure that she should be "the one to say someone should die." (7 RT 1282.) O.G.'s comments expressed her conflicted emotions and personal feelings about the extremely serious and important role of a juror in a death penalty case.

Montes recognizes that this Court will accord substantial deference to the trial court's decision when reviewing that decision on appeal. (See, e.g., *People v. DePriest, supra*, 42 Cal.4th at p. 20.) However, the expression of the juror's feelings in the record did not constitute a hardline belief that would "substantially impair the performance of [the juror's] duties." (See *People v. Mincey* (1992) 2 Cal.4th 408, 456-457.) Accordingly, the trial court erred by excusing Prospective Juror O.G. for cause.

C. THE ERROR REQUIRES THAT THE DEATH VERDICT BE REVERSED.

The error in the improper excusal of a juror for cause is not subject to harmless-error analysis, but rather must be considered reversible per se with regard to any ensuing death penalty judgment. (*Heard*, *supra*, 31 Cal.4th at p. 951; see also *Gray v. Mississippi* (1987) 481 U.S. 648, 664-666; *Davis v. Georgia* (1976) 429 U.S. 122, 123.) Furthermore, the error is reversible per se regardless of whether the prosecutor may have had remaining peremptory challenges and could have excused a prospective juror.[74] (*Heard*, *supra* 31 Cal.4th. at p. 966.)

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[74] It appears that the prosecution may have had two peremptory challenges remaining when the jury was sworn. (8 RT 1400.)

IX.

THE PROSECUTOR IMPROPERLY USED PEREMPTORY CHALLENGES TO DISMISS AFRICAN-AMERICANS AND HISPANICS FROM THE PETIT JURY. THE RACE-BASED EXERCISE OF PEREMPTORY CHALLENGES VIOLATED THE UNITED STATES AND CALIFORNIA CONSTITUTIONS. REVERSAL OF THE JUDGMENT IS REQUIRED.

A. THE MOTIONS

On September 11, 1996, Montes counsel made a *Batson/Wheeler*[75] motion regarding the prosecutor's use of a peremptory challenge against Prospective Juror K.P., an African-American. The court denied the motion, finding no prima facie case had been established. (6 RT 935-944.)

On September 12, 1996, the defense made a further objection to the prosecutor's use of peremptory challenges to excuse four African-American prospective jurors (D.M., W.J., I.T. and L.W.). (7 RT 1163-1166.) The defense noted that the prosecutor had excused five of the seven African-Americans who had been seated in the jury box. (7 RT 1172.)

The court found a prima facie case had been established, now including Prospective Juror K.P. from the day before. (7 RT 1167.) The court thus asked the prosecutor to give reasons for his excusal of Juror K.P. as well as reasons for the African-American prospective jurors excused on

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[75] *Batson v. Kentucky*, *supra*, 476 U.S. 79; *People v. Wheeler*, *supra*, 22 Cal.3d 258.

September 12. (7 RT 1167-1168.) The prosecutor gave his reasons for all relevant prospective jurors. (7 RT 1168-1172, 1307-1310.) The court found the challenges were race-neutral and denied the motion. (7 RT 1173-1174, 1307-1310.)

Later the same day, appellant brought another *Batson/Wheeler* challenge regarding the prosecutor's use of a peremptory challenge against Prospective Juror P.K., another African-American. (7 RT 1302, 1308.) The court "presumed for the sake of argument" (based on its earlier findings that a prima facie case had been made) that a prima facie case existed for juror P.K. as well. However, the court found the prosecutor's explanation to be race-neutral, and denied the motion. (7 RT 1308-1310.)

The defense subsequently objected to the prosecutor's use of peremptory challenges to excuse Hispanic prospective jurors (L.C., D.Q., C.P., D.L., and G.H.).[76] (7 RT 1310-1314, 1320.)

After reviewing the questionnaires, the court suggested its own view of what might have been reasons for excusing C.P. and D.C. (7 RT 1315-1316.) But the court found a prima facie case had been made, at least as to L.C. and D.L. and G.H., and asked the prosecutor to provide reasons for excusing the jurors. (7 RT 1315-1316, 1320.) At the request of the court,

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[76] It was stipulated that another prospective juror, Ms. Rios, everyone agreed that there was a reason to excuse her. (7 RT 1316.)

the prosecutor gave reasons for excusing D.C., L.C., D.L., and G.H. (7 RT 1217-1322.) No reasons were given for excusing C.P.[77] After listening to the prosecutor's explanations for excusing these potential jurors, the court denied the motion. (7 RT 1314-1323.)

B. USE OF PEREMPTORY CHALLENGES TO REMOVE MEMBERS OF COGNIZABLE GROUPS VIOLATES BOTH THE FEDERAL AND STATE CONSTITUTIONS.

Pursuant to the Sixth Amendment to the United States Constitution, the accused in a criminal case is entitled to a speedy and public trial by a fair and impartial jury. (U.S. Const, 6th Amend.) This federal right is made applicable to the states by the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) The California Constitution likewise guarantees the accused the right to trial by a fair and impartial jury. (Cal. Const., art. I, § 16; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 266.) Additionally, California Code of Civil Procedure section 231.5 provides that a peremptory challenge may not be used to remove a potential juror on the basis of race, color, religion, sex, national origin, sexual orientation, or similar ground.

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[77] It appears that everyone thought that Mr. Mitchell had given reasons for excusing Mr. Pasillas. However it was the court, not Mr. Mitchell, who had given possible reasons for why Mr. Pasillas might have been excused. (7 RT 1316-1317, 1320.) This is addressed *infra*, in subsection G.

A criminal defendant also has a right to trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 272.) This fundamental right is protected by the Sixth Amendment to the United States Constitution and article I, section 16 of the California Constitution. (*Wheeler*, *supra*, at pp. 270, 272.) The exercise of peremptory challenges to remove prospective jurors on the basis of group bias is a violation of the fundamental right to trial by a representative jury. (*Id.* at pp. 276-277; *People v. Fuentes* (1991) 54 Cal.3d 707, 714.) Group bias is "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1215.)

Under federal law, a prosecutor's exercise of peremptory challenges is also subject to the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Batson*, *supra*, 476 U.S. at p. 89.) When a prosecutor uses peremptory challenges to exclude veniremen from the petit jury on the basis of race, the action violates the equal protection clause. (*Powers v. Ohio* (1991) 499 U.S. 400, 409.)

African-Americans (*People v. Motton* (1985) 39 Cal.3d 596, 605; *People v. Wheeler*, *supra*, 22 Cal.3d 258) and Hispanics (*People v. Trevino* (1985) 39 Cal.3d 667, 684, 686, disapproved on other grounds *People v.*

Johnson, *supra*, 47 Cal.3d at p. 1221) are cognizable groups for purposes of *Batson* and *Wheeler*.

California law makes it clear that a constitutional violation may arise when only one of several members of a cognizable group are excluded. Federal authority suggests a similar approach. (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) Accordingly, the possible presence of members of the groups discriminated against in the petit jury is not proof contested peremptory challenges were exercised for neutral reasons. (*People v. Motton*, *supra*, 39 Cal.3d at pp. 607-608; *People v. Granilo* (1987) 197 Cal.App.3d 110, 121.)[78]

Additionally, neither California nor federal law requires that a defendant be a member of the group in question in order to complain of improper use of peremptories. (See *Powers v. Ohio*, *supa*, 499 U.S. 400; *People v. Alavarez* (1996) 14 Cal.4th 155, 193.) In the present case,

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[78] The record does not spell out the ethnic composition of the petit jury which was eventually empaneled in this matter, because the questionnaires completed by the jurors do not contain an entry for race. However, a later reference in the record indicates that near the end of the guilt phase there were three African-Americans on the jury (one of whom, Juror No. 7, was excused at the behest of the prosecution, and over Montes' objection, prior to deliberation; see Argument XX, *ante*). But it cannot be determined with certainty from the record if the seated jury included any Hispanic jurors.

however, appellant was a member of one of the cognizable groups (Hispanics) identified in the *Batson/Wheeler* motions.

C. PROCEDURE FOR ANALYZING *BATSON/WHEELER* CHALLENGES

"Ideally, a trial court faced with a *Batson* challenge under-takes a clearly-delineated three step inquiry." (*Derrick v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.)

In the first step, when a challenge is made, the trial court must determine whether the defendant has successfully made a prima facie showing of purposeful discrimination. (*Batson, supra,* 476 U.S. at pp. 96-97; *Wheeler, supra,* 22 Cal.3d at pp. 278-280.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]." (*Johnson v. California* (2005) 545 U.S. 162, 168; *People v. Lewis* (2008) 43 Cal.4th 415, 469.)

A trial court's request for an explanation of contested peremptory challenges establishes at least an implicit finding that a prima facie case has been made. (*People v. Lewis, supra,* 43 Cal.4th at pp. 470-471; *People v. Hayes* (1990) 52 Cal.3d 577, 605; see also *Hernandez v. New York* (1991) 500 U.S. 352, 358-359 [recognizing that once the prosecutor has offered a reason for a particular challenge, and the trial court has ruled on the

ultimate question of intentional discrimination, the issue regarding whether a prima facie showing was made is moot].) For the most part, the trial court in the instant case expressly found that a prima facie case had been made. But even if an express finding was not made for each particular challenged juror, the trial court nevertheless asked the prosecutor to give reasons for each of the jurors discussed herein.

At the second stage, once the trial court finds that a prima facie showing of discrimination has been made, the burden of proof shifts to the prosecutor to justify the peremptory challenges with a race-neutral explanation. (*Johnson v. California*, *supra*, 545 U.S. at p. 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Lewis, supra* 43 Cal.4th 469; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-282.) Unless a discriminatory intent is apparent from the explanation, the reason offered will be deemed race-neutral. (*Derrick v. Lewis, supra*, 321 F.3d at p. 830.) Here, the prosecutor gave a race-neutral reason for each of the challenged jurors.

Third, "'[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California, supra*, 545 U.S. at p. 168; see also *Snyder v. Louisiana* (2008) __ U.S. __ [170 L.Ed. 176, 128 S.Ct. 1203, 1207]; *Miller-El v. Dretke* (2005) 545 U.S. 231, 239.) The

trial court must evaluate the explanation offered by the prosecution to satisfy itself that the explanation is genuine. In this regard, the court must make "a sincere and reasoned attempt to evaluate the prosecutor' s explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; see also *Batson, supra*, 476 U.S. at p. 98.)

As part of its evaluation at this final stage of the analysis, the court must necessarily take the step of asking whether the reasons proffered by the district attorney actually applied to the particular jurors challenged. (*Fuentes, supra*, 54 Cal.3d at p. 721.) "[T]he critical inquiry in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El, supra*, 537 U.S. at pp. 338-339.)

All of the circumstances bearing upon the issue of racial animosity must be considered. Among other things, a court must consider the strike of one juror for the bearing it might have on the strike of another. (*Snyder v. Louisiana, supra*, __ U.S. __ [170 L.Ed. 176, 128 S.Ct. 1203, 1208.) "The credibility of a prosecutor's stated reasons for exercising a peremptory challenge 'can be measured by, among other factors . . . how reasonable, or

how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*Lewis*, *supra*, 43 Cal.4th at p. 469, quoting *Miller-El*, *supra*, 537 U.S. at p. 339.)

Importantly, the trial court "should not attempt to bolster legally insufficient reasons offered by the prosecution with new or additional reasons drawn from the record." (*People v. Ervin* (2000) 22 Cal.4th 48, 77.)

A trial court's ruling on a *Batson/Wheeler* motion is reviewed for substantial evidence. (*People v. Williams* (1997) 16 Cal.4th 635, 666.) If it is determined that the prosecutor abused peremptory challenges to excuse members of a recognized group, the judgment must be reversed without regard to any additional showing of prejudice. (*People v. Turner* (1986) 42 Cal.3d 711, 728; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

D. THIS COURT MUST ENGAGE IN A COMPARATIVE ANALYSIS BETWEEN THE CHALLENGED AND SEATED JURORS WHEN EVALUATING THE SUFFICIENCY OF THE PROSECUTOR'S JUSTIFICATION FOR HIS PEREMPTORY CHALLENGES

In evaluating the sufficiency of the prosecutor's explanations for his peremptory challenges, a reviewing court should compare the reasons given for excusing the challenged jurors with the characteristics of those jurors who were allowed to serve. As explained by the United States Supreme

Court with regard to evaluating a prosecutor's reasons for using peremptory challenges to excuse a black juror: "More powerful than [] bare statistics [] are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El*, *supra*, 545 U.S. at p. 241.)

Again, in *Snyder v. Louisiana, supra*, __ U.S. __ [170 L.Ed. 176, 128 S.Ct. 1203, 1211], the United States Supreme Court evaluated the legitimacy of the prosecutor's proffered reasons for a challenged strike by comparing those reasons to white jurors accepted by the prosecutor.

Prior to the United States decision in *Miller-El*, this Court refused to engage in comparative juror analysis for the first time on direct appeal. (E.g., *Ervin, supra,* 22 Cal.4th at p. 76.) However, since the *Miller-El* decision this Court has undertaken such comparative juror analysis, assuming, without deciding, that it is appropriate for the first time on appeal. (See, e.g., *People v. Lewis, supra,* 43 Cal.4th at p. 472; *People v. Stevens* (2007) 41 Cal.4th 182, 196.)[79]

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[79] Appellant notes that *People v. Lenix*, No. S148029, which raises this precise issue, is presently pending before the Court.

In the instant case, appellant did make some arguments comparing seated and challenged jurors. (See 7 RT 1173 re: challenged jurors L.W. and D.M.; 7 RT 1313 generally pointing out the lack of distinguishing features between seated and challenged jurors.) However, the defense did not in all cases specifically compare the prosecution's proffered reasons for excusing the challenged jurors with other jurors who were not challenged. Nevertheless, Montes believes that in a number of instances the appellate record, which includes a transcript of the voir dire and jury questionnaires, is sufficient to permit review of this legal issue, even where a comparative analysis was not expressly undertaken below. (*Miller-El, supra*, 545 U.S. at p. 241, fn. 2.)

In fact, at least some comparative analysis is possible despite the fact that the juror questionnaires do not contain information for the race or ethnicity of the prospective jurors. With regard to the claim that the prosecutor improperly challenged African-American jurors, appellant has been able to determine the composition of the jury on the first two occasions when the prosecution accepted the panel. At the time of the *Wheeler* motion, the prosecutor had excused five of seven African-Americans who were in the jury box. The two African-American prospective jurors who were seated at that time, Juror No. 4 (see 5 RT 665) and Juror No. 7, are excluded from the appellant's comparative analysis,

post.[80] Appellant is also excluding Prospective Juror D.C. from the comparison since she is the subject of a discriminatory prosecution claim regarding Hispanic jurors.

E. THE PROSECUTOR IMPROPERLY EXERCISED PEREMPTORY CHALLENGES TO EXCUSE AFRICAN-AMERICANS AND HISPANICS FROM THE PETIT JURY

1. African-American Prospective Jurors

a. Prospective Juror D.M.

D.M. was a college graduate and had been employed for 16 years as a real estate appraiser. (16 CT 4567.) His sister had been a Los Angeles County prosecutor for 10 years. (16 CT 4571.)

The prosecutor's stated reasons for challenging D.M. was D.M.'s alleged opposition to the death penalty. (7 RT 1169.) At a later point, the prosecutor also said that Mr. D.M. talked to himself. (7 RT 1173.)

The district attorney's explanation for his challenge to D.M. is not persuasive. D.M. was generally in favor of the death penalty (rating himself as a 6 out of 10), and only had some reservations about capital punishment because it was seldom invoked against the wealthy. (16 CT 4582; 16 RT 907-908.) However, D.M. believed that in some heinous cases

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[80] See table appended as Exhibit A.

the death penalty needed to be imposed. (16 CT 4582-4583.) His sister (a prosecutor) had even been involved in capital case prosecution. (*Ibid.*)

Moreover, the prosecutor accepted other jurors who expressed less support for the death penalty than D.M. Juror No. 2 rated herself as neutral on the death penalty, with a score of 5 (9 CT 2326) and stated in her questionnaire that she had mixed feelings about the death penalty. (9 CT 2326.) Juror No. 8 (7 CT 1758) and Prospective Juror J.B. (14 CT 4010) also scored themselves as a "5" on the 1-to-10 scale. According to J.B's questionnaire, he did not "feel that anybody has the right to take another person's life." But would possibly reconsider if he was "100% sure a person was guilty of a crime worth giving the death penalty." (14 CT 4010.)

The record thus reveals that a significant number of trial jurors were accepted by the prosecution who voiced less support for capital punishment than D.M.

b. <u>Prospective Juror L.W.</u>

L.W. was a 62-year-old retired Air Force veteran with combat experience in Vietnam. (11 CT 3066, 3037-38.) His brother worked for the Department of Corrections. (11 CT 3040.) L.W. scored himself as neutral in his death penalty views, with a score of 5. (11 CT 3051.) L.W. believed the death penalty served no purpose. On the other hand, he believed each

case should be decided on an individual basis, for "each case is different." (11 CT 3052.)

To justify his peremptory challenge, the prosecutor stated that he had "a big vague area as to L.W. and what he does with his life. Wasn't able to clarify much." He noted that L.W.'s questionnaire indicated that he was widowed and retired from the military in 1974, but that there was "a complete void as to what he's been doing since 1974." The prosecutor was further concerned that L.W. had no opinion on the death penalty, yet felt it served no purpose. For this reasons, the prosecutor claimed that L.W. would not be listening to the prosecution argument in favor of a death sentence. (7 RT 1171-1172.)

As discussed in connection with Prospective Juror D.M., *ante*, L.W.'s relative neutrality on the death penalty was comparable to the rating of some jurors accepted by the prosecution.

Importantly, a primary reason the prosecutor gave for dismissing Prospective Juror L.W. was that he (the DA) was unsure what L.W. had done since his retirement from the Air Force in 1974. (7 RT 1171-1172.) But had this truly been of concern to the prosecutor, he could simply have asked L.W. for a more detailed explanation of his activities since 1974. Instead, the prosecutor confined his voir dire of L.W. to one brief, non-

specific question on the standard of proof beyond a reasonable doubt. (7 RT 1073.)

c. Prospective Juror K.P.

The justification offered by the prosecutor for his peremptory challenge of K.P. was that "[b]oth she and her husband had been through the justice system and been convicted of crimes. Her husband is involved in narcotics and spousal abuse. I believe she indicates that he is currently addicted to drugs and alcohol." (7 RT 1168.)

It was true that, according to her questionnaire, K.P. had suffered a prior conviction for petty theft and traffic warrants which had resulted in three days incarceration in the Los Angeles County Jail. (15 CT 4286.) Her husband had spent four months in jail for possession of narcotics and spousal abuse. (15 CT 4286.) But at the time of trial, K.P. had worked as a field service representative in Orange County for more than six years. (15 CT 4281.)[81]

A comparative analysis of the prosecutor's reasons for striking K.P. undermines the genuineness of the stated grounds for this challenge. K.P. was not the only member of the venire to report problems with law

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[81] Perkins was also neutral on the death penalty, with a view that imposition of capital punishment should be decided on a case-by-case basis. (15 CT 4296-4299.)

enforcement and substance abuse within the family. A number of jurors accepted by the prosecutor recounted similar troubles. Juror No. 2 reported that her father had a drinking problem which resulted in a conviction for driving under the influence and a suspension of his driver's license. (9 CT 2316.) Juror No. 8's brother had been convicted of driving without a license. (7 CT 1748.) Juror No. 11's husband had been convicted years ago of driving under the influence. (15 CT 2394.) This juror had used drugs in her youth, her sister had a drug problem, and her husband had a drinking problem, though he had been sober for two years. (15 CT 2395-2396.)

Prospective Juror D.M. (not the same person as the "D.M." who was the subject of the *Batson* motion) had a stepson with drug problems, resulting in juvenile court intervention and a drug program. (13 CT 3507.) Finally, Prospective Juror J.G. had been arrested and charged with domestic violence, although the charges were later dropped. (16 CT 4364.)

d. Prospective Juror W.J.

W.J. was married, the father of four children, and employed as a machine operator for the past six years. (6 CT 1586-1587.) He had completed high school and taken some classes at Long Beach State. (6 CT 1586-1587.) His mother was in law enforcement with the FBI in Los Angeles. (6 CT 1588.) W.J. had a misdemeanor conviction, and felt the

criminal justice system worked because he learned from the experience. (6 CT 1592.) W.J. favored the death penalty, describing it as "OK." (6 CT 1602.)

The prosecutor defended his peremptory challenge of W.J. as predicated "almost entirely" upon W.J.'s education. (7 RT 1169.) The prosecutor also noted that W.J. misspelled many words in his questionnaire. (6 RT 1169-1170.) As an afterthought, the prosecutor mentioned W.J. had a prior misdemeanor conviction. (7 RT 1170.) The court approved the reasoning, finding that W.J. had trouble comprehending simple questions asked on voir dire by Hawkins' trial counsel. (6 RT 1170.)

Contrary to the court's comment regarding voir dire, W.J. only appeared to be confused once during questioning by Hawkins' attorney. When that occurred, W.J. admitted his perplexity. (6 RT 1017.) In his remaining exchanges with counsel, W.J. gave appropriate answers, even when dealing with such nebulous concepts as rules for evaluating circumstantial evidence and aiding and abetting. (6 RT 1022-1024, 1026-1028, 1033.)

In addition, the prosecutor's justification with regard to W.J.'s education and lack of spelling skills are belied by a comparison with other jurors whom he accepted. W.J. graduated from high school, and attended college, studying computers. This was at least as much education as many

of the other jurors accepted by the prosecutor. Prospective jurors Bradford and Bardwell completed some junior college, but received no degrees. (14 CT 3787; 14 CT 3995.) Prospective Juror D.M.[82] had no college. And Prospective Juror S.Y. attended some college, but received no degree. (14 CT 3969.) Prosecutive juror D.M. also had numerous spelling errors in his questionnaire. (See, e.g., 13 CT 3512 ["I thing they are experts in that feild and are creditable."].)

e. Prospective Juror I.T.

Ms. I.T. was an army veteran who was employed as a customs inspector for the federal government. (1 CT 29-30.) She had been offered, but declined, a position with the Riverside Police Department. (1 CT 33.) I.T. had a brother incarcerated at San Quentin for murder (1 CT 34-35) but asserted that her brother's experience would not influence her decision-making. (7 RT 1083-1085.) I.T. described herself as generally opposed to the death penalty, with a score of 2 on a scale of 1 to 10. (1 CT 44.) She believed her Christian religion did not favor capital punishment. (1 CT 44-45.) I.T. nonetheless affirmed she would follow the law, and she would not automatically vote for death or life without the possibility of parole. (1 CT 46.) When questioned in camera regarding her views on the death penalty,

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[82] Again, not the same person as the "D.M." who was the subject of the *Batson* motion.

I.T. informed the court she could impose the death penalty for a single special circumstance murder, and that she would follow the law rather than any personal agenda. (7 RT 1141.)

Despite passing I.T. for cause on her death penalty views, the prosecutor defended the peremptory challenge on the basis of I.T.'s opinions about capital punishment. (7 RT 1170-1171.) Admittedly, I.T. did express reservations about imposing the death penalty, she did state that she would follow the law and impose it in the appropriate case.

Standing alone, the prosecutor's challenge to I.T. might not be remarkable. Judged in the context of the other challenges, however, it further supports a conclusion that the prosecutor was allowing race to influence his decisions to peremporily challenge certain jurors.

f. <u>Prospective Juror P.K.</u>

According to his questionnaire, P.K. was a 40-year-old single man with long-term employment as a custodian. (10 CT 2649.) His sister was employed by the Department of Corrections. (10 CT 2653.) As for the death penalty, P.K. scored himself as a 2 on a scale of 1 to 10 and explained he was opposed to the punishment in light of its application and history in this country. Despite his views, P.K. indicated that it was the law and he would follow it. Hence, he would not automatically vote for life without

the possibility of parole, but would instead consider all of the evidence in the individual case. (10 CT 2664-2666.)

The prosecutor defended his peremptory challenge on the basis of P.K.'s opposition to the death penalty. As with Ms. I.T, given P.K.'s assurances that he would follow the law and vote for a death sentence in the appropriate case, and especially when viewed in the context of other challenges, the prosecutor's justifications for the challenge should not have been credited by the trial court.

In summary, the prosecutor challenged six African-Americans in the venire, and the excuses offered to justify the peremptory challenges do not withstand scrutiny.

2. Hispanic Prospective Jurors

a. Prospective Juror D.C.

D.C. was married, 34 years old, and the mother of one. She had been employed for four years doing data base management. (12 CT 3268, 3296.) D.C. was a strong proponent of the death penalty, rating herself as an 8 on a scale of 1 to 10. Her commitment to capital punishment was at the level of an "eye for an eye" standard. (12 CT 3284-3286.) On the basis of her questionnaire, then, D.C. appeared to be a prosecution-oriented venire person.

D.C. was initially accepted by the prosecutor as an acceptable juror. (See Exhibit A.) In justifying his peremptory challenge of this pro-death penalty juror, the prosecutor said that D.C. somehow appeared "ditzy" and he got the impression that she was having a good time. (7 RT 1317.) She was excused by him as the composition of the jury changed because "after the make-up of the jury had changed and we got to a predominately female jury that somebody of that mental frame of mind wouldn't mix well with them. And based upon that, I excused her for that reason." (7 RT 1317.)

The prosecutor added that he asked for D.C. to be questioned in chambers based upon a negative experience she had with the Riverside Police Department, having to do with a "lazy" detective. (6 RT 905; 7 RT 1318.) However, when D.C. was questioned in chambers, the prosecutor did not address her. Instead, only Montes' attorney asked D.C. about her death penalty views to discern if a challenge for cause was appropriate. (6 RT 905-915.)

b. Prospective Juror L.C.

L.C. was 52 years old, married with two adult children, and an elder of the Seventh Day Adventist Church. (12 CT 3319, 3322.) L.C. was zealous in his support for the death penalty, scoring himself as a 10 on a scale of 1 to 10. (12 CT 3335.)

To defend his peremptory challenge of a resolute death penalty proponent, the prosecutor claimed L.C. was somehow contradictory in his support of capital punishment because of L.C.'s belief that life without parole is more severe than the death penalty. The prosecutor also pointed to L.C.'s role as a church elder, and said he had "a question as to what his true opinion was on the death penalty, and it draws into my mind perhaps he's not telling us everything." Nevertheless, the prosecutor did not ask to have L.C. questioned further on the subject in chambers because he did not "think it was necessary." (7 RT 1318.)

A belief that life without parole is more severe punishment is not contradictory to support for the death penalty, however. In this case, L.C. explained his support for the death penalty as follows: "because a person that kill another person, will always do it again." (12 CT 3336.) As for L.C.'s religion, his denomination did not take a position on the death penalty. (12 CT 3336.) Hence, there was no basis for the prosecutor to allege a purported inconsistency between L.C.'s support for the death penalty and his religion. And certainly, any concern about potential conflicts in L.C.'s views on the death penalty could have been explored further in chambers.

c. Prospective Juror D.L.

D.L. was a 44-year-old divorced postal worker, with 15 years employment with the federal government. (12 CT 3216-3217.) D.L. was neutral on the death penalty, scoring himself as a 5 out of 10, but indicating that he would follow the law. (12 CT 3232-34, 3237.)

The initial basis of the prosecutor's challenge was that D.L. had no opinion on the death penalty. The prosecutor also said he was troubled by D.L.'s education and two misspelled words on the questionnaire. Finally, he said that his reason for excusing D.L. was his lack of concern for any issues which people view as important. (7 RT 1319-1320.) However, D.L. graduated from high school, and his spelling was no worse than that of many other jurors. And D.L.'s disinterest in high-publicity criminal cases simply does not equate to a lack of concern for important issues.

d. Prospective Juror G.H.[83]

G.H. was married and the father of four adult children. He was a high school graduate with junior college training in auto body repair. (16 CT 4592-93.) For the six years preceding the time of trial, G.H. supervised a freight reception crew. (16 CT 4593.) He had prior

[83] Although the court did not think the name "Huish" was Hispanic, Mr. Huish indicated on his questionnaire that he was Hispanic. (16 CT 4606.)

experience as a juror in both criminal and civil cases. (16 CT 4596.) G.H.'s family was involved with law enforcement. (16 CT 4596-4697.) G.H. was an avid supporter of the death penalty, scoring himself as a 10 on a scale of 1 to 10. (16 CT 4608.)

The prosecutor claimed that his reason for excusing G.H. was because of a lack of education. And, according to the prosecutor, G.H. scribbled in his questionnaire and misspelled the word "manager." (7 RT 1321-1322.) As noted, however, G.H. had completed not only high school, but also attended school for auto body repair. He had been found qualified to sit as a juror in two previous cases. As far as "scribbling," G.H. simply scratched out places where he made changes to his questionnaire. The handwriting, while not stellar, is legible.

In summary, the prosecutor challenged four Hispanic venire members on the forbidden basis of race. The justifications offered to support the peremptory challenges do not withstand scrutiny. The prosecution's improper use of peremptories violated the Sixth and Fourteenth Amendments and the Equal Protection Clause to the United States Constitution, as well as article I, section 16 of the California Constitution.

F. THE TRIAL COURT DID NOT PROPERLY DISCHARGE ITS DUTIES TO CAREFULLY EVALUATE THE PROSECUTOR'S EXPLANATIONS

At the final stage of the *Wheeler/Batson* analysis, evaluation of the proffered explanations for the challenge in order to determine whether the defendant has established purposeful discrimination, the court must make a "sincere and reasoned attempt to evaluate the prosecutor's explanation. . . ." (*Fuentes, supra*, 54 Cal.3d at p. 718, quoting *People v. Hall, supra*, 35 Cal.3d at pp. 167-168.) In this regard, the court must ask whether the reasons given actually apply to the particular jurors challenged. (*Fuentes, supra*, 54 Cal.3d at p. 721.)

As can be seen by the detailed discussion in the preceding section, it is apparent that, at least for some of the jurors, the reasons given did not actually apply to the challenged juror. It follows that the trial court did not make a sufficient effort to evaluate the prosecutor's explanation.

G. THE TRIAL COURT IMPROPERLY ASSISTED THE PROSECUTOR BY SUPPLYING ITS OWN REASONS FOR EXCUSING THE JURORS

As noted earlier, a trial court should not try to bolster the reasons offered by the prosecution with new or additional reasons of its own. (*People v. Ervin, supra,* 22 Cal.4th at p. 77.) Here, the court assisted the prosecutor at several points by suggesting other explanations for the exercise of a peremptory.

After finding that a prima facie case had been shown with regard to the prosecution's use of peremptory challenges to excuse Hispanic jurors, the court, before listening to the prosecutor's own reasons, began providing its own possible reasons.

> [THE COURT]: As to C.P., his statement in No. 68 says, 'I'm generally against the death penalty. I believe in special cases it's proper.'
>
> Shows somewhat of a reluctance to apply the death penalty, as he indicated during the examination for cause.
>
> As to D.C., the Court takes note that — 11-b states, 'A police report —' 'Have you ever had good or bad experiences with:' It says, 'If yes, explain.' 'A police report regarding the molestation of my son was closed by Riverside P.D. because I refused to bring my 4-year-old son down to the police station for questioning.'
>
> That could indicate a bias for police, and that would be a reason for use of peremptory challenges. That might be. There might be others. This could be a reason.

(7 RT 1316.)

Shortly thereafter, as the prosecutor was giving reasons for excusing the jurors, the court again proffered its own possible explanations for the prosecutor's challenges.

> [THE COURT]: I also note that [Mr. D.L.'s] answer to 68 was 'Don't care for or against,' describing his general feeling for the death penalty.

(7 RT 1320.)

In the present case, instead of waiting to hear what reasons the prosecutor actually had, the court "assisted" and "second-guessed,"

supplying its own possible explanations for the challenges. As a result, the trial court failed to act as an unbiased evaluator of the prosecution's reasons.

H. THE ERROR IS PREJUDICIAL PER SE AND REQUIRES REVERSAL OF THE JUDGMENT

When the prosecutor abuses peremptory challenges to excuse members of a recognized group, the judgment must be reversed without regard to any additional showing of prejudice. (*People v. Turner*, *supra*, 42 Cal.3d at p. 728; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.) No arbitrary minimum number of challenges is required to establish a violation of the right to a jury selected from a representative cross-section of the community. (*People v. Silva* (2001) 25 Cal.4th 345, 386; *People v. Moss* (1986) 188 Cal.App.3d 268, 277.)

Similarly, when the trial court fails to discharge its duty to inquire into and carefully evaluate the prosecutor's explanations, the error is prejudicial per se. (*People v. Cervantes* (1991) 233 Cal.App.3d 323, 333.)

I. CONCLUSION

The prosecutor excused 10 venire members on the improper basis of race. The excuses tendered by the prosecutor were not persuasive. The trial court failed to scrutinize the justifications, and in several instances actively assisted the prosecutor in finding ways to explain the challenges. Reversal of the judgment is required.

X.

<u>IN MULTIPLE INSTANCES DURING THE GUILT PHASE, OVER APPELLANT'S OBJECTION, THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTION TO ELICIT INADMISSIBLE EVIDENCE. THE ADMISSION OF THIS EVIDENCE MUST BE CONSIDERED FOR ITS EFFECT ON THE PENALTY DECISION.</u>

In the next portion of his brief, Montes addresses a number of issues concerning the admission of evidence at the guilt phase of the trial. Singly and together these evidentiary errors created prejudice to the defense and necessarily carried over to taint the jury's penalty phase determination.

At the conclusion of the penalty phase, the jury was instructed with CALJIC No. 8.85 to "consider all of the evidence which has been received during any part of the trial of this case." (28 CT 7569.) This instruction was also emphasized by the prosecutor in both his opening and closing penalty arguments.

> [MR. MITCHELL]: The law tells us that you can consider all of the evidence received during the first part of the trial and all of the evidence that you're about to receive in this part of the trial. Everything that you've seen and heard before is evidence for you to consider circumstances of the crime, the manner in which it was committed. All of that evidence that you've had to deliberate and to resolve the guilt phase is before you now still in the penalty phase.

(41 RT 7251 – opening argument.)

> [MR. MITCHELL]: "Factors for consideration in the penalty trial. In determining which penalty is to be imposed

> on the defendant you shall consider all of the evidence which has been received during any part of the trial in this case."
>
> It means that you don't throw out everything you have heard and seen in the guilt phase. That is all part of this case. It is not repeated in the penalty phase because such would be redundant. But that is the bulk of evidence for you to consider in the penalty phase.

(45 RT 7870 – closing argument.)

In accordance with this instruction, therefore, the jury would have taken into consideration all of the evidence presented at the guilt phase, including all evidence to which Montes had objected, in reaching its decision to impose a sentence of death.

The standard for penalty phase error is whether or not there is a reasonable possibility that the jury would have rendered a different verdict had the error or errors not occurred. Under this standard, the Court must ascertain how "a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 984.) This "reasonable possibility" test is "the same in substance and effect" as the *Chapman* test applied to federal constitutional error. (*Id.* at p. 965.)

There was a substantial likelihood that some or all of the jurors considered some or all of the improperly admitted and prejudicial evidence described in the following sections. Under the circumstances of this case, the error cannot be found harmless beyond a reasonable doubt.

Moreover, permitting the jury to consider this irrelevant and prejudicial evidence when making the decision whether to impose a sentence of life or death rendered the death verdict unreliable in violation of the Eighth Amendment. The jury's use of erroneously admitted evidence and matters wholly irrelevant to the sentencing process undermines the reliability of the penalty determination. (*Johnson v. Mississippi* (1988) 486 U.S. 578.) Because it cannot be reliably determined that this evidence did not affect the penalty verdict, the Eighth Amendment requires reversal of the judgment.

Finally, since California law precludes the jury from considering evidence outside the listed statutory aggravating factors, the arbitrary deprivation of the right to have the jury make the decision without consideration of this evidence has resulted in a violation of Montes' federal Constitutional right to due process of law in violation of the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 3403; *Board of Pardons v. Allen* (1987) 482 U.S. 369; *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472; *Vitek v. Jones* (1980) 445 U.S. 480, 488-491; *Wolff v. McDonnell* (1974) 418 U.S. 539, 557.)

GANG EVIDENCE

Addressed below are a number of issues having to do with admission of gang evidence, including the qualification of the prosecutions' gang expert, Sergeant Beard.

XI.

THE PROSECUTION FAILED TO COMPLY WITH THE COURT'S ORDER TO DISCLOSE ITS GANG EXPERT IN A TIMELY FASHION. THE TRIAL COURT ERRED BY NOT FASHIONING SOME REMEDY, SUCH AS A CONTINUANCE, FOR THE DISCOVERY VIOLATION.

A. INTRODUCTION

The trial court initially took up admissibility of the prosecutions' proffered gang evidence on September 5, 1996. At that time, the trial court told the prosecutor that he would need to have an expert witness to present gang evidence. The defense voiced concerns about needing sufficient notice of the witness' identity and the specific evidence to be admitted. (3 RT 412-416.)

In response, the court specifically directed the prosecutor to provide the defense with the information on his gang expert by September 9, 1996. (3 RT 417.) The prosecutor did not indicate to the court that he would have any problem complying with this directive. Nevertheless, he failed to comply with the court's explicit discovery order.

The defense learned for the first time that Sergeant Beard was the proposed expert witness, when, on November 4, 1996, the court held a 402 hearing on Beard's qualifications and the admissibility of his testimony. (31 RT 5706-5751.) When her turn came to cross-examine Sergeant Beard, appellant's counsel, Ms. Sandrin, informed the court that the prosecutor had never told the defense who the proposed gang expert would be, and the following colloquy took place:

> [MS. SANDRIN]: Your Honor, I'm not ready. I found out about this gentleman this morning.
>
> [THE COURT]: Ask him questions. I'm not going to grant a continuance. You can ask questions. This is a very limited area.
>
> [MS. SANDRIN]: I'm going to put on the record that I'm winging it at this time. I thought about this officer coming here this morning and Court asked Mr. Mitchell to notify us of this two and a half months ago. This is the first I found out about him, is this morning. Any information he's articulating on the stand further is the first time when I found out, when he got on the stand.
>
> [THE COURT]: You may question.
>
> [MS. SANDRIN]: So I'm not prepared.
>
> [THE COURT]: You may question.
> Let's bring in jury in and send them home. It's obvious that this isn't going to finish today.
>
> [THE BAILIFF]: They're all downstairs.
>
> [THE COURT]: Bring them back. We'll bring them in. This is going to go on for 20 minutes and another 20

> minutes as we ask him questions. So we are not going to be able to do anything else today.
>
> Have at it.

(31 RT 5718.)

At the conclusion of the 402 hearing, the court found Beard qualified as a gang expert. (32 RT 5751.) His testimony before the jury commenced the next morning. (32 RT 5789.)

B. THE PROSECUTION'S FAILURE TO DISCLOSE ITS WITNESS INFORMATION WAS A DISCOVERY VIOLATION

A defendant has a right to the names and addresses of the prosecution witnesses, as well as an opportunity to interview those witnesses if they are willing to be interviewed. (See, e.g. *People v. Lopez* (1963) 60 Cal.2d 223, 246-247; *Clark v. Superior Court* (1961) 190 Cal.App.2d 739, 742-743.)

Failure to provide witness information is a discovery violation, as defined by Penal Code sections 1054-1054.7. Section 1054.1 provides in relevant part that "the prosecuting attorney shall disclose to the defendant or his or her attorney . . . (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial." This discovery requirement must be met at least 30 days prior to trial, unless the prosecutor shows good cause based on issues of witness safety. (§ 1054.7.) In *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, this court defined the statutory language as

referring to all witnesses the prosecution is likely to call. (*Id.* at p. 376, fn. 11.)

In the present case, on September 5, 1996, during in limine motions, the trial court made it clear that a gang expert witness would be required. The court also specifically directed the prosecutor to inform the defense by the following Monday, September 9, 1996, who that expert would be. (3 RT 417.) At no time did the prosecutor ask the court for additional time to comply with its directive. On November 4, 1996, almost two months later, the prosecution called Sergeant Beard as its proffered expert, without ever giving the defense notice.

Clearly, the failure to inform the defense of the identity of its gang expert prior to the 402 hearing was a discovery violation.

C. THE TRIAL COURT SHOULD HAVE TAKEN SOME REMEDIAL ACTION, INCLUDING GRANTING A CONTINUANCE, FOR THE FAILURE TO PROVIDE DISCOVERY

It is apparent from the comments of Montes' counsel, as well as counsel for Hawkins, that the defense was surprised by Sergeant Beard's appearance as the prosecution's proffered gang expert. Ms. Sandrin expressly told the court that she was unprepared, and that she was having to "wing" her examination. Under these circumstances, the trial court should have imposed some sort of sanction for the failure to provide discovery. At

a minimum, the court should have granted the defense a continuance so they could properly prepare to examine the witness concerning his supposed "expertise" in gangs.

Remedies and sanctions for discovery violations are set forth in section 1054.5. These include delaying or prohibiting the testimony of a witness and continuance of the matter. Here, the trial court responded to defense counsel's remarks about her lack of preparedness by immediately stating that it would not grant a continuance. The refusal of the trial court to consider a continuance or some ameliorative action to offset the discovery violation was an abuse of discretion and a denial of Montes' right to present a defense and to due process of law. (U.S. Const., 5th & 14th Amends.)

"Improper denial of a proper request for a continuance to prepare a defense constitutes an abuse of discretion and a denial of due process." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 325.) As recognized by the United States Supreme Court, although the decision on whether to grant a continuance is traditionally within the discretion of the trial court, "[a] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; accord, *People v. Mendez* (1968) 260 Cal.App.2d 302, 306.)

There is no mechanical test for deciding whether a court's denial of a request for continuance was so arbitrary that it violates due process. Rather, each case must be decided upon its own facts with particular attention to the reasons given the trial judge at the time the request is denied. (*Ungar v. Sarafite*, *supra*, 376 U.S. at p. 589.)

Further, where the denial of a continuance means that defense counsel is forced to proceed although unprepared, an accused's right to a fair trial and the effective assistance of counsel (U.S. Const., 6th Amend; Cal. Const., art. I, §15) is transgressed. (*White v. Ragen* (1945) 324 U.S. 760, 764; *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1; *People v. Fontana* (1982) 139 Cal.App.3d 326, 333.)

In the instant case, defense counsel represented to the court that she was unprepared to examine Sergeant Beard with regard to the new evidence which came out for the first time at the 402 hearing. Moreover, defense counsel's inability to effectively proceed was not due to any fault of her own. Rather, it was due to surprise at the undisclosed witness and his testimony on gang evidence matters.

Accordingly, Montes' rights to a fair trial, due process of law and the effective assistance of counsel were transgressed by the combined failure of the prosecution to provide timely discovery, and the refusal of the trial court to take appropriate ameliorative measures.

D. PREJUDICE

An important consideration in the instant case is that the witness' "expertise" was seriously at issue. Beard was not a well-recognized expert in the subject area, and had never qualified as a gang expert before. As can be seen from Argument XII, *post*, there were obvious problems with his qualification as a gang "expert." However, because of the discovery failure, and the court's refusal to take some ameliorative action, defense counsel was forced to "wing" her examination, and was hamstrung in her efforts to have Beard disqualified from testifying as an expert at the trial.

XII.

SERGEANT BEARD WAS NOT QUALIFIED TO TESTIFY AS A GANG EXPERT AND HIS TESTIMONY SHOULD HAVE BEEN EXCLUDED.

On November 4, 1996, the court conducted an Evidence Code section 402 hearing concerning the proposed testimony of the prosecution's gang witness, Sergeant Scott Beard of the Beaumont Police Department. In addition to arguing that the proposed testimony was not relevant to any contested issue (see Argument XIII, subsection C, *post*) appellant also argued that Beard lacked the necessary qualifications to provide expert testimony in this area. (32 RT 5746-5747.) The trial court found that Beard was sufficiently qualified to testify as a gang expert. (32 RT 5750-5751.) The court erred.

Expert testimony is permitted when the subject of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Evidence Code section 720 sets forth the qualifications for a person testifying as an expert witness.

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or

> education must be shown before the witness may testify as an expert.

(Evid. Code, § 720, subd. (a).)

The qualifications of an expert must be related to the particular subject on which he is testifying. It is not sufficient that the person is qualified only on related subject matters. (*People v. Hogan*, *supra*, 31 Cal.3d at p. 852.) Here, Sergeant Beard lacked the necessary training, experience and qualifications to provide expert testimony on gangs.

At the time of his testimony in this case, Beard had never qualified to testify in court as a gang expert. (31 RT 5717-5718.) Beard claimed six years general experience in law enforcement as support for his qualifications as a gang expert. (31 RT 5719.) During that six-year period, Beard received some 20 to 30 hours of gang-related training with various agencies, none of which concerned Vario Beaumonte Rifa (which Beard was unable to spell). (31 RT 5719; 32 RT 5792.) Only 5-10 hours of that training was on identification of gangs. (32 RT 5811.) Beard had no familiarity with gangs in Colton (the apparent gang references found in the notebook seized from appellant). (31 RT 5712-5713, 5720.)

Beard testified it was his "belief that *every* gang in Southern California would like to be somewhat associated with Eme or Mexican Mafia for identification purposes. . . ." (31 RT 5740, emphasis added.)

This included black and Anglo gangs. (32 RT 5740-5741.) According to Beard, there were black gangs that have an association with the Mexican Mafia, but he couldn't name any. (32 RT 5741-5742.) He did not know what the other two letters of the acronym "SUR" stood for, and had never heard of Southern United Race. (32 RT 5742-5743.) In fact, Beard conceded that Mr. Phillips (Gallegos' defense counsel) had more expertise than he (Beard) did. (32 RT 5743.)

In *People v. Williams* (1997) 16 Cal.4th 153, 195, this court found that three police officers were qualified to testify as gang experts in light of their special training and experience, including assignment to a gang unit for 7 years, 10 years and longer, as well as specialized gang seminar training, prior expert testimony in gang cases, and investigation of large numbers of gang murders.

Unlike the experts in *Williams*, who had years of specialized training and experience in gang issues, Beard had limited training, much less experience and no prior testimony as an expert. The trial court erred in finding that Beard was sufficiently qualified to testify as a gang expert in this case.

XIII.

THE TRIAL COURT ERRED BY ADMITTING GANG EVIDENCE.

A. PROCEDURAL HISTORY

Montes filed a motion in limine requesting the court to exclude any gang evidence from the trial in accordance with Evidence Code section 352 on the grounds that such evidence was irrelevant, inflammatory and substantially more prejudicial than probative. The defense noted that there was no contested issue as to identity since numerous witnesses had placed the three co-defendants together on the night of August 27, 1994. (3 RT 410-411.) Appellant also argued that introduction of this evidence would violate his state and federal constitutional rights to due process of law, confrontation, and an accurate and reliable determination of guilt and penalty. (25 CT 7026-7031.)

The prosecution contended that the gang evidence was relevant to show societal association between the co-defendants, and claimed that evidence of the association between the three co-defendants before, during, and after the offenses was relevant to the issue of aiding and abetting. (25 CT 7043-7049.) The prosecution also argued that gang evidence was necessary to explain the meaning of Montes' alleged "earning a stripe" comment. (25 CT 7049.)

Finally, the prosecution also suggested that any prejudice resulting from the admission of gang evidence could be cured by providing a limiting instruction to the jury and refraining from use of the word "gang" in testimony during trial. (3 RT 406.) The trial court overruled the defense objections to the evidence, but indicated a limiting instruction would be given.[84] The defense later renewed all objections to the admission of the gang evidence on all the state and federal constitutional grounds raised earlier. The objections were again overruled on all grounds. (33 RT 6066.)

B. THE "GANG EVIDENCE"

The prosecution presented its gang evidence via the "expert" testimony of Sergeant Beard.[85] In his trial testimony, Beard provided some general information about VBR. (32 RT 5792-5795.) He testified concerning an address book seized from co-defendant Hawkins' residence, specifically pointing to a list of gang monikers that had been written in the back of the book. (32 RT 5797-5798.) Beard also examined a notebook obtained from Montes' residence (Exhibit 36) which contained what Beard

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[84] Although the court instructed the prosecutor to avoid using the word "gang" in presenting evidence (3 RT 417-418), it was later agreed by the parties that the term "gang" could be used because the jurors would not be fooled by the attorneys referring to Vario Beaumonte Rifa as a "group." (9 RT 1637.)

[85] In a related argument, appellant contends that Beard was not qualified to testify as a gang expert.

characterized as "gang-graffiti, gang-type writing." (32 RT 5802-5806.) According to Beard, Montes' notebook included entries such as "Eastside" and "Colton." (32 RT 5803.) It also had the name "Huero." (32 RT 5804.)

Beard described for the jury the various tattoos on Hawkins, Gallegos and Montes. (32 RT 5801-5802, 5807.) Among other things, Hawkins had the name "Huero" tattooed on him, but Beard had no idea if the "Huero" in Montes' notebook was Hawkins. (32 RT 5812.) "Huero" could refer to a number of people. (32 RT 5818.) Montes had a "SUR XIII" tattoo (32 RT 5807, People's Exhibit 84) and "E.S.C." which stood for East Side Colton. (32 RT 5814.)

Over appellant's objection, Beard testified that a person could be "jumped in" to a gang by committing a crime for the group or by being beaten up. (32 RT 5808.) Committing a crime was one way of ingratiating oneself in order to become a member of the gang. Beard "believed" that VBR operated under one of those principles. (32 RT 5808.)

According to Beard, Hawkins was a member of VBR, and Gallegos was an "associate." (32 RT 5819, 5822.) However, neither Montes nor Varela were members of VBR. (32 RT 5809, 5823.) If anything, Montes appeared to be (or have been) a member of a gang in Colton, the area where he lived before moving to Beaumont. (32 RT 5803-5805, 5810, 5814.) Beard was not familiar with Colton gangs. (32 RT 5805, 5810-5811.)

At the conclusion of Beard's testimony, the trial court read the following limiting instruction to the jury:

> Ladies and gentlemen of the jury, testimony relating to gang membership was admitted for the limited purpose of showing, if believed, that there existed an association between two or more of the defendants at the time of the alleged crimes. It cannot be considered for any other purpose.

(32 RT 5827.)

The trial court erred by allowing introduction of gang evidence. The evidence had little or no probative value. Second, if some relevance is presumed for purposes of argument, the gang testimony was substantially more prejudicial than probative.

C. THE ERROR IN ADMITTING THE EVIDENCE

"The word gang . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) Because of the extremely inflammatory impact of gang evidence, this Court has condemned its introduction if it is only tangentially relevant to the charged offenses. (*People v. Cox*, *supra*, 53 Cal.3d at p. 660.) In fact, in cases such as the present one, which do not involve gang enhancements, this Court has held that evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

The general rule is that "evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223, citing *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.)

1. <u>The Gang Evidence Was Not Relevant</u>

Only relevant evidence is admissible. (Evid. Code, § 350.) Gang evidence may be relevant when it goes to a material issue in the case, such as motive, intent or identity. (See, e.g., *United States v. Abel* (1984) 469 U.S. 45, 49 [to impeach for bias]; *United States v. Santiago* (9th Cir. 1995) 46 F.3d 885 [to show motive for crime]; *People v. Contreras* (1983) 144 Cal.App.3d 749 [relevant to understanding activities of the group, identity and motive of defendant]; *People v. Williams, supra*, 16 Cal.4th 153 [relevant to defendant's motive]; *People v. Funes* (1994) 23 Cal.App.4th 1506 [relevant to defendant's intent].)

Because of its inherent prejudicial effect, gang evidence should be excluded if not relevant to a material element in dispute. In *Dawson v. Delaware* (1992) 503 U.S. 159, the Supreme Court reversed a death sentence because it found that the gang evidence admitted during trial "was not tied in any way to the murder of the victim." (*Id.* at p. 166.) In a comparable state decision, admission of gang evidence was held to be error

where "the probative value of the evidence with regard to disputed issues or facts in the case was minimal if not nonexistent." (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 343.) Further, this court has consistently held that gang evidence is irrelevant and substantially more prejudicial than probative when it is not connected to proof of the charges. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 942.)

In the present case, gang evidence was not relevant to proof of any material issue. In fact, the "issue" on which the evidence was offered — to prove the association of the codefendants — was not even in dispute. The evidence was uncontested that Montes, Gallegos and Hawkins arrived at the Varelas' party together. The evidence was also uncontested that Varela, Gallegos and Montes left together with the car. Although there was some attempt to raise a doubt about whether Hawkins left with the group, no effort was made to limit the gang evidence to Hawkins alone. There was simply no need to bolster evidence of the defendants' "association" by introducing gang evidence.

Further, although one might theorize that gang evidence could be relevant in some circumstances to prove association if it had been established that all defendants were active members of the same gang, that was not the evidence in this case. Rather, it was clear that appellant and his co-defendants were not linked by membership in a gang. Only Hawkins

was identified as belonging to VBR. According to Beard, Gallegos was merely an associate of VBR. Neither appellant nor Varela were members or associates. (32 RT 5809, 5823.)

The admission of gang evidence in this case was clearly error because it did not even meet a threshold showing that it pertained to any material issue in the case.

2. Any Presumed Relevance Of Gang Evidence Was Substantially Outweighed By Its Inherently Prejudicial Effect

Even if it is assumed the contested evidence had some marginal relevance, it was far outweighed by the prejudice inherent in the testimony. Pursuant to Evidence Code section 352, a trial court should exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Prejudice within the meaning of Evidence Code section 352 refers not to damage to the defense from relevant, probative evidence, but rather "the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 958.)

This Court has repeatedly acknowledged that gang evidence is highly inflammatory and prejudicial. (*People v. Williams*, *supra*, 16 Cal.4th

at p. 193; *People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 942; *People v. Cox*, *supra*, 53 Cal.3d at p. 660; *People v. Cardenas*, *supra*, 31 Cal.3d at p. 905.) Federal decisions likewise recognize the highly inflammatory and prejudicial nature of gang evidence. (*Dawson v. Delaware*, *supra*, 503 U.S. at p.165; *United States v. Roark* (8th Cir. 1991) 924 F.2d 1426, 1434.)

The reported cases view gang evidence as prejudicial because it is inflammatory and tends to establish the criminal propensity or disposition of the purported gang member. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 942; *Dawson v. Delaware*, *supra*, 503 U.S. at p. 165.) As this court has stated: "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox*, *supra*, 53 Cal.3d at p. 660; see also *People v. Anderson* (1978) 20 Cal.3d 647, 650-651.)

Importantly, when gang evidence is offered to establish a significant social relationship, where other evidence has established that "relationship," then common membership evidence is cumulative and, if prejudicial, inadmissible. (*People v. Cardenas, supra*, 31 Cal.3d at p. 904; *People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 342.)

In the instant case, the prosecution was allowed to interject amorphous gang evidence into a non-gang case, exposing appellant to significant prejudice without providing evidence with any probative value.

D. SINCE THE EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE, IT SHOULD HAVE BEEN EXCLUDED

The admission of gang evidence in this case was substantially more prejudicial than probative. Any marginal relevance the so-called association evidence may have had was significantly outweighed by the prejudice to Montes.

The testimony and evidence related to "gangs" (which apparently sought to brand Montes as some kind of a generic gang member) was not relevant to proof of any defendants' intent, motive, identity, or any other material issue in dispute. Additionally, association was not an issue given the simultaneous arrival of the defendants and their interactions during the course of the party. Appellant, Hawkins and Gallegos were positively identified by numerous witness as arriving together in Walker's car. (E.g., 16 RT 2697-2698; 17 RT 2856-2858; 18 RT 3062-3063; 20 RT 3358-3359, 3363.) Accordingly, to the extent the evidence may have been relevant to prove association, it was merely cumulative.

When evidence is cumulative, particularly when the highly-inflammatory category of gang evidence is involved, this weighs strongly

against its admissibility. (See *People v. Cardenas, supra* 31 Cal.3d 807, 904; *People v. Davis* (1996) 42 Cal.App.4th 806, 813.) As in *Cardenas*, the gang evidence in this case was introduced as a way to prejudice and inflame the passions of the jury against appellant and his co-defendants. Accordingly, the evidence should have been excluded pursuant to Evidence Code section 352.

E. THE ERROR IN ADMISSION OF THIS EVIDENCE VIOLATED MONTES' RIGHTS TO DUE PROCESS OF LAW AND A FAIR PENALTY TRIAL, AND WAS PREJUDICIAL TO THE PENALTY VERDICT

The erroneous admission of this evidence violated Montes' state and federal rights to due process of law, and rendered his penalty phase trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) As discussed above, gang evidence is particularly prejudicial, and is certainly more so where, as here, it is allowed to infect a jury's decision whether a defendant should live or die.

"To determine whether an evidentiary ruling denied defendant due process of law, 'the presence or absence of a state law violation is largely beside the point' because 'failure to comply with the state's rule of evidence is neither a necessary nor a sufficient basis' for granting relief on federal due process grounds." (*Albarran, supra*, 149 Cal.App.4th at p. 229, quoting *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.)

As noted, the court did give a limiting instruction in the guilt phase when the evidence was admitted. This did not alter the fact the court erred in admitting the evidence, however. One purpose of an in limine motion is to avoid the obviously futile attempt to "unring the bell" if evidence is admitted but stricken, reflecting the appellate courts' understanding that some evidence simply will not be erased from the minds of jurors by a court's directive. (See *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337.) A limiting instruction is certainly no more effective than a directive to disregard evidence entirely, especially with evidence as inflammatory as gang evidence.

In addition, the limiting instruction given by the court at the guilt phase did not carry over to prevent the jury's consideration of this highly inflammatory evidence in making its penalty decision. This is because the jury was not only specifically instructed at the penalty phase with CALJIC No. 8.85 to "consider all of the evidence which has been received during any part of the trial of this case" (28 CT 7569), it was also directed to *disregard* the instructions it was given in the guilt phase. (44 RT 7970-7971.) This would have included the court's guilt phase limiting instruction on gang evidence. The jury was therefore left free to consider gang evidence for improper and prejudicial purposes in its penalty determination.

Moreover, the gang evidence, and the prosecutor's direct and implied references to it during both the guilt and penalty phases, was extremely inflammatory, "such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (*Albarran, supra*, 149 Cal.App.4th at p. 230.) For example, in arguing aiding and abetting liability based on the requisite mens rea, the prosecutor asserted that the association or companionship of the defendants supplied circumstantial evidence of shared intent. (36 RT 6483-6484.)[86] Similarly, the prosecutor argued that none of the defendants could have been ignorant of the presence of Mark Walker in the trunk because the gang ties among the defendants meant that even if initially one of the group did not know Walker was in the trunk he would have been told of Walker's presence by one of the others who did know. (38 RT 6767, 6771-6772.)

In his argument on these points the prosecutor also highlighted the negative aspect of this evidence.

> [Mr. Mitchell]: And if you look at the common friends that each of them have, Smiley, George Hernandez, you see

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[86] But see *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243 ["[m]embership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting.] Accord *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir.), cert. denied, 118 S.Ct. 295 (1997), overruled in part on other grounds, *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc)."

> the big picture, you see the relationship between these people.
> You see not only how connected they are *but what they're connected in.*

(38 RT 6769, emphasis added.)

Furthermore, at penalty phase the prosecution made repeated attempts to elicit testimony about Montes' supposed gang activities between his childhood and the time of the offense. (See, e.g. 42 RT 7544; 7555-7557 and Argument XXXIII, subsection B, *post.*)

As discussed in Argument V, subsection H.2, and Argument X, *ante*, any error in the admission of evidence which may have affected the jury's decision whether or not to impose a sentence of death requires that the penalty verdict be reversed.

XIV.

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE AUTOPSY PHOTOGRAPHS OF THE VICTIM. THE ADMISSION OF THIS EVIDENCE VIOLATED MONTES' STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. INTRODUCTION

The defense objected to the admission of autopsy photographs (People's No. 10, photos A-I and No. 11, photographs A-F.) (11 RT 1854, 1862.) The objection was specifically grounded on the federal constitutional (U.S. Const., 5th, 8th, & 14th Amends.) and contended that admission of these photos would result in a denial of due process because of their inflammatory nature. The defense also argued that any potential death sentence would be rendered arbitrary and capricious. (11 RT 1865.) Montes hereby urges that the same grounds compel a finding that admission of this evidence was error, and requires reversal of his death sentence.

On September 19, 1996, the trial court conducted a hearing regarding admission of these, and other, photographs. The court examined the challenged photographs, and declined to exclude them from evidence. (11 RT 1860, 1864-1865.) At the conclusion of the guilt phase evidence all defendants, including Montes, objected to admission of Exhibits 10-14. (34 RT 6216.) The objections were overruled. (34 RT 6216.)

Again, at the close of the guilt phase arguments, Montes' counsel objected to the prosecutor's use of the photographs during his closing argument. Montes' counsel contended that the autopsy photos were used in closing, not because of any probative value, but rather to inflame the jury. (41 RT 7214.) The court ruled that there had been no misconduct. (41 RT 7216.)

A trial court has broad discretion to decide whether the probative value of photographic evidence outweighs any prejudicial effect under Evidence Code section 352. (*People v. Carpenter* (1997) 15 Cal.4th 312, 385; *People v. Anderson* (2001) 25 Cal.4th 543, 590-594; *People v. Lewis* (2001) 25 Cal.4th 610, 640-642.) Nevertheless, in the instant case the trial court abused its discretion by admitting the autopsy photographs.

Moreover, the admission of this evidence transgressed Montes' state and federal constitutional rights to a fair trial, due process of law and a reliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, and corresponding California Constitutional provisions.

B. DESCRIPTION OF THE EVIDENCE ADMITTED OVER OBJECTION

Exhibit 10 contains nine photographs of the victim at the time of the autopsy. Exhibit 10-D shows Walker on the autopsy table dressed in a

t-shirt, shorts and tennis shoes, with an apparent gunshot wound near the right eye, and the rear of his shirt soaked with blood. Exhibit 10-B shows the victim turned onto his right side, with the T-shirt pulled up on his back. The shirt and shorts are soaked with blood. Exhibit 10-C, taken from the foot of the autopsy table, shows Walker on his back, with one shoe removed and his shirt pulled up. (Exhibit 10-C.)

Another photograph shows a close-up of the victim's head, with the area around an apparent wound shaved and a ruler held near the head. (Exhibit 10-D.) The photograph in Exhibit E shows an entrance wound to Walker's right eye. (Exhibit 10-E.) The next photograph shows an entrance wound to the mouth. The victim's eyes are open in a death stare.[87] (Exhibit 10-F.) Photographs G and H show wounds to the left side of the face. (Exhibits 10-G and 10-H.) Photograph G shows a close-up of Walker's face before he was cleaned up. The body is unwashed with long streaks of blood running from the mouth and nose toward the back of the head. Blood is caked in the ear and on the neck. A gaping wound is visible on the victim's cheek. His eyes are open in a death stare. In photograph H,

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[87] Even the prosecutor acknowledged that Exhibit 10-F "bothered" him because of the death stare. He stated his willingness to find a way to cover the eyes, but it is not apparent that this was ever done. (11 RT 1856.)

Walker's head is on a headrest. The last photograph in the set shows an entrance wound in the lower neck area. (Exhibit 10-I.) (11 RT 1854-1859.)

Exhibit 11 contains another array of photographs. In the first photograph, the victim's back is shown. Two or perhaps three exit wounds are visible, with a ruler being held near a wound on the left side of the victim's back. (Exhibit 11-A.) A second picture shows the ruler being held near a wound on the right side of the back. (Exhibit 11-B.) The next photograph in order depicts the victim's back and head with a T-shirt pulled up to expose blood and wounds prior to any cleaning of the body. (Exhibit 11-C.) Photograph 11-C shows the location where it appears that a bullet went through the shirt.

In another photograph, the victim is turned onto his right side, again with the T-shirt pulled up to expose blood and exit wounds. (Exhibit 11-E.) Finally, there is a close-up of an apparent bullet bulging up the skin of the victim's back. A ruler is visible next to the lump. (Exhibit 11-F.)

For the reasons discussed below, the trial court erred in permitting these inflammatory photographs to be introduced into evidence.

C. THE TRIAL COURT ERRED BY NOT EXCLUDING THE PHOTOGRAPHS IN ACCORDANCE WITH EVIDENCE CODE SECTION 352

1. The Evidence Was Neither Relevant Nor Probative

The rules pertaining to the admissibility of photographic evidence are well settled. Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau, supra,* 6 Cal.4th at pp. 176-177; *People v. Babbit* (1988) 45 Cal.3d 660, 681.)

> Relevant evidence is defined by Evidence Code § 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevancy as applied to evidence is whether it tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]

(*People v. Garceau, supra,* 6 Cal.4th at p. 177.)

As with the admission of evidence generally, the trial court has broad discretion in determining the relevance of evidence (*Garceau, supra,* 6 Cal.4th at p. 177; *People v. Crittenden, supra,* 9 Cal.4th at p. 132; *People v. Babbit, supra,* 45 Cal.3d at p. 681) but lacks discretion to admit irrelevant evidence. (*People v. Crittenden, supra,* 9 Cal.4th at p. 132; *People v. Burgener* (1986) 41 Cal.3d 505, 527.)

In *People v. Turner, supra,* 37 Cal.3d 302 (disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149) this Court ruled that photographs offered to show the position of the victims' bodies

and the nature of their wounds were erroneously admitted where "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of the infliction of the wounds to the issues presented." (*Turner, supra*, 37 Cal.3d at p. 321.)

A similar result was reached in *People v. Marsh* (1985) 175 Cal.App.3d 987, in which the court found that the admission of seven gory autopsy photographs did not aid the jury in any way and was instead a "'blatant appeal to the jury's emotions.'" (*Id.* at p. 998; quoting *People v. Smith* (1973) 33 Cal.App.3d 51, 69, disapproved on other grounds *People v. Wetmore* (1978) 22 Cal.3d 318, 324, fn. 5.) The *Marsh* court reasoned that the evidence was irrelevant because the testimony of the autopsy surgeon was comprehensive, the primary cause of death was not in dispute, no expert testimony contrary to the autopsy surgeon's findings was presented and no other medical witness referred to the photographs.

Likewise, in *People v. Anderson, supra*, 43 Cal.3d at p. 1137, this Court found that photographs of the victim "seem relevant only on what in this case is a non-issue [i.e. whether a human being was killed] and therefore should not have been received into evidence." Abuse of discretion in the admission of such evidence has also been found in the admission of gruesome autopsy photos where the chief purpose was to "inflame the jury's emotions against defendant." (*People v. Burns* (1952)

109 Cal.App.2d 524, 541; *People v. Redston* (1956) 139 Cal.App.2d 485, 491.)

In the instant case, the photographs were wholly irrelevant because they were not probative of any matters in dispute. Neither Montes nor his co-defendants contested any issue on which the photographs were purportedly relevant. (See 11 RT 1859-1860.) Furthermore, the photographs did not serve to clarify or elucidate the cause of death or the nature and extent of the wounds inflicted. They were, therefore, not probative of any contested matter.

No one contested the fact of the Walker's death. Dr. Choi testified at length as to the wounds inflicted on Walker, and a mannequin with probes was used to illustrate the path of the various wounds inside the victim's body. (30 RT 5415-5467.) In addition, the jury had photographs that were taken at the scene, including ones showing the victim in the trunk of the car. (E.g., Exhibits 2-E through 2-H and 3-B and 3-H; see 11 RT 1849-1853.) These photographs clearly depicted the circumstances surrounding the murder. Thus, even without the autopsy photographs objected to, the other evidence in this case explained: (1) the cause of death; (2) the nature and extent of the wounds inflicted; and (3) the location of the victim's body. Because there simply were no contested facts with respect to any of the

issues related to the cause or nature of death, the photographs were not probative of any material issue.

Even if this evidence might have been preliminarily admissible, it was merely cumulative and therefore should have been excluded. "If evidence is merely cumulative with respect to other evidence which the People may use to prove the same issue, it is excluded under a rule of necessity." (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) This rule applies to photographs.

Where, as here, certain photos are not necessary to clarify or explain a material matter in dispute, there is "no added probative value. . . . They supply no more than a blatant appeal to the jury's emotions." (*People v. Smith*, *supra*, 33 Cal.App.3d at p. 69; see also *People v. Boyd* (1979) 95 Cal.App.3d 577, 589-590; *Anderson*, *supra*, 43 Cal.3d at p. 1137.)

2. <u>The Photographs Were Unduly Prejudicial</u>

Even if this Court concludes that the evidence was sufficiently relevant to be admissible, the trial court nevertheless erred in failing to exclude the photographic evidence as cumulative and unduly prejudicial pursuant to Evidence Code section 352.

In addition, the photographs were unduly prejudicial. This Court has "described the 'prejudice' referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke emotional bias against

a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau*, *supra*, 6 Cal.4th at p. 178.)

Victim photographs and other graphic items of evidence in murder cases are always disturbing. (*People v. Hendricks* (1987) 43 Cal.3d 548, 594.) And, "[i]f the principal effect of demonstrative evidence such as photographs is to arouse the passions of the jury and inflame them against the defendant because of the horror of the crime, the evidence must of course be excluded." (*People v. Carter* (1957) 48 Cal.2d 737, 751.)

That was precisely the situation in the instant case. The photographs discussed above were certainly disturbing, and the principal effect of this evidence was to arose the passions of the jury. There was little, if any, probative value to the evidence, and any value there may have been was outweighed by its prejudicial effect. Accordingly, the trial court erred by refusing to exclude this evidence from the jury's consideration.

D. MONTES' RIGHT TO A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT WAS VIOLATED BY THE ADMISSION OF THIS UNDULY PREJUDICIAL AND IRRELEVANT EVIDENCE

The Due Process Clause of the Fourteenth Amendment guarantees to criminal defendants in state court proceedings the right to a fundamentally fair trial. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342.) This

guarantee of a fundamentally fair trial may be violated by the admission of irrelevant and prejudicial evidence. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1466.) "Unnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment." (*People v. Marsh, supra*, 175 Cal.App.3d at p. 997; see also *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548 [admission of irrelevant and lurid photographs may render a trial fundamentally unfair].) When a trial court's ruling admitting prejudicial evidence renders a trial fundamentally unfair, regardless of whether the ruling complies with or violates state evidentiary law, the ruling runs afoul of the Due Process Clause. (*Jammal v. Van De Kamp, supra*, 926 F.2d at p. 919.)

In the present case, the multitude of photographs depicting the victim can only be described as gruesome in nature. Even the prosecutor used similar terms when describing the photographs to the jury, referring to them as "graphic" and "disgusting." (38 RT 6751.) The photographs consisted of close-up views of the victim's wounds, multiple exposures of similar views and several views of the victim's face with eyes open in a death stare. As noted with regard to relevance, the photos did not serve to illuminate any testimony given at trial. Therefore, the principle effect of the

photographs was to inflame the passions of the jurors against Montes in such a way as to deprive Montes of his right to a fair trial.

Admission of the inflammatory autopsy evidence thus violated appellant's state and federal rights to a fundamentally fair trial, in violation of his right to due process of law. (U.S. Const., 6th & 14th Amends.; *McKinney v. Rees*, *supra*, 993 F.2d 1378; *Kealohapauole v. Shimoda*, *supra*, 800 F.2d at p. 1466; Cal. Const., art. I, § 16.)

E. MONTES' EIGHTH AMENDMENT RIGHT TO A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION WAS TRANSGRESSED BY ADMISSION OF THE AUTOPSY PHOTOGRAPHS IN THE GUILT AND PENALTY PHASES

As discussed in the preface to the guilt phase evidentiary issues (see Argument X, *ante*) Montes' contention is that errors in the admission of evidence in the guilt phase impacted the jury's penalty determination. Here, the error in admission of autopsy evidence not only deprived Montes of his right to a fundamentally fair penalty trial in violation of his right to due process of law (see subsection D, *ante*) it also transgressed his right to a reliable penalty determination in violation of the Eighth Amendment. (*Johnson v. Mississippi*, *supra*, 486 U.S. 578 [consideration of erroneous evidence and matters wholly irrelevant to the sentencing process undermines the reliability of the penalty determination].)

F. MONTES WAS PREJUDICED BY ADMISSION OF THE AUTOPSY PHOTOGRAPHS

When a prosecutor exploits erroneously admitted evidence during closing argument, the error is far more likely to be prejudicial to the defendant. (See e.g., *People v. Woodward* (1979) 23 Cal.3d 329, 341.) Here, the prosecutor drew specific attention to the photographs and their graphic nature during his closing argument at guilt phase. "[Mr. Mitchell]: That's how Mark Walker ended up, on an autopsy table. . . . The photographs are graphic. They're disgusting." (38 RT 6751.)

The prosecutor was correct in his characterization of these photographs. That is precisely why they should not have been admitted, and why it is reasonably possible that the erroneous admission of this evidence influenced the jury's decision to impose a penalty of death rather than life without the possibility of parole. (See prejudice discussion in Argument V, subsection H.2, and Argument X, *ante*.)

XV.

THE TRIAL COURT ERRED BY ADMITTING, OVER OBJECTION, EVIDENCE OF A STATEMENT BY VICTOR DOMINGUEZ TO GEORGE VARELA THAT GEORGE WAS "RIDING WITH A 187."

A. BACKGROUND

Before the commencement of opening arguments in Montes' case, his counsel raised an objection to evidence referred to by the prosecution in its opening argument before the Varela jury. The objection was to a statement purportedly made by Victor Dominguez to George Varela when George dropped Montes at his home the day following the murder, that George was "riding with a 187." (12 RT 1933.) Montes' objection was that the statement was double hearsay and was irrelevant.

The prosecution argued that the statement was admissible as nonhearsay to explain George Varela's subsequent conduct, and as circumstantial evidence that Montes made phone calls to others, including Dominguez, admitting the killing. (12 RT 1933-1934.) The court agreed with the prosecutor that the statement was "probably admissible" and refused to order the district attorney to delete it from his opening statement. (12 RT 1934.) Thereafter, in his opening statement before Montes' jury, the prosecutor related the following:

> And George will tell you that as he drives Joe Montes home to 10th and Magnolia, he pulls up to his house, and here comes Victor Dominguez. And Victor Dominguez is a friend of George's and a cousin of Joe's. Victor comes running up to the car and say, hey, man, you're riding with a 187. 187 is Penal Code for murder. And George, according to George, finally realizes he's not getting a bunch of bullshit from Joe; this is true.

(12 RT 1958.)

Later, during George Varela's trial testimony, the court again overruled appellant's hearsay objection to this testimony. The court found that Dominguez' statement was not offered for the truth of the matter, but was offered to explain George Varela's conduct. The court admonished the jury that the statement was admitted only to explain George Varela's further actions. (25 RT 4472.)

Thereafter, George Varela testified that, after hearing this statement about riding with a "187," he and appellant got out of his car. He did not tell appellant to get out of the car, and in fact, appellant got out after he did. George, Victor and appellant then went into appellant's house. (25 RT 4473.)

B. THE STATEMENT WAS HEARSAY

The hearsay rule is codified in Evidence Code section 1200, which provides that: "(a) Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is

offered to prove the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible." The proponent of hearsay evidence has the burden of proof that a statement comes within an exception to the hearsay rule. (Jefferson, California Evidence Benchbook (1972) § 1.3, p. 5.)

The statement at issue was clearly hearsay. In fact, it was quite possibly multiple hearsay. First, George's testimony about Victor Dominguez' out-of-court statement related hearsay (Domingez' statement). Second, the source of Dominguez' "knowledge" was never established. It may have been nothing more than rumor. More likely, it came from the police officers who had already been over to the Montes' residence before George and Montes arrived there.

C. THE STATEMENT WAS NOT PROPERLY ADMISSIBLE FOR A NON-HEARSAY PURPOSE

"An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute." (*People v. Turner* (1994) 8 Cal.4th 137, 189.) The trial court admitted Dominguez' statement for the non-hearsay purpose of explaining George Varela's actions after hearing Dominguez' statement.

> "[O]ne important category of nonhearsay evidence [is] evidence of a declarant's statement that is offered to prove

> that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with the belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement."

(*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907, quoting Jefferson, California Evidence Benchbook (1978 supp.) § 1.5, p. 21.)

In the instant case, the out-of-court statement was not admissible for this purpose. There is simply no way to say that George Varela acted in conformity with any belief that the "riding with a 187" statement was true. When the statement was allegedly made, George and Montes had already arrived at Montes' house. After hearing the statement, George and appellant both got out of the car, and they, along with Victor Dominguez, went inside the Montes home. There was simply no "reaction" to the statement by George Varela which justified its admission.

Additionally, George Varela's actions after hearing the statement were irrelevant. "A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute. (§ 350; Jefferson, California Evidence Benchbook (1972 ed.) § 1.3, pp. 5-10.)" (*People v. Armendariz* (1984) 37 Cal.3d 573, 585.) Here, George's reaction, or state of mind, after hearing

the "187" statement, and any actions he took based thereupon shed no light on any issues presented in the case. (*Scalzi*, *supra*, 126 Cal.App.3d at p. 907.)

D. THE ERROR WAS PREJUDICIAL AND WAS NOT CURED BY THE LIMITING INSTRUCTION

"The danger of prejudice to the appellant in that the jury would use the statement in a hearsay manner despite the court's limiting instruction is obvious." (*Scalzi*, *supra*, 126 Cal.App.3d at p. 907.) Here, the evidence was of a particularly damning nature, since it identified Montes as the person who killed Mark Walker. The likely prejudice was therefore not eliminated by the court's admonition that the statement was admitted only to explain George Varela's further actions. This is particularly true with regard to the impact of this evidence on the penalty determination, since the jury was directed to disregard all guilt phase instructions. (44 RT 7970-7971.)

Accordingly, this error, which created a possibility that one or more jurors decided to impose a sentence of death because they believed that Montes was the person who actually killed Walker, requires reversal of the death sentence. (See prejudice discussion in Argument V, subsection H.2 and Argument X, *ante*.)

XVI.

THE TRIAL COURT ERRED BY PERMITTING GEORGE VARELA'S TESTIMONY CONCERNING HIS SUBJECTIVE STATE OF MIND REGARDING MONTES' IDENTITY AS THE SHOOTER.

A. THE EVIDENCE

George Varela was twice permitted to testify, over appellant's objection (25 RT 4472-4473, 26 RT 4737) that once Victor Dominguez told him he was "riding with a 187," he changed his mind about not believing Montes' story that he had killed Walker, and "finally realized that he [Montes] did it." (25 RT 4473, testimony on direct as witness for prosecution; and 26 RT 4737, testimony during examination by counsel for Sal Varela.)

> [MR. BELTER]: Prior to going into Joe Montes' house, had you become convinced that he actually had killed somebody?
>
> [MS. SANDRIN]: Objection — relevance.
>
> [THE COURT]: Overruled.
>
> [MR. BELTER]: Had you become convinced that he had actually killed anybody?
>
> [GEORGE VARELA]: Yeah.
>
> [MR. BELTER]: What was your thought?
>
> [MS. SANDRIN]: Objection — relevance.

[THE COURT]: Overruled.

[MR. BELTER]: That is, before you went into the house?

[GEORGE VARELA]: I didn't — Right, like, well, when I got told at first, I didn't believe it, until, like, Victor told me, and that's when I —

[MS. SANDRIN]: Objection — nonresponsive.

[THE COURT]: Overruled.

[GEORGE VARELA]: — finally realized that he did it.

(26 RT 4737.)

B. ADMISSION OF THIS EVIDENCE WAS ERROR

Admission of this evidence was error. George's testimony that he believed it when Dominguez told him that Montes had committed a murder, was implicitly a lay opinion about Dominguez' veracity. Lay opinion testimony concerning the truth or falsity or another's statement is inadmissible to support or attack the credibility of the declarant. (*People v. Melton* (1988) 44 Cal.3d 713, 744.)

> With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where "helpful to a clear understanding of his testimony" (*id.*, 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise

> be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (*Id.*, 780, subds. (a)-(k)). Thus, such an opinion has no "tendency in reason" to disprove the veracity of the statements. (*Id.*, 210, 350.)

(*People v. Melton*, *supra*, 44 Cal.3d at p. 744. See also *People v. Smith* (1989) 214 Cal.App.3d 904, 915 [police officer could not properly give lay opinion that dying declaration was truthful]; *People v. Serg* (1982) 138 Cal.App.3d 34, 38-40 [police officers' testimony that they believed child's complaint of sexual abuse was irrelevant, whether they testified as lay witnesses or as experts].)

In the instant case, George's opinion about the veracity of Victor Dominguez' statement was irrelevant. This evidence was therefore inadmissible.

C. PREJUDICE

For the reasons discussed in Argument V, subsection H.2, any error in admitting improper evidence which may have led the jury to believe that Montes was the one most culpable for Walker's death requires reversal of the death sentence in this case.

XVII.

MONTES' CONSTITUTIONAL RIGHTS WERE VIOLATED BY ADMISSION OF KIM SPECK'S TESTIMONY WHICH CONVEYED TO THE JURY THAT SAL VARELA HAD IMPLICATED MONTES AS THE PERSON WHO SHOT MARK WALKER.

A. DEVELOPMENT OF THE ISSUE IN THE TRIAL COURT

In a statement to the police, Sal Varela said that Montes was the one who shot Mark Walker. (22 CT 6125.) At the preliminary hearing, Kim Speck testified that Sal had told her the morning after the shooting that Montes shot Walker. (21 CT 5993.)

On August 23, 1996, the trial court ruled that out-of-court statements by Sal Varela concerning Walker's death, which implicated the other defendants, could not be sufficiently redacted to permit their introduction at the joint trial without violating the co-defendants' constitutional rights to confrontation and cross-examination. (Aug. RT of Proceedings held August 23, 1996, at p. 30.) The court initially gave the prosecutor the choice between outright severance, or proceeding in a joint trial without using the statements. (*Ibid.*) Ultimately, the court approved of a third alternative — empaneling a separate jury to hear and determine the Varela case. (Aug. RT of proceedings held August 23, 1996, at p. 44.) The very

purpose of this second jury was to prevent the jury hearing the case against Montes, Gallegos, and Hawkins from hearing Varela's statement.

Despite the court's precautions to prevent the Montes, et al jury from learning of any out-of-court statements by Sal Varela, that jury was nevertheless improperly given such evidence. The evidence was as follows:

On Sunday morning, Varela and Speck went to a donut shop and purchased a newspaper because of something Varela had told her. (20 RT 3401, 3406.) Varela located an article in the local section about a body being found in the trunk of a car off Palisades Road. (20 RT 3407.)

Back at the apartment, the article was shown to Montes. According to Speck, after looking at the article, Montes said to her in a joking tone of voice: "Can you believe that they're trying to pin this on me?" (20 RT 3411.) Eventually, during cross-examination, Speck admitted that Montes also denied committing the crime, saying: "Man, I don't believe it, I didn't kill that guy." (21 RT 3504-3505.)

During re-direct, the prosecutor attempted to elicit information from Speck about what Sal Varela had told her concerning the previous evening's events, and about her subjective response to the statements she claimed Montes made after being shown the newspaper article.

> [MR. MITCHELL]: Salvador Varela ever tell you that he shot or killed anyone on Saturday night?

[MS. SANDRIN]: Objection — hearsay.

[THE COURT]: Sustained.

[MR. MITCHELL]: After you had a conversation with Salvador Varela, you had some certain knowledge regarding something that happened Saturday night. Did you have a conversation with Joe Montes regarding what his involvement was in anything on Saturday night?

[KIM SPECK]: No.

[MR. MITCHELL]: Did Joseph Montes know that you knew?

[MS. SANDRIN]: Objection — hearsay, relevance and 352.

[THE COURT]: Sustained.

[MR. MITCHELL]: Do you know whether or not he knew you knew?

[MS. SANDRIN]: Objection — same objection.

[THE COURT]: Sustained.

[MR. MITCHELL]: When he made the statements to you regarding after reading the paper and regarding the subject matter of what was in the paper, did you make any response?

[MS. SPECK]: Not that I remember.

[MS. SANDRIN]: Objection — asked and answered.

[Mitchell]: Why not?

[MS. SPECK]: Because I knew.

(21 RT 3622.)

Montes' objection and motion to strike this response on relevance and 352 grounds was overruled. (21 RT 3621-3622.)

A short time later, out of the jury's presence, Montes' counsel requested that the above question and answer either be stricken from the record, or that the court grant a mistrial. The basis for the request was that Montes' right to confrontation was abridged because he was unable to confront and cross-examine Sal Varela about what Varela told Kim Speck. As explained by counsel for Montes, the intimation from the above questions and answers was that Sal Varela had told Speck that Montes had shot someone, and she therefore was not surprised when Montes allegedly made this admission in her presence. In addition to the confrontation clause, Montes grounded his request on the Fifth, Sixth, Eighth and Fourteenth Amendments. (21 RT 3656-3657.) The court refused to strike the statement or grant a mistrial. (21 RT 3657.)

B. MONTES' RIGHT TO CONFRONTATION, GUARANTEED BY THE SIXTH AMENDMENT AND ARTICLE I, § 15 OF THE CALIFORNIA CONSTITUTION, WAS ABRIDGED BY THE ADMISSION OF THIS EVIDENCE

It is well-settled that a co-defendant's statement is not admissible at trial as evidence against another defendant. (*Bruton v. United States*, *supra*,

391 U.S. 123; *Douglas v. Alabama* (1965) 380 U.S. 415; *People v. Aranda, supra*, 63 Cal.2d 518.) This rule prohibiting the admission at a joint trial of one defendant's extrajudicial statement which incriminates the co-defendant is founded on the confrontation clause.

The Confrontation Clause of the Sixth Amendment guarantees the accused in a criminal action the right to confront and cross-examine the witnesses against him. This right extends to criminal defendants in state as well as federal proceedings. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *Davis v. Alaska* (1973) 415 U.S. 308, 315.) It is also independently grounded in this state's constitution. (Cal. Const., art. I, § 15; see *People v. Allen* (1978) 77 Cal.App.3d 924, 931, fn. 8.) Denial of the right to cross-examination is also separately viewed by the courts and legal scholars, under the laws of evidence, as a denial of the right to demonstrate the existence of a witness' bias, interest or motive to fabricate. (*People v. Allen, supra*, 77 Cal.App.3d at p. 931, fn. 8.)

> The confrontation clause of the Sixth Amendment to the Federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right of confrontation includes the right of cross-examination.

(*People v. Fletcher* (1996) 13 Cal.4th 451, 455, quoting *Pointer v. Texas* (1965) 380 U.S. 400, 404, 406-407.)

The hearsay statements of co-defendants are considered so prejudicial that even a limiting instruction to consider the statement only as against the person making the statement is considered ineffectual to remedy the harm caused by admission. As the *Aranda/Bruton* decisions make clear, an admonition by the court is totally ineffective: "the premise of *Aranda* is essentially the same as that of *Bruton*: jurors should not be permitted to be influenced by evidence that as a matter of law they cannot consider but as a matter of fact they cannot ignore. (*People v. Anderson, supra*, 43 Cal.3d at p. 1121.)

The rule requiring exclusion of extrajudicial statements by co-defendants applies whether the statement is categorized as a "confession" or merely an "extrajudicial statement." (*People v. Fletcher, supra*, 13 Cal.4th at p. 455, fn. 1; *People v. Anderson, supra*, 43 Cal.3d at pp. 1122-1123.) Furthermore, this rule applies regardless of whether the statement is admitted for its truth or for some other purpose. (*Anderson, supra*, 43 Cal.3d at pp. 1123-1124.) The constitutional limitation on the admission of an incriminating extrajudicial statement by a co-defendant applies not just to statements which are "powerfully incriminating" but also to statements which are "facially incriminating." (*Richardson v. Marsh* (1987) 481 U.S. 200, 207-208.) Finally, the rule requiring exclusion of a co-defendant's statements (or severance) applies even where portions of the statements are

against the co-defendant declarant's own penal interest. (*Lilly v. Virginia* (1999) 527 U.S. 116.)

In the instant case, the court did order that Sal Varela's trial be severed from that of his co-defendants on *Aranda/Bruton* grounds, but approved the procedure of using two juries. Despite this precaution, evidence was still admitted in violation of Montes' confrontation rights.

The obvious intimation from Speck's testimony was that Varela had told her (his version) of the previous night's events, implicating Montes as the person who had shot Walker. Because Montes was unable to cross-examine Varela about these statements, his confrontation rights were transgressed.

C. THE STATEMENT WAS INADMISSIBLE LAY OPINION EVIDENCE

Lay opinion testimony concerning the truth or falsity of another's statement is inadmissible to support or attack the credibility of the declarant. (*People v. Melton*, *supra*, 44 Cal.3d at p. 744.) Kim Speck's statement implied that Sal Varela had told her Montes shot Walker, and suggested a belief in the truth of this hearsay statement. As such, it was improper lay opinion testimony and was inadmissible.

D. THE EVIDENCE, WHICH WAS BOTH IRRELEVANT AND PREJUDICIAL, SHOULD HAVE BEEN EXCLUDED PURSUANT TO EVIDENCE CODE SECTION 352

At the time the evidence was elicited, Montes objected to admission of this evidence on relevance and Evidence Code section 352 grounds. The objection was overruled. (21 RT 3621-3622.) At the next recess, Montes asked the court to order the statement stricken, and alternatively moved for a mistrial. Montes based this request on several federal Constitutional grounds, including the Fourteenth Amendment. His request was denied. (21 RT 3621-3622.)

The trial court erred by overruling Montes' objection to this evidence on the above grounds, and by denying Montes' request to either order the statement stricken or grant a mistrial. Kim Speck's subjective belief as to whether or not Montes had shot someone was irrelevant. (See subsection C of this argument, *ante*.) Only relevant evidence is admissible. (Evid. Code, § 350.)

The evidence was also very prejudicial. As discussed above, from the context of the questions and answers the jury would have likely concluded that Sal Varela told Speck that Montes was the one who had shot Walker. Obviously, such evidence was considered quite prejudicial as the court had ruled that the Varela and Montes cases were to be heard by

different juries for this very reason. Accordingly, this evidence should have been excluded on Montes' relevance and Evidence Code section 352 objection. Alternatively, the trial court should have taken some ameliorative action.

E. THE IMPROPER ADMISSION OF THIS EVIDENCE REQUIRES THAT THE DEATH SENTENCE BE REVERSED

For the reasons discussed in Argument V, subsection H.2, *ante*, a penalty of death was not a foregone conclusion in this case. It is thus reasonably possible that the erroneous admission of this evidence may have affected the penalty decision in Montes' case. Accordingly, the error requires reversal of the death sentence.

XVIII.

THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT GALLEGOS KNEW WALKER AND HAD PLAYED FOOTBALL WITH HIM, AS EVIDENCE OF A MOTIVE FOR GALLEGOS COMMITTING THE MURDER.

A. INTRODUCTION

Appellant sought to present evidence that Gallegos told Detective Anderson that he knew Mark Walker, and had played football with him for several years. (33 RT 6063-6064.) This evidence was offered pursuant to Evidence Code section 1220, as evidence of a possible motive for Gallegos being the actual killer. (33 RT 6062, 6065.)

Gallegos objected to introduction of this evidence. His counsel argued that it was not true that Gallegos had played football with Walker, and represented to the court that if this evidence was admitted, he would call witnesses to testify that Walker did not know Gallegos. (33 RT 6065.)

Gallegos' objection to introduction of this evidence was sustained. (33 RT 6062, 6066.) The trial court excluded the evidence pursuant to Evidence Code section 352, on the ground that it was more prejudicial than probative. (33 RT 6066.) The trial court erred in excluding this evidence.

B. THE EVIDENCE WAS ADMISSIBLE PURSUANT TO EVIDENCE CODE SECTION 1220

Evidence Code section 1220 provides:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

Under section 1220, a hearsay statement of a co-defendant is admissible based on the rationale that "the hearsay-exclusionary rule cannot reasonably be invoked by a party who is himself present and can testify in explanation or contradiction of the prior statement or conduct and can cross-examine the witness who testifies to the party's statement." (*People v. Wheeler* (1968) 262 Cal.App.2d 63, 69.) More succinctly stated, the declarations of a party defendant offered against him are not made inadmissible by the hearsay rule. (Evid. Code, § 1220; *People v. Panky* (1978) 82 Cal.App.3d 772, 776.)

An admission has been defined by the courts as an "acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt." (*Id.*, citing *People v. Fitzgerald* (1961) 56 Cal.2d 855, 856; *In re Cline* (1967) 255 Cal.App.2d 115, 122; *People v. Beverly* (1965) 233 Cal.App.2d 702, 712, hearing denied: Evid. Code, § 1220, Comment.) Accordingly, the

proffered statement was properly admissible pursuant to Evidence Code section 1220 as the statement of a party.

C. THE EVIDENCE SHOULD NOT HAVE BEEN EXCLUDED PURSUANT TO EVIDENCE CODE SECTION 352

1. The evidence was probative

The testimony of Detective Anderson that Gallegos and Mark Walker knew each other was highly relevant to Montes' defense, especially as it would carry over to the penalty phase. The excluded evidence clearly provides facts or circumstances which would tend toward establishing a motive for Gallegos to shoot Walker, to prevent him from identifying Gallegos as one of his assailants.

2. There was no risk of undue prejudice to Gallegos by admission of this evidence

There would have been no undue prejudice to Gallegos had the court admitted the proffered evidence.

> [A]ll evidence which tends to prove guilt is prejudicial or damaging to [a] defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."

(*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

The evidence at issue, as is the case with all evidence tending to establish an element of an offense, was potentially prejudicial to Gallegos' defense. Clearly, however, it was not unduly prejudicial.

3. <u>There was no substantial danger of undue consumption of time or of confusing the jury</u>

Pursuant to Evidence Code section 352, evidence may also be excluded where its probative value is substantially outweighed because of a substantial danger that its admission will necessitate undue consumption of time or of confusing or misleading the jury. Here, Gallegos made an offer of proof that he could call witnesses who would testify that he did not know Mark Walker, and did not play football with him. (33 RT 6065.)

Nevertheless, there was no indication that such testimony would create a substantial danger of consuming an undue amount of time or of confusing or misleading the jury. In fact, because the evidence pertained to one single point in issue, it should have been a fairly simple matter for Gallegos to present any contrary evidence to the jury. Certainly, there was no risk that the jury would become confused or distracted from the main issues before it by hearing evidence about Mark Walker's prior knowledge of Gallegos.

4. Any prejudice was outweighed by the probative value of the evidence

The evidence that Gallegos may have known Mark Walker, and thus had a motive to kill him to prevent identification, was highly relevant to appellant's defense that he was not the shooter. Although this evidence would have been admitted at the guilt phase, the beneficial effect to appellant would have carried over to the penalty phase, especially as appellant emphasized a lingering doubt argument at penalty, and argued that he was not the actual killer. (See e.g. 45 RT 7916-7921, 7949-7951, 7968-7967.)

Appellant's right to present this highly relevant evidence was not substantially outweighed by any risk of undue prejudice to Gallegos, or by concerns that its admission would necessitate an undue consumption of time or mislead the jurors from the ultimate issues. Accordingly, the trial court erred by excluding the evidence.

D. EXCLUSION OF RELEVANT DEFENSE EVIDENCE TRANSGRESSED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Exclusion of this defense evidence violated appellant's state and federal constitutional rights to a fair trial, to due process of law, compulsory process, confrontation, and a reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. art. I, § 7, 15 & 16.) It is well

settled that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Accordingly, the U.S. Supreme Court has found that improper exclusion of defense evidence may violate the Constitution. (See *Crane*, *supra*, 476 U.S. at p. 689-690; *Chambers v. Mississippi* (1973) 410 U.S. 294, 302-303 [finding a constitutional violation from application of hearsay rule to exclude evidence of another's guilt].) Reversal is thus required unless the error is found to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 368 U.S. at p. 25.)

As discussed in Argument V, subsection H.2, *ante*, any error which may have tipped the balance in the jury's decision in electing between a punishment of death or life without parole requires that the penalty verdict be reversed.

XIX.

IMPROPER DISMISSAL OF TWO SEATED JURORS VIOLATED MONTES' CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING CALIFORNIA CONSTITUTIONAL PROVISIONS, AND REQUIRES REVERSAL OF THE JUDGMENTS OF GUILT AND PENALTY.

Two jurors were discharged, over defense objection, during trial. The first juror, Juror No. 7, was discharged near the conclusion of the guilt phase. His replacement, alternate Juror No. 2, was discharged after guilt verdicts were rendered, and before commencement of the penalty phase. Dismissal of a sitting juror without good cause is error. As explained herein, removal of these two jurors was improper, and requires that the guilt and penalty judgments be reversed.

Penal Code section 1089 provides in relevant part:

> If at anytime . . . a juror . . . upon . . . good cause to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw a name of an alternate. . . .

Section 1089 permits the trial court to discharge a juror when (1) a juror becomes ill, or (2) upon other good cause shown by the court, a juror is found unable to perform his duty, or (3) if a juror requests a discharge and good cause appears thereof. (*People v. Delamora* (1996) 48 Cal.App.4th 1850, 1855.)

The language of section 1089 clearly requires that mid-trial dismissal of a juror must be based on "good cause" to find that the juror is "unable to perform his duty." On appeal, the rule as generally articulated is that a reviewing court will review the trial court's determination of good cause for abuse of discretion and will uphold that decision if there is substantial evidence supporting it. (*People v. Boyette* (2002) 29 Cal.4th 381, 462.) However, the inability of a juror to perform must also appear in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Williams* (2001) 25 Cal.4th 441, 448.) Bias in a juror is not to be presumed. (*People v. Williams* (1997) 16 Cal.4th 153, 232.)

In this regard, it has been pointed out that "[r]epetition of the 'abuse of discretion' standard in this context is potentially misleading. . . ." (*Cleveland, supra*, 25 Cal.4th at p. 487 (conc. opn. of Werdegar, J.).) In fact, the standard articulated by this court, that a juror's inability to deliberate must appear on the record as a demonstrable reality, indicates that a stronger evidentiary showing is required than mere substantial evidence in order to uphold the trial court' discharge of a sitting juror. (*Id.* at p. 488 (conc. opn of Werdegar, J.).) Accordingly, it may fairly be said that "a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate." (*Ibid.*)

Federal courts have promulgated an even stricter standard, which precludes dismissal of a juror whenever there is "any reasonable probability that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." (*United States v. Symington* (1999) 195 F.3d 1080, 1087; see also *United States v. Brown* (1987) 823 F.2d 591, 596; *United States v. Thomas* (1996) 116 F.3d 606, 622.)

The standard for dismissing a juror is very strict for good reason. A more lenient standard, such as the judge used here, impairs a defendant's constitutional rights.

A criminal defendant has the right to a trial by jury, and to due process of law. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 16.) The right to trial by an impartial jury, guaranteed by the Sixth Amendment, is an integral aspect of due process in view of the jury's role as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." (*Duncan v. Louisiana, supra,* 391 U.S. at p. 156.)

A defendant also has the right to the independent decision of each juror (see, e.g., CALJIC No. 17.40 ["The government and the defendant are entitled to the individual opinion of each juror."]; *People v. Gainer* (1977) 19 Cal.3d 835, 848, 849.) This right arises from the state and federal constitutional rights to be free from conviction absent a unanimous verdict.

(U.S. Const., 6th & 14th Amends.; *Apodaca v. Oregon* (1972) 406 U.S. 404; *United States v. Brown, supra*, 823 F.2d at p. 595; Cal. Const., art. I, § 16; see also *Hicks v. Oklahoma, supra*, 447 U.S. 343 [the due process clause entitles a defendant to application of favorable state law]; *Brown v. Louisiana* (1980) 447 U.S. 323, 330 [while the 6th and 14th Amendments do not require full unanimity, they do prescribe size and unanimity limits preserving the essence of the right to jury trial].)

A second line of constitutional authority provides further support for appellant's position. In assessing when the double jeopardy clause permits retrial following a mistrial, the United States Supreme Court has spoken of the defendant's "valued right to have his trial completed by a particular tribunal." (*United States v. Jorn* (1971) 400 U.S. 470, 484 (plur. opn.); *Wade v. Hunter* (1949) 336 U.S. 684, 689.)

With these principles in mind, the court's discharge of Juror No. 7 and Alternate Juror No. 2 will be examined in turn.

XX.

THE COURT IMPROPERLY DISCHARGED JUROR NO. 7.

A. BACKGROUND

Juror No. 7 was one of three African-Americans on the jury. (36 RT 6445.) Early in the case, Juror No. 7 made it clear that he was very committed to remaining as a juror on the case. On September 30, 1996, he let the court know that he had been denied unemployment benefits. (26 CT 7218.) At that time, the court inquired about Juror No. 7's ability to remain on the jury. Juror No. 7 replied that he would love to stay on the jury. His only request was to allow for a little flexibility regarding job interviews. At the end of the discussion with the court, everyone's concerns had been addressed, and Juror No. 7 was to remain on the jury. (15 RT 2376-2379.)

Almost a month later, on October 28, 1996, Juror No. 7 advised the court that he had been notified of an upcoming job interview, and asked to have the early part of the morning of October 31st off to attend. The court agreed to schedule a late start to accommodate Juror No. 7's interview. (26 CT 7219; 27 RT 4845.)

On October 30, 1996, the bailiff notified the court that some other jurors on the Montes jury had apparently seen Juror No. 7 looking at flash cards. (29 RT 5277.) The court had Juror No. 7 brought in, and questioned him about the incident.

Juror No. 7 explained that he had some flash cards on medical terminology for a class he was taking, and that he kept them with him near his trial notes. Juror No. 7 said that he had been paying attention to the trial testimony, and that he had only looked at them because of a witness's use of the term "enzyme" in the previous days' testimony. (29 RT 5278-5279.)

The court admonished Juror No. 7 not to consult any outside sources of information, including his cards. Juror No. 7 agreed that he would not bring the cards back into court, and would not discuss anything on the cards with the other jurors. (29 RT 5279-5280.)

None of the defense attorneys expressed any concern with Juror No. 7's behavior. At this point, however, the prosecution initiated what would be ongoing efforts to have Juror No. 7 removed from appellant's jury. The reason originally proffered by the prosecutor was that he was concerned about the effect of Juror No. 7's supposed inattention on the other jurors, and that it might somehow affect deliberations later on. (29 RT 5280-5281.)

The court dismissed much of what the prosecutor was saying as speculative, and stated that it did not see how any of what had transpired would affect the other jurors. The court also expressly found that Juror No. 7's looking at a definition of "enzyme" was not going to prejudice either side in the case. The court described this as a "minor violation," one

which did not required removal of Juror No. 7 from the jury. (29 RT 5281-5282.)

At the urging of the prosecution, the court also questioned Juror No. 8, the juror who complained about Juror No. 7 to the bailiff. (29 RT 5283-5284.) In the end, the court denied the prosecution's request to disqualify Juror No. 7. (29 RT 5286.)

The following day (October 31, 1996) the prosecutor renewed his efforts to have Juror No. 7 removed from the jury. This time the prosecutor complained that he had heard Juror No. 7 say something like "thank you lady" to another juror. The prosecutor also complained that Juror No. 7 was making loud noises and acting in a disruptive manner. (30 RT 5445.)

The court expressly stated that it had not observed any noises, etc. (30 RT 5445.) The court asked the bailiff, who said that Juror No. 7 had something going on with his nose, that he snorted with his nose, and that he was always moving. (30 RT 5445.) The court noted that Juror No. 7 had been animated from the beginning, and that it appeared Juror No. 7 had some idiosyncratic behavior, such as a tic. (30 RT 5446.) The court said it would keep an eye on Juror No. 7, but that it hadn't seen any of what the prosecutor was talking about, and had not heard the snorting. (30 RT 5446.)

On November 4, 1996, the prosecution filed a written motion seeking to have Juror No. 7 removed from the jury. (Exhibit D to Montes' Motion to Augment the Record, filed in this Court on June 14, 2007, and granted on August 15, 2007; 31 RT 5590.)

The court took up this motion the following morning (November 4, 1996). (32 RT 5754.) Essentially, the prosecutor voiced his opinion that Juror No. 7's actions indicated to him that Juror No. 7 had possibly pre-judged the case. (32 RT 5754-5758.) Appellant and his co-defendants objected to removing Juror No. 7. (32 RT 5758-5761.) Among other things, appellant's counsel disagreed with the prosecutor's factual representations concerning what had transpired up to that point. (32 RT 5759.) Hawkins' attorney, Mr. Angeloff, also stated that Juror No. 7 appeared to be paying attention. As pointed out by Mr. Angeloff, "someone can be animated and have his own personality and still be a very successful juror." (32 RT 5760.)

The trial court denied the motion to remove Juror No. 7 from the jury. The court found that the prosecutor was exaggerating matters in his argument. According to the court, "[m]y observation is he's paying attention as much as anyone else during those two days." The court also noted that Juror No. 7 appeared to be listening to the evidence. The court pointed out that, when he had been questioned by the court about looking at

the flash cards, Juror No. 7 explained that he was taking notes at the same time. The court also did not see any sign of an ongoing conflict between Juror No. 7 and Juror Vasquez. (32 RT 5762-5763.)

The prosecutor again complained about Juror No. 7 the next day, November 5, 1996. (32 RT 5879.) This time the prosecutor complained that it appeared to him Juror No. 7 wasn't paying attention when the tape was played because Juror No. 7 did not appear to be following along with the transcript. (32 RT 5879.) The court took no action in response to the prosecutor's comments.

On November 13, 1996, the day closing arguments commenced, Juror No. 7 informed the court that he had received an offer of employment. (26 CT 7235; 36 RT 6412.) The letter from the prospective employer indicated that it would like Juror No. 7 to begin work on November 18, 1996. (*Ibid.*)

The court questioned Juror No. 7 to determine whether he was asking to be excused, and whether it would constitute a financial hardship for him to remain on the jury. Juror No. 7 told the court that he had informed the employer about his participation as a juror on the case, which was nearing its conclusion, and said that they understood. Juror No. 7 asked the court to call the employer and ask that commencement of the job be delayed for a few additional days.

Juror No. 7 said that he was not aware that the case could go to a penalty phase, which would not likely conclude until December 6th. However, Juror No. 7 said that the employer was prepared to allow for a few more days, and only required a phone call from the court. Juror No. 7 told the court that he was willing to remain as a juror as long as needed, if it could be worked out with the employer. (36 RT 6414.)

The court called the prospective employer, and learned that they would guarantee keeping the job open an additional week, until November 25th. However, they would not extend it until December 2nd. The court stated that it did not want Juror No. 7 to feel any pressure to make a decision because he would have to leave by the 25th; however, it acknowledged that there was no hardship to Juror No. 7 before that time. (36 RT 6424.)

Counsel for Montes expressly requested that Juror No. 7 remain on the jury through the guilt deliberations. The other defense attorneys concurred. (36 RT 6424.) Not surprisingly, the prosecution argued that Juror No. 7 should be excused. (36 RT 6424-6426.) The court took the matter under submission, and asked that the parties supply it with authority for their respective positions. (36 RT 6428.)

After reconvening that afternoon, the court asked the prosecutor if he was asking to have Juror No. 7 removed only because of employment

pressures, or if he was renewing his motion for juror misconduct during the trial. (36 RT 6430.) In response, the prosecutor renewed his earlier arguments for Juror No. 7's removal. (36 RT 6432.)

Montes counsel objected to Juror No. 7's removal on constitutional grounds, expressly citing the Fourth, Fifth, Sixth, and Fourteenth Amendments, and concurrent state grounds. (36 RT 6438-6439.)

Gallegos' attorney, Mr. Phillips, had taken notes during the court's most recent voir dire of Juror No. 7. His notes characterized Juror No. 7 as "animated, committed and enthusiastic." (36 RT 6439.) Phillips pointed out that there was no new evidence regarding Juror No. 7's behavior since the time the court last rebuffed the prosecutor's efforts to have him removed from the case. (36 RT 6440.)

In response, the court said that it had been watching Juror No. 7, and that during the prosecutor's examination of Investigator Clark, Juror No. 7 would look around the room rather than at the witness, and would look down. Apparently at some point Juror No. 7 seemed to be mouthing words. (36 RT 6440-6441.) The defense attorneys pointed out that other jurors were in obvious distress during the prosecutor's examination of Clark, due to acute boredom. (36 RT 6441, 6446.) Other jurors actually fell asleep. Ms. Sandrin also noted that she had seen similar conduct from the other jurors. (36 RT 6447.) Mr. Cotsirilos made a comment to the effect that the

jury had been so relieved at the conclusion of the prosecution's examination that they broke into applause. (36 RT 6446-6447.)

The court then stated that it had not noticed Juror No. 7 taking notes recently. (36 RT 6442.) However, Mr. Cotsirilos, who had a direct-on view of the jury, had seen Juror No. 7 taking notes. (36 RT 6445.) The court stated that it also appeared that Juror No. 7 did not have conversations with the juror seated next to him; there were no "friendly exchanges." (36 RT 6442.)

At the request of the defense, the court called Juror No. 7 back in to discuss the new information from his employer. (36 RT 6448.) Juror No. 7 expressly told the court that he would not have any problem serving from the 18th to the 25th, but that he could not serve beyond that. He told the court that, even though he would not be paid for that week, he could "make it work." (36 RT 6452.) After Juror No. 7 left, counsel for appellant suggested that, if the court had concerns about Juror No. 7's ability to concentrate on the trial because he would be starting the job by the 25th, it should ask Juror No. 7 if that would affect him. The court declined to so inquire. (36 RT 6455.)

The court then ruled that there was good cause to excuse Juror No. 7 for the following reasons: (1) that there would be an "atmosphere of time urgency" because of the November 25th starting date, which would

"substantially impair" Juror No. 7's ability to fulfill his duties as a juror in the case; and (2) as an alternative ruling, the court found misconduct due to Juror No. 7's reading of the term "enzyme" several weeks earlier, and his supposed "inattentiveness" or "questionable behavior." (36 RT 6457-6459.) The court specifically ruled against all of Montes' constitutional objections raised earlier. (36 RT 6458-6459.)

As it turned out, the jury rendered its guilt phase verdicts on November 22, 1996, three days within the time frame which would have been allowed by Juror No. 7's employers. (26 CT 7252.)

B. IT WAS ERROR TO EXCUSE JUROR NO. 7

1. Dismissal Based on Supposed Employment Conflict

A trial court does not abuse its discretion when it discharges a juror because of problems related to the juror's employment, but the employment problem must be real and not imagined. (*People v. Delamora, supra*, 48 Cal.App.4th at p. 1855.) In *People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1100, this court found good cause for discharge of a juror who had talked to her employer by telephone and then informed the trial court that her "anxiety" over work she had to complete would affect her ability to deliberate. The trial court discussed the matter with the juror on several occasions, only dismissing her when she answered affirmatively that the

anxiety she was experiencing would affect her ability to deliberate. (*Id.* at p. 1100.)

Fudge provides a good juxtaposition to the present case. In *Fudge*, when a potential employment conflict arose with a juror, the court made several inquiries into the juror's state of mind. Ultimately, the court found good cause for the juror's dismissal only when the juror expressed actual concern about her ability to deliberate due to excessive anxiety over her job.

In the present case, nothing in the record supports a conclusion that Juror No. 7 had any anxiety or concern that his impending employment date would affect his ability to deliberate. To the contrary, Juror No. 7 indicated that he would like to see things through to the end of the guilt phase. Moreover, the trial court refused to directly inquire into Juror No. 7's state of mind, instead substituting its own speculation that there would be an "atmosphere of urgency" in the deliberations due to his employment situation if Juror No. 7 were to continue as a juror.

In *People v. Turner*, *supra*, 8 Cal.4th at pp. 203-205, this court upheld the trial court's denial of good cause for excusing a sitting juror. In *Turner*, the defendant requested that the court remove a sitting juror, prior to penalty phase deliberations, based on the fact that the juror's employer had refused to extend payment benefits to the juror throughout the entire deliberation period. (*Id.* at p. 204.) The trial court questioned the juror as

to his ability to be fair and impartial during the rest of deliberations despite a lack of extended benefits from his employer and the juror indicated that the lack of benefits would not affect his judgement. (*Ibid.*) Upon conclusion of the inquiry, the court denied the defendant's request for removal. (*Ibid.*)

Just as there was no good cause for excusing the juror in *Turner*, the record in this case does not disclose good cause for dismissing Juror No. 7. In fact, unlike *Turner*, the trial court in the instant case failed to even question Juror No. 7 concerning his ability to remain fair and impartial during deliberations. Had the trial court in the present case conducted a proper follow up interview with Juror No. 7, it would have established a clear record of whether or not good cause existed to dismiss Juror No. 7. Absent a clear record of support, the trial court in the present case lacked a factual basis for finding good cause for dismissal.

In another case, *People v. Delamora, supra*, 48 Cal.App.4th 1850, the trial court was found to have abused its discretion by dismissing two jurors without good cause. In *Delamora*, 12 jurors deliberated for about three and one half days, with two or three holdouts. Two jurors were then replaced without inquiry as to whether or not they would be willing to continue without pay. Subsequently, the reconstituted jury reached a verdict in approximately three hours.

Upon review, the appellate court noted that the two dismissed jurors were not ill, nor were they found unable to perform their duties, nor did they ask the court to be excused. (*Delamora, supra*, 48 Cal.App.4th at p. 1855.) Further, the court questioned the trial court's finding based on the record which provided nothing to suggest that either juror was unwilling or unable to continue if they had to serve another day without pay. (*Ibid.*) In conclusion, the court held that there was no evidence at all to show good cause (because no inquiry of any kind was made), and the procedure was, therefore, by definition inadequate. (*Ibid.*)

Delamora is similar to the case at hand. In *Delamora*, the trial court dismissed two jurors based on speculation that the jurors would not continue deliberating if their employment benefits ceased. Similarly, in the present case, the trial court made a leap of logic, speculating that the date of Juror No. 7's new employment would affect his ability to deliberate as he might have felt rushed. Much like the juror dismissals in *Delamora*, Juror No. 7's dismissal was not based on illness, or a finding that he was unable to perform his duties as a juror, nor did he make a request for dismissal. As noted previously, the court in the present case failed to establish any supportive evidence to show good cause for the dismissal of Juror No. 7. Therefore, the complete absence of inquiry into the basis for good cause

must be acknowledged as inadequate procedure and an abuse of discretion by the trial court.

2. Dismissal Based on Alleged Inattentiveness and Misconduct

a. Misconduct

Misconduct of a juror is not included as a ground for discharge in section 1089. Although misconduct can constitute grounds to believe that a juror will be unable to fulfill his or her functions as a juror, it must be serious and willful. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) Where a charge of misconduct or inability to perform is made against a juror, the court must conduct "an inquiry sufficient to determine the facts." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 519, overruled in other grounds in *People v. Reyes* (1998) 19 Cal.4th 743.)

In a case similar to the case at hand, *People v. Hamilton* (1963) 60 Cal.2d 105, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, the court held that it was error for the trial court to dismiss a sitting juror based on the prosecutor's charge of misconduct. At trial, a juror was dismissed on the grounds that she had consulted the Penal Code. Upon review, the court held that the juror did not commit misconduct and was fully capable of performing her duties as a juror.

In reaching its decision, the court reasoned, "If the juror had given any indication that she would substitute her knowledge . . . for the instructions of the court, or would convey such knowledge to other jurors, then it might have been said that she was incapable of performing her duties." (*Hamilton*, *supra*, 60 Cal.2d at p. 126.) The court concluded that the "mere reading of the Penal Code, for the sole purpose of becoming better informed, cannot, without more, be either misconduct or an act which results in inability to perform the duties of a juror." (*Ibid.*)

In the present case, the court dismissed Juror No. 7 partly based on a charge of misconduct similar to that presented in *Hamilton*. As in *Hamilton*, Juror No. 7 was questioned by the court after it was discovered that he had looked at a card which defined the term "enzyme." Following the inquiry, the court admonished Juror No. 7 for consulting his medical flash cards, and told him not to communicate this information to the other jurors.

The court was obviously satisfied at that time that Juror No. 7 was able to continue as a fair and impartial juror. In fact, the court itself described this as a "minor violation." (31 RT 5281-5282.) Clearly, Juror No. 7 did not commit serious and willful misconduct which would have justified his discharge nearly two weeks later. Rather, this was a pretextual

reason provided by the court in an effort to bolster its otherwise weak reasons for discharging Juror No. 7.

b. Inattentiveness

In *People v. Johnson* (1993) 6 Cal.App.4th 1, 21-22, the trial court discharged a juror mid-trial for inattentiveness and misconduct. The juror in *Johnson* was discharged because he appeared to be paying no attention to the proceedings, slept during the trial, and lied in his jury questionnaire about being arrested. (*Id.* at pp. 16, 22.) Prior to making its finding, the court noted that a juror must not be discharged for sleeping unless there is convincing proof the juror actually slept during trial. (*Id.* at p.21, citing *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.) The court further found that the charge of misconduct based on concealment of prior arrests also constituted good cause for discharge under section 1089. (*Johnson*, *supra*, 6 Cal.App.4th at p. 22)

Unlike *Johnson*, there is no evidence in the present case supporting the claim that Juror No. 7 was sleeping or otherwise was so inattentive that he was unable to perform his duties. Here, the prosecutor made a claim of inattentiveness based on scant observations which were not corroborated. In fact, when the prosecutor first sought Juror No. 7's removal on this ground, the trial court stated that Juror No. 7 was paying as much attention as anyone else. (32 RT 5762-5763.) The record in the instant case, as set

forth in detail above, simple does not provide evidence of a demonstrable reality that Juror No. 7 was unable to perform his duty.

Based on the facts and the law as stated, the trial court abused its discretion by dismissing Juror No. 7 without a proper finding of good cause.

C. THE ERROR IN DISCHARGING JUROR NO. 7 REQUIRES REVERSAL OF THE VERDICTS

In *People v. Hamilton, supra*, 60 Cal.2d 105, this court explained the prejudice which results from replacing a seated juror with an alternate as follows:

> While it has been said . . . that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during trial, has given the impression that he favors one side or the other.

(*Hamilton, supra*, 60 Cal.2d at p. 128.)

As can be seen, the prosecution raised numerous complaints about Juror No. 7, all of which were initially rejected by the trial court. In fact, at more than one point, the court stated that the prosecutor's complaints about Juror No. 7 were speculative (29 RT 5281-5282) and that he was exaggerating. (32 RT 5762-5763.) All three defendants opposed Juror No. 7's removal from their jury. (See 36 RT 6424, 6439-6443.)

There can be only one reason for the prosecution to have so zealously sought Juror No. 7's removal when considered against the desire and efforts of all defense counsel to have him remain as a juror. There was obviously something about Juror No. 7 which led the parties to believe he was, at least for the moment, favoring the defense, or at least seemed inclined to give serious consideration to the defense witnesses.

In the instant case, the prosecution's unrelenting efforts to have a qualified and acting juror removed from the panel were ultimately successful. Dismissal of Juror No. 7 during trial deprived Montes of his constitutional right to trial by the jury which was selected and sworn. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const. art. I § 16.)

Moreover, errors which affect the composition of the jury are necessarily prejudicial and cannot be harmless. (*United States v. Annigoni* (9th Cir. 1996) 96 F.3d 1132, 1144-1145 (en banc).) Because of the manifest error in removing Juror No. 7, this court should reverse the judgement of both guilt and penalty.

XXI.

IT WAS ERROR TO EXCUSE ALTERNATE NO. 2

A. BACKGROUND

As noted in the preceding argument, Alternate Juror No. 2 was substituted in during the guilt phase to take the place of Juror No. 7. (36 RT 6460.) Following the guilt verdicts, and before commencement of the penalty phase, the court was informed that Alternate No. 2 wished to speak with it about being relieved as a juror. (41 RT 7229-7230.) Alternate No. 2 told the court that she had been having nightmares from the beginning of the case, and that she could not get the trial out of her head. The previous week she had been sick and depressed. (41 RT 7230.) Alternate No. 2 had not been to a doctor, and had not needed to resort to any medications except Tylenol PM. Other than being upset, the juror had suffered no physical ailments. (41 RT 7232-7234.)

Alternate No. 2 had had "overwhelming guilt at first" even though she felt she made the right decision at the guilt phase. (41 RT 7231.) When asked if she could enter into penalty deliberations with an open mind, and discuss the possible sentences with other jurors, Alternate No. 2 replied that she "mentally [felt] like [she] was unable to continue." Finally, Alternate

No. 2 explained that she could not vote to sentence Montes to death. (41 RT 7231, 7233-7234.)

The defense objected to excusing Alternate No. 2. (41 RT 7234-7235.) Montes' counsel argued that it would be improper to excuse the juror for her feelings on the death penalty if it was the evidence at the guilt phase which had led her to that conclusion. (41 RT 7234-7235.) Despite the concerns on this point raised by the defense, the court made no further inquiry of Alternate No. 2 to try to ascertain the basis for her reluctance to impose the death penalty against Montes. Notably, in her questionnaire, Alternate No. 2 had rated herself an 8, out of a possible 10, in favor of the death penalty. (1 CT 18.)

B. ALTERNATE NO. 2'S INABILITY TO PERFORM AS A JUROR DOES NOT APPEAR IN THE RECORD AS A DEMONSTRABLE REALITY

The most common application of section 1089 provides for removal of a juror who becomes physically or emotionally unable to serve as a juror due to illness or other circumstances. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 474.) An example of good cause for dismissing a juror made both physically and emotionally ill by the testimony at trial is found in *People v. Van Houten* (1980) 113 Cal.App.3d 280.

In *Van Houten*, the trial court held a hearing to determine whether good cause existed to excuse a juror who made a formal request for

dismissal. (113 Cal.App.3d at p. 285.) During the hearing, the juror stated that she was tuning out witness testimony to avoid getting physically ill. (*Id.* at p. 286.) The *Van Houten* court determined that the juror's physical and emotional reaction to the evidence, and inability to participate in the deliberation process, provided good cause existed for dismissing her. (*Id.* at p. 288.) The appellate court found that the record supported a finding that the juror was so distraught over the testimony and evidence of the trial that she could no longer perform her duties as a juror.

Prior to finding good cause in *Van Houten*, the trial court questioned the juror as to her particular ailments, and ascertained the underlying reasons why she was unable to physically or mentally pursue her service as a juror. In addition, the record of *Van Houten* established that the juror's emotional and physical reactions were severe and insurmountable.

It is clear that jury service in this case was upsetting to Alternate No. 2, and that is certainly understandable. The stress to jurors from serving on traumatic criminal cases has been documented. (See Shuman et al., *The Heath Effects of Jury Service* (1994) 18 L. & Psychol. Rev. 267.) However, any distress caused to a juror from performing jury service should not justify excusal from service unless it actually affects the juror's ability to carry out the functions of a juror.

In the present case, there is no demonstrable reality on the record similar to that presented in *Van Houten.* Alternate No. 2's emotional reactions were not so severe as to affect her physically, and there was no indication that the understandable emotional toil of the trial would prevent her from fulfilling her duty as a juror based on her emotional stability. Unlike *Van Houten*, where the record was clear that the juror was actively trying not to listen to the evidence in the case, there is absolutely nothing in the record of the instant case demonstrating that Alternate No. 2's emotional distress rendered her unable to continue functioning as a juror. In fact, Alternate No. 2 had participated throughout the entire guilt phase, and had been able to deliberate and render a verdict of guilt.

In another case reviewing juror dismissal, this Court upheld a finding of good cause to excuse a juror based on the juror's professed inability to be objective during deliberations and apply the trial court's instructions. (*People v. Boyette*, *supra*, 29 Cal.4th 381.) In *Boyette*, the record at trial reflected that the dismissed juror understood his role as a juror, weighing aggravating evidence against mitigating evidence, but felt he was unable to perform his duty based on his emotional connections to the penalty phase evidence. (*Id.* at p. 462.) The record also reflected that the juror had responded that discussions with fellow jurors would not alter his decision. (*Id.* at p. 463.) Based on a thorough inquiry by the trial court, the record

established that the sitting juror was unable to perform his duties either as an impartial judge of the evidence or as a deliberating member of the jury.

Boyette is distinguishable from the present case. First of all, the defendant in *Boyette* failed to object to the juror's discharge, thereby waiving the issue for appeal (although this Court did proceed to consider the merits of the contention). Montes did object to the court's discharge of Alternate Juror No. 2, thereby creating a stronger basis for urging error in his appeal.

Moreover, in *Boyette*, it was the juror's position that his own personal bias would prevent him from fulfilling his duties as a juror. (29 Cal.4th at p. 462.) The dismissed juror made it clear that he could not longer be *objective*. The juror intimated that he would be unable to deliberate effectively with the other members and apply the court's instructions. (*Id.* at p. 463.) In the present case, the dismissed juror never indicated that she could not be objective. She did state that she could not vote for the death penalty, but never gave any reasons for this assertion.

The error in discharging Alternate Juror No. 2 becomes even more apparent when distinguishing the instant case from *People v. Samuels* (2005) 36 Cal.4th 96, which also involved discharge of a juror who voiced concerns about voting for the death penalty after being seated as a trial juror in a capital case. The juror in *Samuels*, Audrey W., wrote a letter to the

court during penalty phase deliberations, asking to be removed as a juror. In this letter, Audrey W. stated she had come to realize that she had serious questions about her ability to vote for a death sentence in the case, *even if she were to be convinced it was the appropriate sentence in the case.* During questioning by the court and counsel, Audrey W. indicated that she did not believe she had the courage to impose a death sentence in a case where she thought such a sentence would be appropriate. (*Id.* at p. 132.)

This Court concluded that Audrey W. "could not follow her oath and instructions to consider imposition of the death penalty in this case. She also admitted she lacked 'courage' to impose the ultimate punishment if appropriate under all the circumstances, and that she feared she 'couldn't act' on her obligation to do so." This Court found that the record disclosed a demonstrable reality that Audrey W. could not perform as a juror, and upheld the trial court's decision to dismiss her from the case. (*Samuels*, *supra*, 36 Cal.4th at p. 133.)

In the present case, Alternate No. 2 did not indicate she could not impose a death sentence even if she were convinced it was appropriate. She simply said she could not vote to sentence Montes to death. The record fails to indicate the underlying reason for Alternate No. 2's statement that she would not vote for death. A trial judge has an obligation to conduct whatever inquiry is necessary to determine whether or not good cause exists

to discharge a juror. (*People v. Burgener*, *supra*, 41 Cal.3d at pp. 520-521 (plur. opn.) [overruled on an unrelated point in *People v. Reyes*, *supra*, 19 Cal.4th 743].) Here, the court made no effort to ascertain *why* Alternate No. 2 was unwilling to impose a death sentence, even when the defense raised concerns that her reluctance might be based on her view of the evidence adduced at the guilt phase of the case.

As it stands, the record developed at trial does not establish a demonstrable reality of Alternate No. 2's inability to perform her duty as a juror. There is nothing in the record suggesting that Alternate No. 2 suffered from personal bias or a lack of objectivity, or that she was physically or mentally unable to fulfill her duty as a result of her concerns.

Most importantly, despite the concerns on this point raised by defense counsel, the court did not determine (and there is nothing in the record to indicate) whether or not Alternate No. 2's professed unwillingness to vote for the death penalty was based upon the evidence adduced at the guilt phase.

Lingering doubt about Montes' role in the offense was a primary argument advanced by the defense at the penalty phase in support of a life sentence. (41 RT 7258-7259, 7295-7296; 45 RT 7929, 7958, 7960-7970.) Any juror's lingering doubt about whether Montes was the actual shooter was enough, standing alone, to justify rejecting the death penalty.

Under California law, jurors have discretion to assign whatever value they deem appropriate to the aggravating and mitigating factors. (CALJIC No. 8.88 [instructing jurors that they are "free to assign whatever moral or sympathetic value [they] deem appropriate to each and all of the various factors. . . ."]; see also *People v. Brown* (1985) 40 Cal.3d 512, 541 ["Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider. . . ."].) As this Court has held, "the sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion under [California's death penalty law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.)

If Alternate No. 2's resistance to imposing a death sentence in this case was based on such lingering doubt (which, given her comments about her "overwhelming guilt" following her guilt phase verdicts, was a real possibility) then her decision not to impose a death sentence would have been fully within her rights and duties as a juror tasked with making a capital penalty decision.

Accordingly, it was error to excuse Alternate No. 2 because of her professed unwillingness to vote for the death penalty. The improper removal of this jury violated Montes' constitutional rights as described

above. It also transgressed his right to a reliable penalty determination, in violation of the Eighth Amendment.

C. THE ERROR IN DISCHARGING ALTERNATE NO. 2 REQUIRES REVERSAL OF THE PENALTY JUDGMENT

Errors which affect the composition of the jury are necessarily prejudicial and cannot be harmless. (*United States v. Annigoni*, *supra*, 96 F.3d at pp. 1144-1145 (en banc).) In any case, it is apparent from the record in this case that Alternate Juror No. 2 was favorable to the defense on the penalty determination, inasmuch as she declared she would not sentence Montes to death. Thus, her disqualification could only be beneficial to the prosecution, and prejudicial to the defense. Accordingly, the error in discharging Alternate No. 2 mandates reversal of the death sentence. (*People v. Hamilton*, *supra*, 60 Cal.2d at p. 128; *People v. Cleveland*, *supra*, 25 Cal.4th at p. 486.)

XXII.

ONE OF THE THREE SPECIAL CIRCUMSTANCES MUST BE REVERSED; BECAUSE THE ERROR IN PERMITTING THE JURY TO CONSIDER THE ADDITIONAL CIRCUMSTANCE VIOLATED MONTES' RIGHT TO DUE PROCESS OF LAW, AND HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE PENALTY DETERMINATION, THE DEATH SENTENCE IMPOSED IS UNCONSTITUTIONAL AND MUST BE REVERSED.

A. ONE OF THE THREE SPECIAL CIRCUMSTANCES MUST BE REVERSED

The amended information filed September 4, 1996, alleged three special circumstances: (1) robbery (§ 190.2, subd. (a)(17)(i)); (2) kidnapping for robbery (§ 190.2, subd. (a)(17)(ii)); and (3) kidnapping (§ 190.2, subd. (a)(17)(ii)). (25 CT 7036-7040.) All three special circumstances were found true. (40 RT 7122-7136; 27 CT 7468-7469; 28 CT 7282-7291.)

The law is clear that multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 354.) Kidnapping is a lesser-included offense of kidnap for robbery. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 518; *People v. Jackson* (1998) 66 Cal.App.4th 182, 190-191.) The kidnap special circumstance must therefore be reversed.[88]

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[88] In *People v. Lewis*, *supra*, 43 Cal.4th at p. 518, this Court (disapproving previous cases to the contrary) held that robbery is not a lesser included offense of kidnap for robbery.

B. THE JURY SHOULD NOT HAVE BEEN PERMITTED TO CONSIDER THE LESSER-INCLUDED SPECIAL CIRCUMSTANCE IN REACHING ITS PENALTY DETERMINATION

As discussed above, in *Melton* this Court rejected the reasoning of the plurality opinion in *People v. Harris* (1984) 36 Cal.3d 36, 64-65, which had found that a capital sentencing jury should not be permitted to consider overlapping special circumstances, such as robbery and burglary, which arise from the same course of conduct. But *Melton* rejected *Harris*' reasoning only insofar as *Harris* had suggested that "the penalty jury should not be permitted to consider, *in any form,* the existence of *more than one felony* leading to the capital murder. . . ." (*Melton, supra,* 44 Cal.3d at p. 766, emphasis in original.) *Melton* still recognized "that multiple felony-murder special circumstances might artificially inflate the weight to be given the underlying offenses as aggravating factors if considered more than once for exactly the same purpose. . . ." (*People v. Bean, supra,* 46 Cal.3d at p. 955.)

Unlike the situation in *Melton* and every other California case appellant has found which has since considered the issue, the instant case does not involve separate felonies committed during one ongoing transaction, but rather the use a lesser-included offense as the basis for multiple special circumstances. In fact, *Melton* specifically distinguished

cases from other states which involved situations such as appellant's where the special circumstances were simply restatements of the same conduct. According to *Melton*, "[i]n none [of these cases] did the 'overlapping' circumstances at issue focus on separate culpable *acts* of the defendant, they simply restated in different language the single criminal objective from which the murder arose." (*Melton*, 44 Cal.3d at p. 767 (emphasis in original), citing e.g., *State v. Goodman* (1979) 298 N.C. 1; *Provence v. State* (Fla. 1976) 337 So.2d 783, 786.)

Years ago, in *People v. Allen* (1986) 42 Cal.3d 1222, this Court recognized the dangers inherent in permitting a jury to consider improperly excessive special circumstances in reaching a penalty determination. *Allen* thus held that only one multiple murder special circumstance could be found under Penal Code section 190.2(a)(e), even though the defendant was charged with six murders. (*Id.* at p. 1273.) In so doing, *Allen* recognized the inherent danger of finding multiple special circumstances:

> [A]lleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty, a result also inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the individual offender.

(*People v. Harris*, *supra*, 36 Cal.3d at p. 67; accord, *People v. Allen, supra*, 42 Cal.3d at p. 1273.)

In *United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, the Tenth Circuit found reversible penalty-phase error because of overlapping, duplicative aggravating factors. *McCullah* involved a death sentence imposed under federal law. The Tenth Circuit concluded that, especially under a weighing scheme, double counting of aggravating factors "has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." (*Id.* at p. 1111.)

As explained in *McCullah*, "when the same aggravating factor is counted twice, the defendant is essentially condemned twice for the same culpable act." (76 F.3d at p. 1111, internal quotation marks omitted.) And, "[w]hen the sentencing body is asked to weigh a factor twice in its decision, a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side of the scale.'" (*Id.* at p. 1112, quoting *Stringer v. Black* (1992) 503 U.S. 222, 232.) Relying on *Stringer*, the *McCullah* court concluded that the error in its case required a reweighing of the aggravating and mitigating factors. (76 F.3d at p. 1112.)

Here, as in *McCullah*, the listed special circumstances were artificially inflated. Since the jury was directed to consider the special circumstances it had found true when reaching its penalty determination,

the artificial inflation of these circumstances must have skewed the jury's penalty determination.

The instant situation is thus analogous to *Allen* and *McCullah*. Permitting the jury to find three special circumstances (kidnap, robbery, and kidnap for robbery) instead of two (robbery and kidnap for robbery) improperly increased the risk that the jury would find Montes more culpable and deserving of death. Thus, the jury's improper consideration of the kidnap special circumstance inflated the risk that the jury arbitrarily imposed the death penalty in this case, and is also inconsistent with constitutional requirements for capital sentencing procedures, in violation of the Eighth and Fourteenth Amendments and article I, sections 7 and 17 of the California Constitution. It also violated Montes' Fifth and Fourteenth Amendment rights to due process of law. As explained *post*, the error is reversible.

C. THE ERROR IS OF CONSTITUTIONAL MAGNITUDE, AND MANDATES REVERSAL

In *Brown v. Sanders* (2005) 546 U.S. 212 [126 S.Ct. 884; 163 L.Ed.2d 723], the United State Supreme Court articulated the new standard for evaluating the effect of an invalid special circumstance in the capital decision-making process. Dispensing with the previous distinction between "weighing" and "non-weighing" states, the *Sanders* majority announced the

following rule: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* at p. 220, emphasis in original.)

Unlike *Sanders*, the jury in Montes' case could not give aggravating weight to the additional special circumstances under the more general "circumstances of the crime" factor. Because the additional special circumstance was not based on independent conduct, it would not have been considered as "circumstances of the crime" for purposes of aggravation. Nevertheless, in deciding whether to impose a sentence of life or death, the jury was permitted to consider that it had found true three special circumstances when there were only two.

Even if it might be argued that the jury could independently consider the conduct underlying the separate charges, the number of special circumstances unrelated to the circumstances of the crime was still artificially inflated from two to three. Thus, under the test articulated in *Brown v. Sanders*, the jury's consideration of invalid special circumstances resulted in constitutional error.

Here, as in *Brown v. Sanders*, the issue is that the jury considered as aggravating properly admitted evidence which should not have weighed in favor of the death penalty. Specifically, the jury improperly considered as factors in aggravation an additional special circumstance not based on independent conduct. "'When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.'" (*Brown v. Sanders, supra*, 546 U.S. at p. 221, quoting *Stringer v. Black, supra*, 503 U.S. at p. 232.) According the Court in *Stringer*, "[w]hen the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." (*Stringer, supra*, 503 U.S. at p. 232.)

In addition, because the error impacted the jury's penalty deliberations, it transgressed Montes' right to a reliable penalty determination, in violation of the Eighth Amendment. (*Johnson v. Mississippi, supra*, 486 U.S. 578.)

Thus, at a minimum, the error in permitting the jury to consider invalid special circumstance must be reversible unless it is found harmless beyond a reasonable doubt. For the reasons discussed in Argument V, subsection H.2, *ante*, the error cannot be found harmless in the present case.

This is particularly true because, as discussed in Argument XLII, *post*, the court refused to instruct the jury with the instruction Montes requested which would have directed the jury *not* to double-count the conduct underlying the special circumstances.

XXIII.

THE TRIAL COURT ERRED BY FAILING TO LIMIT APPLICATION OF CALJIC NO. 2.15 TO THE THEFT-RELATED OFFENSES. THE MURDER CONVICTION AND ATTENDANT SPECIAL CIRCUMSTANCES SHOULD BE REVERSED.

A. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT COULD FIND APPELLANT GUILTY OF KIDNAPPING, MURDER AND SPECIAL CIRCUMSTANCES IF THEY FOUND, TOGETHER WITH SLIGHT CORROBORATION, THAT APPELLANT WAS IN POSSESSION OF PROPERTY STOLEN FROM MARK WALKER

In addition to its duty to instruct the jury on the principles of law relevant to the issues raised by the evidence, a trial court has a correlative duty "'to refrain from instructing on principles of law which not only are irrelevant to the issues realized by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.'" (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1172, quoting *People v. Saddler* (1979) 24 Cal.3d 671, 681.)

In the present case, the trial court erred by instructing the jury, over objection,[89] with CALJIC No. 2.15, as follows:

> If you find a defendant was in conscious possession of recently stolen property, the fact of such possession is not by

[89] All three defendants objected to this instruction, noting this was a murder case (implicitly distinguishing it from a case involving only property crimes). (35 RT 6358-6361; see also 36 RT 6405-6406.)

> itself sufficient to permit an inference that a defendant is guilty *of the crimes and allegations as charged in the amended information.* Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attributes of possession — time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, his false or contradictory statements, if any, and/or other statements he may have made with reference to the property, a false account of how he acquired possession of the stolen property, any other evidence which tends to connect the defendant with the crime charged.

(27 CT 7342; 38 RT 6820, emphasis added.)

As can be seen, this instruction told the jury that, if it found Montes was in possession of property stolen from Mark Walker (which was likely since Montes was seen driving the Walker's car), only slight corroboration was needed to find appellant guilty of all offenses including murder and the attendant special circumstances.

In *People v. Barker*, *supra*, 91 Cal.App.4th 1166, the court held it was error to instruct a jury with CALJIC No. 2.15 in reference to a murder charge. (*Id.* at p. 1173.) The *Barker* court noted that CALJIC No. 2.15 was originally intended as a cautionary instruction, inuring to the benefit of a defendant. It's purpose was to warn the jury not to infer that conscious possession of recently stolen goods was sufficient to prove a theft crime, absent some corroborating evidence. (*Id.* at p. 1174.) In *People v. Prieto*

(2003) 30 Cal.4th 226, this court found *Barker* persuasive, and held that it is error for a court to instruct the jury with CALJIC No. 2.15 in regard to non-theft offenses. (*Id.* at pp. 248-249; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101.)

In the instant case, as in *Prieto*, the CALJIC No. 2.15 instruction given by the court told the jury that the inference arising from the conscious possession of stolen property applied to the *crimes charged* (which here included the murder and kidnapping charges, and the special circumstances allegations which accompanied the murder charge). As in *Prieto*, the court did not limit the instruction to the theft offenses as suggested by the use note. Consequently, the instruction told the jury to use Montes' actual or constructive possession of property stolen from Mark Walker as evidence to constitute proof of every crime and the special circumstances.

In fact, appellant's possession of property stolen from Mark Walker had no legitimate tendency to prove that Montes was guilty of murder with special circumstances. The instruction was clearly erroneous with regard to the murder and kidnapping charges. It was also an improper instruction with regard to the special circumstances allegations because these were intertwined with the murder charge, and contained elements beyond those necessary to prove the underlying substantive offenses. Accordingly, the

court erred in delivering this instruction without limiting it to the theft-related charges.

B. THE ERROR REQUIRES REVERSAL

As discussed above, the instructions given in the present case told the jury that it could convict Montes of the murder and special circumstances based on a finding that he was in recent possession of Mark Walker's car, together with slight corroboration. The instruction thus provided the jury with the means for finding Montes guilty of all the charged offenses without the need for proof beyond a reasonable doubt of each element thereof. In the circumstances of the instant case, the error had the effect of relieving the prosecution of its burden of proving appellant guilty of the charges beyond a reasonable doubt, violated appellant's rights to due process of law and to a fair trial (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), and mandates reversal.

The prosecutor relied heavily upon the instruction as a means of convincing the jury that it could find appellant guilty of every offense if it found beyond a reasonable doubt that he was in possession of the Walker vehicle, together with only slight corroboration. In his initial closing argument, the prosecutor highlighted the instruction.

> The Court will give you an instruction. The instruction is very, very simple, very, very compelling. Possession of stolen property.

(36 RT 6493.) The prosecutor then read the instruction to the jury, and specifically referred to murder as an offense which could be proved in this fashion. (36 RT 6494.)

The prosecutor expressly argued to the jury that they could find appellant guilty of all the charged crimes, including murder, if they found he was in possession of the Walker car (which was uncontested) and they found slight corroboration. The prosecutor further argued that this slight corroboration could be found in the attributes of possession — i.e., the time, place and manner of possessing the car. (36 RT 6495.)

According to the prosecutor:

> Conscious possession of recently stolen property. All you need on top of that is slight corroboration.
>
> Well, you got much more than that in this case. Way more. *And everything over and above possession of that car, the fact that they've been identified in getting out of that car, is really icing on the cake.*

(36 RT 6496, emphasis added.)

The prosecutor also contended that the testimony of Nate Hanvey supplied this corroborating evidence; that only slight corroboration was required; and that such evidence did not need to be sufficient by itself to warrant an inference of guilt. (36 RT 6499-6500.) In his final closing argument, the prosecutor returned to this theme, again quoting from the instruction and emphasizing that the corroboration need only be slight.