In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH MANUEL MONTES,

Defendant and Appellant.

CAPITAL CASE

Case No.
S059912

Riverside County Superior Court Case No. CR58553
The Honorable Robert J. McIntyre, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In 1994, Joseph Montes and co-defendants Ashley Gallegos and Travis Hawkins robbed, car-jacked, and kidnapped sixteen-year-old Mark Walker in Beaumont and shoved him into the trunk of his own car because they needed a ride to a birthday party. Montes and the group later left the party and drove to a nearby isolated location where Montes executed Walker; Montes shot Walker at close range and while Walker struggled to get out of the trunk. Co-defendant Salvador Varela had followed from the party in a separate car and helped them get rid of the car and Walker's body. Montes and the others then returned to the party, with Montes bragging he had earned his gang "stripes" for the murder. Montes and his three-codefendants were convicted of Walker's murder in 1996, and a death judgment was imposed upon Montes.

STATEMENT OF THE CASE

An amended information filed by the Riverside District Attorney on September 4, 1996, charged Montes and co-defendants Travis Hawkins, Ashley Gallegos and Salvador Varela with the murder of Mark Walker.[1] They were each charged with, in count one, murder (Pen. Code, § 187, subd. (a)), in count two, kidnapping during a car-jacking (Pen. Code, § 209.5), and in count three, car-jacking (Pen. Code, § 215). Three special circumstances were also alleged: murder during the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), murder during the commission of kidnapping (Pen. Code, § 190.2, subd. (a)(17)(ii)), and kidnap for the purposes of robbery (Pen. Code, § 190.2, subd. (a)(17)(ii)). It was further

[1] The death penalty was only sought against Montes because co-defendants Hawkins and Gallegos were too young and co-defendant Varela did not participate in the initial car-jacking. (See 4 PRT 799, 891 (prosecutor's comments.)

alleged a principal was armed with a firearm as to each count (Pen. Code, § 12022, subd. (a)(1)). In addition, counts four and five each charged Montes and Varela with being ex-felons in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)), and having previously been convicted of a serious or violent felony (Pen. Code, § 667, subd. (a)(1)). (4 CT 956-960.)

On August 23, 1996, prior to the filing of the amended information, the trial court granted the People's motion to sever and ordered Varela to be jointly tried but with a separately empanelled jury. The court otherwise denied a similar motion for severance by the remaining defendants.[2] (4 CT 923-925; PRT 29-30, 40, 44.)

Following trial by jury, on November 22, 1996, Montes and co-defendants Hawkins and Gallegos were convicted of first degree murder, kidnap during the commission of a car-jacking, and car-jacking. The jury also found all the special circumstances to be true. In addition, the jury convicted Montes of possession of a firearm by an ex-felon. (5 CT 1268-1268A, 1274-1291, 1302; 40 RT 7122-7136, 7159-7168.)

That same day Varela's jury convicted him of first degree murder, car-jacking, kidnapping during the commission of a car-jacking, and possession of a firearm by an ex-felon. The jury found true only the special circumstance of murder during commission of a kidnapping. (5 CT 1292-1301, 1304; 40 RT 7165-7166, 7168.).[3] On December 3, 1996, Montes's

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[2] Both juries were present in court and simultaneously heard all the evidence, with the exception of co-defendant Varela's statement to police (inculpating Montes as the shooter) being introduced in Varela's trial only. (Augmented RT of proceedings held August 23, 1995, at pp. 29-30, 44; PRT 885-886.)

[3] On March 18, 1997, Montes's co-defendants were each sentenced to life in prison without the possibility of parole for the murder in count one, a concurrent prison term of life with the possibility of parole for

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penalty phase began. On December 11, 1996, the jury commenced penalty phase deliberations. (28 CT 7553.) The jury recommended death on December 16, 1996. (28 CT 7623-7624.) The trial court denied Montes's automatic motion to modify the penalty and on March 18, 1997, entered a judgment of death for murder (count one), life with the possibility of parole for kidnapping during commission of a car-jacking (count two) with a concurrent one-year term for the section 12022, subdivision (a)(1) firearm enhancement; an aggravated nine-year term for carjacking (count three) and a one-year consecutive term for the section 1022, subdivision (a) firearm enhancement; a two-year concurrent term for being an ex-felon in possession of a firearm (count four); and a five-year consecutive term for the section 667, subdivision (a) serious felony prior conviction. (28 CT 7727-7729.)

STATEMENT OF FACTS

In 1994, Joseph Montes and co-defendants Ashley Gallegos and Travis Hawkins robbed, car-jacked, and kidnapped sixteen-year-old Mark

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kidnapping during the commission of a carjacking in count two, and a concurrent determinate nine-year term for the car-jacking plus a concurrent one-year term for the principal arming enhancement. Each indeterminate term also included a consecutive one-year term for the arming enhancement. (7 CT 1697-1698, 1703, 1705-1707; SCT 4-5; 41 RT 7174 et seq. [Hawkins], 7195 et seq. [Varela], 7206 et seq. [Gallegos].) Varela also received a concurrent three-year term for possession of a firearm by an ex-felon and a concurrent three-year term for a probation violation. (41 RT 7199-7200.)

On November 15, 1999, the Fourth District Court of Appeal affirmed the judgments with modification to the abstract to correct slight sentencing errors. (*People v. Varela* et al. (E020144).) Co-defendants Varela and Hawkins also sought federal habeas relief; their petitions were denied in 2002. (*Varela v. Cambra* (CV 01-0447-CBM (JTL), filed April 15, 2002), and *Hawkins v. Plier* (ED CV 01-0348-CBM (E), filed April 4, 2002).

Walker in Beaumont and shoved him into the trunk of his own car because they needed a ride to a birthday party. Montes and the group later left the party and drove to a nearby isolated location where Montes executed Walker; Montes shot Walker at close range and while Walker struggled to get out of the trunk. Co-defendant Salvador Varela had followed from the parry in a separate car and helped them get rid of the car and Walker's body. Montes and the others then returned to the party, with Montes bragging he had earned his gang "stripes" for the murder. Montes, Varela, Hawkins, and Ashley Gallegos were convicted of Walker's murder in 1996.

A. Events Preceding Mark Walker's Death

Sixteen-year-old Mark Walker lived in Banning with his mother, Judith Koahou, and stepfather, Abel Koahou. (13 RT 2004-2005.) His stepfather was a football coach at Beaumont High School which Walker attended, and a Cabazon Tribal Police Sergeant. Koahou kept a briefcase with handcuffs, a baton and other police related items inside the trunk of his grey Buick Regal. (13 RT 2030, 2039-2040.)

At 2:30 p.m. on August 27, 1994, Walker called his best friend Jason Probst and arranged to attend a concert with Probst. (13 RT 2077, 2079.) About one-half hour after he called Probst, Walker called his girlfriend, Leah Larkin, to tell her he was coming over to her house. (13 RT 2060.) However, Walker did not arrive until 5 p.m. and by that time, Larkin had angrily arranged to go to a movie with some friends. (13 RT 2058, 2061-2062.) Larkin and Walker talked for 20 minutes. (13 RT 2059.) Walker said he was going to see a local band and then left in the grey Buick. (13 RT 2059, 2061.)

Walker returned home after 5:30 and asked his mother for permission to go clothes shopping at the mall. (13 RT 2009.) She consented and gave Walker two $100 bills. (13 RT 2009.) Walker put the money behind his ATM card inside his dark blue nylon wallet. (13 RT 2009-2010, 2025.)

Walker also told his mother he wanted to listen to a local band with Probst and to see Larkin. (13 RT 2012.) Walker's mother told him to be home by 11 p.m., or to call if he stayed over with a friend. Walker left around 6:40 p.m. in the grey Buick. (13 RT 2013, 2011, 2022.) Walker's mother never saw him alive again. (13 RT 2013.)

Walker had arranged to pick up Probst around 7 p.m. (13 RT 2079-2082.) Walker never showed up and Probst made numerous futile telephone calls searching for his friend that evening. (13 RT 2081-2082.)

Nathan Hanvey knew Walker. Around dusk, Hanvey roller-bladed to Jay's Market in Beaumont to buy a candy bar. (13 RT 2093-2098.) Inside the store, Hanvey saw Walker at the checkout counter paying for a fountain drink. (13 RT 2099-2100.) Hanvey noticed Walker had a substantial amount of money in his wallet; Hanvey also noticed five or six "scary looking" Hispanics in line behind Walker, eyeing Walker's wallet and gesturing to each other. Hanvey knew one of the Hispanics to be Hawkins, but was unsure if Hawkins was actually with this group. (13 RT 2093-2117, 2160.) Hanvey felt intimidated as if they were "staring him down." (14 RT 2225.) Hawkins and Walker knew each other and played football together, as well. (12 RT 2045-2046; 13 RT 2030, 2043.) After Walker completed his purchase, the Hispanic group bought a six-pack of beer and also left the store. (13 RT 2105.) At trial, Hanvey identified Gallegos and Montes as part of the group inside the market. (13 RT 2103, 2160-2161.)

B. Events Surrounding Varela's Birthday Party And The Following Day

Salvador Varela lived in Apartment No. 4, 1599 Plaza de Noche Drive, in Corona, with his sister Sylvia Varela (hereafter "Sylvia Varela"), brother George Varela (hereafter "George Varela"), and George's girlfriend, Marcy Blancarte. (16 RT 2686; 17 RT 2851-2852; 25 RT 4384-

4386.) On the evening of August 27, 1994, a birthday party was going to be held for Varela. (17 RT 2852.)

Montes and Travis Hawkins were cousins. (25 RT 4395.) Montes and Gallegos knew the Varela brothers from when they lived in Beaumont.[4] Sometime between 3 and 5 o'clock that morning, Montes, Gallegos and two or three others went to the Varela apartment to speak with George Varela. (22 RT 3689-3870; 25 RT 4399-4400.) Gallegos showed George Varela a black handgun that George Varela offered to buy; Gallegos did not want to sell it. (25 RT 4404-4406.) George Varela invited Montes and Gallegos to the birthday party planned for that evening. (22 RT 3870; 25 RT 4399, 4408.)

That afternoon, Montes called the apartment several times to ask George Varela for a ride from Beaumont for himself and Gallegos. George Varela refused to come pick them up because it was too far away. (17 RT 2887, 2943; 25 RT 4399, 4409-4416.) In addition, Gallegos called once from a pay telephone searching for a ride to the party. (25 RT 4414-4415.) Before Gallegos arrived at the party, Sylvia Varela had called him and offered a ride, but he indicated that he already had a ride. (17 RT 2889-2890.)

Christopher Eismann was married to Varela's aunt. He and George Varela bought a keg of beer and brought it to the apartment around 3 p.m. (20 RT 3348; 22 RT 3669-3670; 25 RT 4395-4398.) The party started around 5 or 6 p.m., and people stood on the balcony where the keg of beer

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[4] Varela knew Gallegos and Montes from growing up in Beaumont. (25 RT 4388-4389, 4391.) Varela's sister Elizabeth was married to Gallegos's brother. (25 RT 4389.) Varela had dated Gallegos's sister and they had a daughter together. (25 RT 4390.)

had been placed.[5] (17 RT 2853-2854; 18 RT 2958; 20 RT 3352-3353; 22 RT 3673.)

Sometime before sunset, Montes drove Walker's grey Buick in and parked near the apartment. (16 RT 2798; 17 RT 2858-2859; 22 RT 3815-3820; 23 RT 4046-4048.) Montes, Gallegos, Hawkins, and a fourth then unknown male wearing a Dodgers baseball cap[6] jumped out the car. They stood at the rear of the car and talked for a few seconds before coming up to the party. (16 RT 2696-2699; 17 RT 2860-2862; 22 RT 3758; 25 RT 4428.) Gallegos had been in the front passenger seat. As he exited the car, Gallegos made a bending motion as he stepped from the vehicle, as if he was getting something, possibly a gun, and then tucked in his shirt. (16 RT 2697-2700.)

Kevin Fleming was on the balcony when the four men entered the apartment. (18 RT 3054, 3063.) Hawkins stood near Fleming on the balcony. (18 RT 3073-3074.) Hawkins joined a conversation between Fleming and the Varela brothers and said he had been in a convenience store where the clerk displayed an attitude about his clothing. (19 RT 3158-3159, 3174.) Hawkins then said he could have "smoked" or shot the clerk. (19 RT 3159.)

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[5] In addition to the already named persons, the party-goers included Kevin Fleming, a co-worker and friend of George Varela and Fleming's ex-wife Samantha (18 RT 3050-3054), Arthur Arroyo and his girlfriend Angie Avitia, a cousin of the Valera's (16 RT 2685-2686; 23 RT 4044-4046), and Nadine Herrera and her boyfriend Eddie Montes, Montes's cousin (27 RT 4976-4979; 31 RT 5601-5603).

[6] This fourth youth was later identified as Miguel Garcia (27 RT 5041-¬5042; 29 RT 5193, 31 RT 5647-5649), a Vario Beaumonte Rifa "VBR" gang member with the nickname (monikers) of Thumper or Grumpy (32 RT 5822).

Montes asked George Varela to help drop off the grey Buick. Montes claimed the car belonged to a friend in Yorba Linda, but George Varela suspected the vehicle was stolen and refused to help Montes. (25 RT 4436-4437, 4447-4449.) Montes also provided Varela a similar story about the car and asked Varela to help him. (18 RT 3067; 22 RT 3729.) Varela initially refused to help, claiming he drank too much alcohol and wanted to stay at his party. (22 RT 3808.) However, Varela eventually agreed to help. (18 RT 3067.) Varela's former girlfriend Kimberly Speck hid the keys to his van under a mattress so he would not drink and drive. (20 RT 3375.) But Varela insisted that she retrieve the keys, and explained he needed to do a favor for Montes and would soon return. (20 RT 3379-3382.) Fleming and Christopher Eismann offered to drive Varela, but Varela refused because he was going "just around the corner." (18 RT 3067-3069; 19 RT 3170; 22 RT 3688.)

Montes, Hawkins and Garcia left in Walker's grey Buick. Varela and Gallegos drove in Varela's white van.[7] (16 RT 2709-2710; 17 RT 2872; 18 RT 2870-2872; 22 RT 3686-3687; 25 RT 4438-4439; SCT 43-44.) The

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[7] Fleming testified and claimed Hawkins stayed at the party and played dominoes or cards. (18 RT 3070.) Various party-goers played dominoes at one time or another during the evening. Around the time the Buick and the van left, George Varela played with Kevin and Samantha Fleming and Junior Avitia. (25 RT 4439-4441.) Hawkins asked if he could play, but George Varela told Hawkins he would have to wait. (26 RT 4666.)

At some point, Fleming and Hawkins also played two games of dominoes. (19 RT 3201.) Fleming believed the games could have taken place while Varela, Montes, Gallegos and the unknown male were out of the apartment dropping off the Buick. (19 RT 3171; 20 RT 3330.) Fleming also believed the games were played after the van returned. (20 RT 3331, 3334.) Marci Blancarte saw Hawkins sit down to play dominoes before the Buick was driven from the parking lot, and noticed he participated again in a dominoes game much later, around 9:15 p.m. (22 RT 3868, 3916.)

group was gone approximately 15 to 30 minutes and then all of them returned inside Varela's van; the grey car did not return. (16 RT 2713-2714; 17 RT 2876; 18 RT 3071; 22 RT 3689.) Varela was driving and Gallegos was in the front passenger seat. (16 RT 2714-2715, 2724-2725; 17 RT 2876-2877; 23 RT 4057-4058.) Upon their return, most of the men stood together and talked on the balcony. (16 RT 2717.) Some of the party-goers believed the demeanor of the men was similar to what it had been before they had left; others believed Montes appeared nervous before leaving but seemed jovial upon his return, while Gallegos and Varela seemed very subdued. (17 RT 2883-2884; 18 RT 3071-3072; 20 RT 3306-3307; 21 RT 3587-3591; 22 RT 3691; 23 RT 4060-4065.) Speck explained that after Varela returned, he was pale, worried and in a panic, and refused to tell her what was wrong, although he later confided in her what had happened.[8] (21 RT 2244, 3385-3386, 3550, 3581-3582.)

After the van returned, Angelina Avitia went into Sylvia Varela's bedroom to make a telephone call inside the room. (23 RT 4044, 4046, 4063.) Montes, Gallegos and Hawkins were inside the room using the telephone, and they stayed for about one-half hour inside the room. (23 RT 4063, 4078.)

Sometime that evening, Montes bought pizza. (16 RT 2727; 20 RT 3394, 22 RT 3891-3892.) George Varela gave Montes change for a $100 dollar bill. (25 RT 4504.) Marci Blancarte saw Montes pay for the food with $20 bills taken from a black wallet. (22 RT 3775, 3892.) Sometime between 11:30 and 12:45 a.m., Montes's cousin Eddie Montes, Eddie's girlfriend Nadine Herrera, and Nadine's friend Dina Barajas, arrived at the party. (27 RT 5001, 5025; 29 RT 5153-5154.)

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[8] Speck did not however, testify as to what Varela told her.

Many party-goers observed firearms being displayed that evening. Early in the evening, Montes showed Arthur Arroyo and some others a nickel-plated revolver. (16 RT 2706-2707; 23 RT 4070-4071.) The gun was passed around the group. (25 RT 4460-4461.) Marci Blancarte saw a large black gun passed around on the balcony, then later noticed Montes showing a small gun to two people in the bathroom. (22 RT 3898-3899.) Speck observed Montes with two handguns before he and the others left the apartment. (21 RT 3457-3459.) Around midnight, Varela and his brother showed Arroyo a nine-millimeter handgun that had been concealed under the bathroom sink. (16 RT 2719-2720.) Arroyo wanted to purchase the weapon. (23 RT 4117, 4128.)

Sometime between 10 p.m. and midnight, a group left the party to play pool nearby. The group included the Varela brothers, Kevin Fleming, Hawkins and Gallegos. (18 RT 3089-3090; 25 RT 4447; 31 RT 5617-5618.) Eddie Montes drove to the pool hall with his cousin Montes, and two others. (31 RT 5618.)

While some members of the group played pool, Montes and Hawkins had an argument. (25 RT 4452.) Hawkins pulled a small derringer from his pocket; George Varela told him to put the weapon away and "kick back." (25 RT 4453-4454.) Some time after midnight, Marci Blancarte walked to the pool hall with Samantha Fleming but then returned to the party a short time later, along with George Varela, Fleming, and Hawkins. (22 RT 3875-3876.)

George Varela eventually left the party with a female named Jennifer and spent the night in Long Beach. (25 RT 4457, 4528.) Around 1:30 or 2 a.m. that Sunday morning, Eddie Montes drove Hawkins and Miguel Garcia back to Beaumont. (21 RT 3460-3461, 22 RT 3876-3877, 23 RT 3984, 31 RT 5624-5628, 5647-5649.) Eddie Montes drove to Beaumont

and dropped off Miguel Garcia at a liquor store and Hawkins either at Hawkins's home or his grandmother's house. (31 RT 5626-5628.)

Montes and Gallegos stayed at the Varela apartment after the party ended. (17 RT 2892.) Sylvia Varela played Nintendo games with them and smoked methamphetamine, although it did not affect her memory of the events that evening; she had also given some methamphetamine to Montes and Gallegos at the party. (17 RT 2895, 2915-2916, 2918-2919; 18 RT 2992-2994.)

That Sunday morning, co-defendant Varela and Speck went to a donut shop and purchased a newspaper. (20 RT 3406.) Varela found an article about a dead body that had been found inside the trunk of a car off Palisades Road. (20 RT 3407.) Speck showed the article to Montes and Gallegos back at the apartment. Montes denied committing the crime and told Speck, "Can you believe they're trying to pin this on me? They're trying to say that I killed this kid." (20 RT 3407-3409; 21 RT 3504-3505.) However, Montes showed the article to Sylvia Varela and bragged "I did this," asking her not to tell anyone. Montes also made a number of telephone calls, including to his own father, in which he made the same claim and argued with his dad. At one point, Montes stated he would have to go a few "rounds" with his dad. Both Marci Blancarte and Sylvia Varela heard Montes state that he had earned "his stripes" for the killing. (17 RT 2902-2903; 18 RT 2892-2903, 2979; 22 RT 3883-3884; 34 RT 6209-6210.) Montes also revealed the victim had been shot in the head. (23 RT 3879-3882.)

George Varela returned to the apartment that Sunday afternoon. He agreed to drive Montes and Gallegos back to Beaumont. (20 RT 3403-3404, 3418-3419; 25 RT 4463-4464.) He drove a two-door, blue Laser. (26 RT 4688-4689.) Montes sat in the front passenger seat and Gallegos sat in the back. (25 RT 4464, 4469; 26 RT 4689.) Montes removed a

newspaper clipping from his pocket and told George Varela that an "old man" from Beaumont had been killed. (25 RT 4465-4466.) Montes bragged that he committed the murder and described how he shot the victim, pulling his sleeve down to cover his hand and protect him from blood spatter. Montes even showed George Varela a blood spot on his sleeve. Montes also explained that after firing one or two shots, he turned away as he continued to fire, because he was "grossed out" by the sight. Montes also told George Varela he had "jacked" the car, and said the gun was gone. (25 RT 4467-4469; 26 RT 4701.)[9]

George Varela dropped off Gallegos at a liquor store near his home and then drove to the Montes's residence. (25 RT 4470.) George Varela parked at the Dominguez residence two doors away from Montes's house. (26 RT 4695.) Victor Dominguez was standing in the yard when they arrived and told George Varela, "You're riding with a 187." (25 RT 4471-4472.) George Varela then ordered Montes to get out of his car. (26 RT 4658.)

George Varela went into the house with Montes. Montes's father was inside the living room and visibly upset. (25 RT 4474.) Montes admitted to the killing and explained, "I had to do it. I ain't going to let four vatos go down for some white boy." (25 RT 4463-4475.) George Varela and Dominguez left the house, as police arrived to arrest Montes. (25 RT 4476.)

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[9] The music was playing loudly in the car. When asked if it was "your impression" that Gallegos, a relative by marriage to the Valera's, could hear the conversation, George Varela stated, "probably not." (26 RT 4689-4690.)

C. Events Surrounding The Murder And The Subsequent Criminal Investigation

1. The Murder

Alexander Silver lived in a house on a hill that overlooked Palisades Road in Corona. The road had no streetlights and was rather isolated. Around 8 p.m., on August 27, 1994, Silver was talking with his sister, Laura Esqueda, and her husband in the back yard of his residence. (14 RT 2234-2239, 2241.) Silver heard what he believed to be four gunshots come from the direction of Palisades Road. Silver ran to the fence. (14 RT 2239.) Silver and the others then noticed a van parked on the highway shoulder facing east. He also saw an older model car almost parallel, but facing the opposite direction. (14 RT 2240-2241, 2359; 15 RT 2436-2438.) Three Hispanics were near the open trunk of the car, and Silver thought one may have extended an arm for an instant. (14 RT 2248, 2278.) The men scurried and Silver went inside to call the police. (14 RT 2240, 2297.) Silver contacted the 911 operator just after 8:30 p.m. (SCT 2, 10 [Exhibits 39A and 39B].)

Laura Esqueda and her husband Robert watched the activity below while Silver was on the telephone. (14 RT 2248-2249.) When the males came around to the van, the lights in the back of the van were turned off, and they could no longer see what was taking place. (15 RT 2356, 2371, 2385-2386, 2425.)

While Silver was on the phone with the 911 operator, he updated the operator with information received from the Esquedas. (14 RT 2251, 2304, 2314.) When Silver later returned to the fence, the lights on both vehicles were switched off and two men were seen inside the back of the van. (14 RT 2252, 2283.) Another male walked out of Silver's view and entered the van. (14 RT 2253.) Silver stepped away from the fence a second time to bring his children into the house. (14 RT 2285.) When he returned a third

time, he could not see the van, but the car had a dome light on and had been backed towards a dirt area at the side of the road. (14 RT 2284, 2363-2364.)

2. The Investigation

Corona Police Department Officers Craig Taylor and Gary Butera were on routine patrol in separate vehicles. They received a "shots fired" call and arrived at Palisades Road at about 8:32 p.m., but by then, the van was already gone. (15 RT 2391, 2481-2483, 23 RT 4023-4204.) The location was about three miles from the Varela apartment, or six minutes away by car. (24 RT 4339-4341.) The officers discovered the car; the trunk was open and the trunk light was on. Inside, the officers found Walker on his back with one leg out of the vehicle. (15 RT 2489-2492; 23 RT 4030.) After searching for suspects and additional victims, the officers secured the crime scene. (15 RT 2492-2493; 23 RT 4032.)

Corona Police Department Detective Ronald Anderson was the assigned case agent and arrived around 9:00 p.m. (23 RT 4131-4132.) Anderson discovered tire tracks in a circular pattern across the dirt median. (23 RT 4146.) Identification Technician Murray Robitaille photographed the tire tracks and crime scene and collected the physical evidence. (15 RT 2506-2508, 23 RT 4146.)

The tire impressions matched the type of tires on Varela's van. (15 RT 2607-2614.) In addition, shoe impressions were identified as being made by Van tennis shoes, a brand owned by both Varela and Hawkins.[10] (31 RT 5546-5566.) Robitaille also collected two spent nine-millimeter cartridge casings from the car trunk and two on the ground behind the car. (15 RT 2539, 2541-2542; 24 RT 4192-4193.) He also lifted two latent

[10] Witnesses identified the shoes worn by Varela that evening, however, as black dress shoes. (22 RT 3804; 23 RT 3946-3947.)

fingerprints, one from the hood of the Buick, and the other from the glass in the driver's window. (15 RT 2549-2550.)

Walker's body was removed from the vehicle and the trunk was searched. Both rear taillight assemblies had been loosened. The wing nuts were also removed from one light, which was pushed out from inside the trunk. (15 RT 2545-2546; 24 RT 4191.) The car was eventually towed to the Corona Police Department. (23 RT 4033, 41474148.)

The following morning, Robitaille provided the latent print cards to Thai-Loi Tran at the Riverside County Sheriff's Department fingerprint identification section. (15 RT 2549-2560.) Detective Anderson was then notified that the fingerprint from the driver's window matched Montes. (23 RT 4152-4153; 28 RT 5102-5104, 5110-5118.) On August 28, 1994, Montes was arrested at his father's Beaumont residence. (23 RT 4156-4158; 24 RT 4261, 4273.) Varela, Gallegos and Hawkins were arrested between August 29 and September 2, 1994. (23 RT 4163, 4167-4169, 4171.)

3. The Autopsy

On August 31, 1994, pathologist Joseph Choi, M.D., performed an autopsy on Walker. (30 RT 5419-5420.) Walker's blood alcohol content of .09 did not contribute to his death. (30 RT 5463-5464.) Instead, Walker died from being shot five times at close range and within a few seconds of each other. He was shot on the top of his head, the right side of his mouth and the left side of his face. (30 RT 5424-5425, 5427-5428, 5435, 5438, 5449.) Walker died within minutes after the shots were fired. Dr. Choi believed Walker was shot while he tried to get out of the trunk. (30 RT 5422, 5452-5453, 5458-5459.)

4. Recovery of the Murder Weapon

Steven Glomb owned the Glock nine-millimeter Montes used to kill Walker. In late August of 1994, Gallegos, Refugio Garcia and other friends visited Glomb's teenage daughter. She discovered that her dad's gun safe was not locked. Glomb has kept guns inside a firearms safe, but forgot to lock the safe after a party held in his home in June or July of 1994. (26 RT 4832-4833, 4841; 27 RT 4915.) Gallegos and Garcia opened the safe and stole both the Glock and a black-handled .380 Walther PPKS. (27 RT 4909-4922; 29 RT 5200-5206.) Gallegos kept the Glock nine-millimeter and Garcia kept the .380 Walther PPKS. (29 RT 5203-5205, 5346.)

Sometime later, Gallegos came to Garcia's house and asked to borrow the .380. (29 RT 5208.) Gallegos said he was going to a party in Corona and wanted the gun in case he was jumped. (29 RT 5208, 5336.) Gallegos stuck it in his pants, opened the front passenger door of a grey car, and entered the car. (29 RT 5209.)

A few nights later, Gallegos knocked on Garcia's bedroom window and woke him up. (29 RT 5215.) Gallegos returned the gun and Garcia hid the weapon in his closet. (29 RT 5215-5216.) Garcia saw Gallegos the next day, and Gallegos told him to get rid of the weapon. (29 RT 5216-5217.) Gallegos explained that he and the others had carjacked and then killed Walker and robbed him of $200 dollars. Gallegos said that the .380 had not been used, and the nine-millimeter had been thrown away. (29 RT 5221, 5223, 5225.) Garcia later sold the .380 for $100 dollars and a pair of speakers. (29 RT 5227, 5312-5313.)

Several months after the murder and on January 17, 1995, a jogger discovered the nine-millimeter handgun. It was found sticking up in a trench on the side of a road, about mile away from where Walker had been murdered. (24 RT 4250-4253, 4255, 4334.) The gun did not have a

magazine; rocks and mud were inside the area where the magazine would be inserted. (24 RT 4253; 28 RT 5130.)

The gun, shell casings recovered from the crime scene, and the bullets recovered from Walker's body during the autopsy were all eventually compared by California Department of Justice Criminalist Richard Takenaga. (16 RT 2591; 24 RT 4304, 4318, 4321, 4326.) Takenaga concluded the casings were fired from the recovered weapon and the bullets also could have been discharged from the gun. San Bernardino County Sheriff's Department criminalist William Mattey specialized in identification of Glock firearms and concurred with Takenaga's opinion. (24 RT 4329-4330; 28 RT 5126, 5128-5129, 5132-5134.)

5. Additional Evidence

Beaumont Police Sergeant Scott Beard testified as an expert on Beaumont gangs. He testified two Hispanic gangs were active in the city of Beaumont during 1994 - Vario Beaumonte Rifa ("VBR") and Northside Beaumont. (32 RT 5792-5793.) Sergeant Beard also noted Hawkins and Miguel Garcia were VBR members (32 RT 5819, 5822, 5824), that Gallegos and Eddie Montes were considered associates of the gang (32 RT 5819-5820), and that Montes, Varela and brother George Varela were not members of the gang (32 RT 5809, 5823). However, Arthur Arroyo thought the Varela brothers were in a "kind of gang or group," but did not know which one. (17 RT 2762.)

Sergeant Beard also discussed an address book taken from Hawkins's residence and a notebook from Montes's residence. Hawkins's address book contained nicknames or monikers of gang members, including Gallegos's nickname, "Oso." (21 RT 3451-3452, 32 RT 5799.) Hawkins also had various gang related tattoos, including VBR, "SUR X3" (associated with Southern California Hispanic street gangs) and "Huero," his own gang moniker. (32 RT 5801-5802.) Montes's notebook also

contained gang monikers, including "Huero" (Hawkins's moniker), "Oso" (Gallegos's moniker), as well as the name "Ashley" written (also a reference to Gallegos). (32 RT 5803-5804.) Additionally, Montes had a "SUR XIII" tattoo and an "ESC" tattoo which stood for the "Eastside Colton" gang, and, Gallegos had a "SUR" tattoo. (32 RT 5807, 5814.) Sergeant Beard explained the relevance of tattoos in that gang members often have gang-related tattoos (32 RT 5796), group together, and have mutual loyalty to other members of the gang (32 RT 5807-5808, 5814-5815). Sergeant Beard also discussed how someone can get "jumped" into a gang by committing a crime. (32 RT 5808.)

D. DEFENSE

None of the defendants testified.

E. PENALTY PHASE

1. Prosecution

In aggravation, the prosecution presented evidence that Montes had been previously convicted of burglary. Additionally, on September 8, 1995, and while awaiting trial, Montes was in a holding cell with Gallegos and about 15 other prisoners. Less than a minute after deputies closed the cell door, Montes attacked Gallegos with his own chains that he had managed to slip off his waist. (41 RT 7270-7283.) Montes also possessed deadly weapons in jail while awaiting trial: On July 23, 2006, correctional officers discovered a toothbrush with a razorblade on the end, and a shank inside his cell on September 11, 1996. (41 RT 7301-7306, 7312-7319.)

The prosecution also presented victim impact evidence from Walker's mother, father, brother and step-father. They described Walker's upbringing and described him as a responsible young man, and a caring son and brother. They also discussed the devastating impact that Walker's murder had on his family and friends, both at the time of the murder and

that continued to the date of the trial. (See, e.g., 41 RT 7326-7337; 42 RT 7360-7379, 7383-7426.)

The prosecution also provided the jury a 10-and-one-half minute videotape set to light instrumental music. The videotape depicted a photo montage of Walker while alive. The videotape ended with the image of a snow covered road and followed by a photograph of Walker's memorial bench and plaque. (Exhibit P-12.) Walker's mother mentioned that the memorial bench and plaque had been donated to the cemetery by the football team in memory of her son. (42 RT 7423.)

2. Defense

Defense oriented penalty phase evidence focused primarily on Montes's childhood and alleged developmental disability. This included evidence about the how Montes was hyperactive and had difficulties in public and later religious school as a "slow child" (42 RT 7491, 7494, 7496, 7529-7532, 7550; 43 RT 7618-7625; 44 RT 7728); the impact on Montes following his parents' divorce (42 RT 7485-7489, 7498-7501, 7512; 44 RT 7735-7736); and his mother's emotional and personal problems that developed after the divorce (42 RT 7545, 7558-7561; 44 RT 7747). Additional alleged developmental problems included childhood testing that showed an I.Q. of 68 to 70 (42 RT 7553-7534); school teachers from the first, second, fifth and sixth grade who described school performance consistent with someone who had an I.Q. around 77 (42 RT 7515-7516, 7523, 7580, 7583; Exhibits PD-36 and PD-37); and a subsequent test while in custody awaiting the instant trial that showed a borderline mentally retarded I.Q. of 77 (with a possible range of 72 to 82) (43 RT 7635-7639, 7673-7674).

To explain the possession of weapons while in jail, Montes presented evidence he had been the victim of a stabbing in jail. (42 RT 7449-7458.) Montes also presented testimony from family members that they would be

devastated if he were executed. (42 RT 7503, 7513, 7541, 7553; 44 RT 7730, 7744.)

3. Rebuttal

The prosecution presented evidence that in 1994, the police discovered Montes in possession of an altered Philips screwdriver. He was not arrested for the offense. (44 RT 7777-7778, 7781.)

GUILT PHASE ARGUMENTS

I. ARGUMENT I DOES NOT RAISE A CLAIM OF ERROR

Argument I merely summarizes the procedural history governing Montes's efforts to obtain discovery, pursuant to *Murgia v. Municipal Court*, *supra*, 15 Cal.3d at p. 286, of the capital charging practices of the Riverside District Attorney's Office.

II. THE TRIAL COURT PROPERLY DENIED MONTES'S *MURGIA* MOTION TO DISCOVER PROSECUTION STANDARDS GOVERNING WHETHER TO CHARGE SPECIAL CIRCUMSTANCES

On October 13, 1995, Montes filed a *Murgia* motion (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286) to discover the standards for charging special circumstances in the Riverside County District Attorney's Office. (23 CT 6261-6267.) Montes maintained the decision to seek death in this case had been influenced by invidious factors (race and the status of the victim) and therefore violated his federal rights under the Eighth Amendment, as well as the due process and equal protection clauses. (23 CT 6291, 6276, 6292-6295.) The trial court denied the motion, ruling Montes did not show plausible justification by direct or circumstantial evidence that the prosecution's discretion had been exercised with intentional and invidious discrimination. (24 CT 6642.) Montes claims the trial court erred when it reached this conclusion. (AOB 65.) Respondent disagrees.

A. STANDARD OF REVIEW

> [I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion.

(*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 834, quoting *Murgia v. Municipal Court, supra,* 15 Cal.3d at p. 298.)

> [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.' .... In the instant case we have no occasion to consider the entire range of classifications that may be 'arbitrary' in this context, i.e., that bear no rational relationship to legitimate law enforcement interests....

(*Baluyut v. Superior Court, supra*, 12 Cal.4th at p. 835, quoting *Murgia v. Municipal Court, supra*, 15 Cal.3d at p. 302.)

For a defendant to establish that he is entitled to discovery in order to support a claim of invidious discrimination, this Court has held there must be some degree of specificity, "sustained by plausible justification" for the evidence sought. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1170.)

In *United States v. Armstrong*, the United States Supreme Court addressed the specific issue of what showing a criminal defendant must make to warrant discovery in support of a discriminatory prosecution claim based on the United States Constitution's guarantee of equal protection. The Court determined the threshold requirement is to "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not" or in other words, "a credible showing of different treatment of similarly situated persons." (*United States v. Armstrong* (1996) 517 U.S. 456, 469 [116 S.Ct. 1480, 134 L.Ed.2d 687].)

Montes acknowledges the lesser "plausible justification" standard (relied on by the trial court in this case) may have been superseded by the higher standard of "some evidence" set forth in *Armstrong*. (AOB 68-69.) Respondent believes that is accurate. The Supreme Court articulated a higher showing than "plausible justification," because it specifically observed the need to produce evidence, and, to make a credible showing of disparate treatment. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1187; see also *People v. McKay* (2002) 27 Cal.4th 601, 640 (Brown, J., concurring and dissenting, stating this is "a hurdle that has proved to be higher in the lower courts than one would initially suspect.") This higher burden applies to Montes, as his crime occurred in 1994 but the trial began in 1996 a few months after the *Armstrong* decision. As *Baez* explained,

> In sum, although the burden on a California criminal defendant prior to 1990 did not require that he or she produce "some evidence" in support of his or her discriminatory prosecution claim in order to justify discovery in support of that claim, the enactment of Penal Code section 1054, subdivision (e) in 1990 subjected California criminal defendants to the burden necessary to justify disclosure under the United States Constitution. That burden is the one set forth in *Armstrong*. Baez was entitled to discovery only if the trial court concluded that he had produced "some evidence" in support of his discriminatory prosecution claim. The trial court determined that he had met this burden. The only remaining question is whether the trial court's decision was an abuse of discretion.

(*People v. Superior Court (Baez), supra*, 79 Cal.App.4th at pp. 1190-1191.)

B. ANALYSIS

In this case and despite the higher burden provided in *Armstrong*, the trial court applied the *lesser* plausible justification standard and determined that Montes failed to meet his burden for obtaining the rather extensive discovery order. (24 CT 6642.) Evaluating the claim under the lesser standard obviously inured to Montes's benefit. Regardless, it cannot be

said that the trial court abused its discretion because it "could reasonably have concluded" Montes did not satisfy his burden of producing "some evidence" and making a "credible showing" of "different treatment of similarly situated persons." (*United States v. Armstrong, supra*, 517 U.S. at p. 470.)

Montes sought expansive discovery related to the policies and procedures in the Office of the Riverside District Attorney since November 7, 1978, related to charging special circumstances and the decision to seek the death penalty. This included information about each homicide case prosecuted by the Riverside County District Attorney since 1978 in which special circumstances were alleged and the death penalty was sought as well as those cases where the office sought only a penalty of life without parole, and, information about homicide cases where special circumstances were not alleged. He also requested discovery of information giving the race and ethnic background of each victim and defendant.[11] (23 CT 6270.) Montes also provided a declaration of Professor Edward Bronson a political science PhD and lawyer (23 CT 6298-6311), an exhibit table of Riverside prosecutions since 1978 in which the death penalty was known to have been sought (23 CT 6319-6321), and an exhibit table showing the race of the victim versus the race of defendant in 96 of these capital cases (23 CT 6322).

The prosecutor responded that Montes failed to make the requisite showing needed to justify the "burdensome" task of obtaining and

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[11] 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 County District Attorney's Office, and specifically requested any complaints made against the trial prosecutor, Mr. Mitchell, with regard to racial discrimination and/or racial slurs or other bias.

supplying the information sought. Attached to its pleadings was a study entitled: "Relationship of Offender and Victim Race to Death Penalty Sentences in California"; a Declaration of Paul E. Zellerbach, Supervising Deputy District Attorney; and a declaration from the trial prosecutor, William E. Mitchell. 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.

A supplemental pleading filed by Montes on March 15, 1996, contained Department of Justice statistics from the years 1992 through 1994 for the contention that race had been a factor in the decision to seek the death penalty in Riverside and that showed disparity in minority capital defendants. (24 CT 6630-6635.)

The motion to compel discovery was argued on March 8, 1996. (3 PRT 677-719.)[12] 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.) The prosecution challenged some of the statistical evidence cited by Montes, in that there were cases missing from Montes's list of capital prosecutions (over 156 murders in 1994 were not part of Montes's statistical evidence), and that some of the races alleged

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[12] At the hearing, Montes's attorneys requested the court listen to the tape containing excerpts of the interviews by the police and prosecutor referenced in the pleadings. The defense believed tone of voice on the tape excerpts helped resolve whether the status of Montes's victim played a role in the decision to seek death. (3 PRT 678-679.) The request also helped Montes establish his alternative discriminatory prosecution theory, namely, that he was charged with the death penalty because the victim was the step-son of a police officer. That theory and evidence are discussed as part of the invidious discrimination claim in Argument III and the denial of Montes's Pitchess motion in Argument IV.

of the victims were inaccurate. Additionally, comments from some of the interviews were taken out of context.[13] (3 PRT 690-694.) As a result, the prosecutor observed that at best, the statistical evidence presented was highly misleading. (3 PRT 691-692.) The prosecutor also observed that,

> ...In this case, there's no direct or circumstantial evidence indicating that the prosecutorial discretion was in any way exercised with intentional and invidious discrimination in this case.
>
> To cite this as invidious discrimination requires a quantum leap of not only logic in this case, but I guess faith.
>
> The language used here does not lead reasonably, logically or any way inferentially to conclude that the district attorney's office charged Mr. Montes with the crimes with which he is charged based upon anything other than his involvement in the crime, his participation in the crime. In fact, the charging of the co-defendant in this case, Mr. Varela, seems to defeat their argument. Here is Mr. Varela, co-defendant, charged similarly to Mr. Montes with two prior violent felony convictions, also Hispanic, yet, the death penalty is not sought against him.

(3 PRT 699-700.)

On March 26, 1996, the court issued a minute order and denied the motion to compel *Murgia* discovery. The order stated:

> To prevail on this motion for discovery the [d]efense needs to show that [p]rosecutorial discrimination was exercised with intentional and invidious discrimination. After review of all evidence presented the filed points and authorities and the arguments of counsel the Court finds that the [d]efense has not shown plausible justification by direct or circumstantial

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[13] The prosecutor admitted race may have played a factor but only as to why Montes and his codefendants killed Walker: "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.) This statement then became the basis for another supplemental motion to compel Murgia discovery, where Montes contended Walker's race played a factor in his being subject to the death penalty. (24 CT 6631.)

> 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 [d]efense having failed to make the requisite threshold or prima facie showing the [d]efense motion for discovery will be denied.

(24 CT 6642.)

The trial court did not abuse its discretion. After reviewing the pleadings and conducting an extensive hearing, the trial court could reasonably have concluded that Montes did not satisfy his burden. There was simply no credible evidence that the decision to seek death in this case resulted from different treatment of similarly situated persons. Montes merely provided some inaccurate statistical evidence, countered by the prosecution, that suggested a greater number of black defendants may be subject to the death penalty. But absent case specific data that establishes a plausible justification for further inquiry, statistical disparity does not entitle a defendant to discovery of prosecution records. (*People v. McPeters, supra*, 2 Cal.4th at pp. 1169-1171.)

> In light of the substantial discretion properly allowed decision makers in the capital sentencing process, however, any statistical or comparative evidence presented for these purposes must demonstrate a 'significant,' 'stark,' and 'exceptionally clear' pattern of invidious discrimination.

(*People v. Keenan* (1988) 46 Cal.3d 478, 506, citing *McClesky, supra*, 481 U.S. at pp. 293-297 [95 L.Ed.2d at pp. 279-281, 283-296].)

Here, no such pattern was shown. At best, Montes presented a statistic in isolation, not taking into account the specific circumstances underlying the crimes or the backgrounds and other factors related to the defendant and victim. Consequently, the trial court did not abuse its discretion and the claim should be rejected.

III. MONTES'S CLAIM THAT THERE EXISTED INVIDIOUS DISCRIMINATION IN THE DECISION TO SEEK THE DEATH PENALTY MUST BE REJECTED

Montes argues he made a sufficient showing of invidious discrimination in the capital charging decision on grounds of (1) race and (2) the status of the victim. Consequently, he claims the death sentence should be vacated because it violated his federal rights to equal protection and due process. (AOB 72-88.) The claim should be rejected.

Prosecutorial discretion to select those death eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend equal protection, due process, or cruel and/or unusual punishment. (*People v. Tafoya* (2007) 42 Cal.4th 147, 198.) And because discretion is essential to the criminal justice process, exceptionally clear proof is required before an inference of abuse of discretion in that selection process can be drawn. (*People v. Box* (2000) 23 Cal.4th 1153, 1218-1219.)

> Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

(*Gregg v. Georgia* (1976) 428 U.S. 153, 225 [96 S.Ct. 2909, 49 L.Ed.2d 859] [White, J., concurring].)

Montes recognizes that unless there is direct or circumstantial evidence of invidious discrimination, this Court will not normally review the charging decisions of prosecutors. (AOB 76, referring to *People v. Pinholster* (1992) 1 Cal.4th 865, 971 and *Keenan*, *supra*, 46 Cal.3d at p. 506.) Montes suggests that is exactly what occurred here - the prosecution sought the death penalty because a white victim was related to law enforcement. Respondent disagrees.

First, Montes argues the death penalty was sought because the victim was white. (AOB 80, referring to *McCleskey v. Kemp* (1987)481 U.S. 279, 310, fn. 30 [107 S.Ct., 95 L.Ed.2d 262 ["This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race."]) In the trial court Montes presented statistical evidence the Riverside County District Attorney's Office selected almost twice as many more cases for capital prosecution when the victim was white. (AOB 81, referring to 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; see also 24 CT 6632 (California Department of Justice statistics from 1992-1994.) Montes also incorporated the same declaration from Dr. Edward Bronson he submitted to support his motion for discovery of capital charging practices in Riverside County, and where Dr. Bronson opined the death penalty was disproportionally applied to people of color and when the victims are white (see 23 CT 6298-6311) and concluded,

> [t]he 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).

Montes also presented the pleadings and cassette tapes where Officers Anderson and Rasville and the prosecutor Mitchell referred to Walker as "the white kid" and mentioned the race of the suspects. (23 CT 6376-6383; 24 CT 6772-6775, and cassette tape with interview excerpts; see also 24 CT 6776; 3 PRT 695, 711 (comments by prosecutor Mitchell that Walker was carjacked and killed because he was white, although there was no evidence that the offense was racially motivated).)

Montes's argument here is no different Argument II. Just as he failed to establish sufficient evidence to warrant discovery of the charging

practices of the Riverside County District Attorney's Office, Montes has not demonstrated by clear and convincing evidence that race played an invidious role in the death penalty decision itself. As the trial court indicated, Montes did not even make a

> plausible justification by direct or circumstantial evidence that the prosecution's discretion has been exercised with intentional and invidious discrimination in this case.

(24 CT 6642.)

At best, Montes showed a statistical disparity in capital charging in general. But those statistics were fraught with error, were incomplete, and were inaccurate. Further, Montes does not present any evidence race played a role in the death penalty charging decision in this case. Admittedly, during Montes's interview the officers referred to the victim as "the white kid" and noted the race of the suspects. (AOB 84, referring to 23 CT 6376-6383; 24 CT 6772-6775.) But this had nothing to do with the reason he was arrested or charged. And, it certainly was not a factor used in the charging decision. Indeed, the prosecutor explained that Montes presented these comments out of context:

> ... at the beginning of Mr. Montes' interview, which I've cited in part to the Court, is it is Mr. Montes who first describes the individual in the car as "the white person" or "the white guy." And as Mr. Montes, during his first interview, talking about people in the car as looking like "wetbacks," and that's in page 22 of the first interview.
>
> The officers, in responding to Mr. Montes during the interrogation after he says there was only one white person in the car, responded with, "One white guy."
>
> "And how old was that white guy?" and goes on from there talking about "this white guy" Mr. Montes is referring to....

(3 PRT 693.)

The prosecutor further noted that,

> To use the terms like that that people refer to themselves on the streets is not derogatory and does not convey any inferiority or superiority in investigating individuals during interrogation.
>
> As the Court knows, sometimes people use what offensively what others might consider to be racially derogatory terms. It all goes down to context and how it's said.

(3 PRT 694.)

Alternatively, Montes argues the death penalty was sought because the victim was related to members of law enforcement. (AOB 85.) Here Montes relies on investigation tapes submitted as evidence in support of the discriminatory prosecution claim, where the detectives and prosecutor Mitchell told co-defendant Gallegos that Walker's step-father was a former cop and Walker's brothers were cops, so "[t]here's a lot of pissed off angry people in Beaumont, in Banning about this thing." (AOB 86-87; 23 CT 6380 and 6383, 24 CT 6775, and excerpt tape.)

Even assuming the victim's status as the step-child of a well known former police officer in the community was considered as a factor, Montes fails to show this was an unconstitutional factor. And, it is hard to fathom that such a factor resulted in purposeful and intentional singling out of Montes for a capital trial. Clearly it was neither a factor based on race, religion, or other arbitrary classification.

Montes nevertheless intimates this meant he was charged based on the "perceived worthiness of the victim." (AOB 85-86, referring to *Booth v. Maryland* (1987) 482 U.S. 496, 506, fn. 8 [107 S.Ct. 2529, 96 L.Ed.2d 440], overruled on other grounds in *Payne v. Tennessee* (1991) 501 U.S. 808, 830 [111 S.Ct. 2597, 115 L.Ed.2d 720]; see also 23 CT 6380, 638; 24 CT 6775 (interview tape excerpts where detectives and prosecutor Mitchell discuss victim's father and law enforcement upset that he killed the son of a policeman).) But that language in *Booth* related only to the then-improper

decision to allow a sentencing jury to consider a victim's background, and, whether they were "assets to their community" in the jury's decision to impose death. Here, Montes has simply failed in suggesting the victim's status as someone related to members of law enforcement played a role in the death penalty charging decision and in a manner that was arbitrary or unconstitutional.

IV. THIS COURT MAY ACCEPT MONTES'S REQUEST TO CONDUCT AN INDEPENDENT REVIEW OF THE IN CAMERA HEARING ON *PITCHESS* MATERIALS

Montes requests that this Court conduct an independent review of the in camera hearing when the trial court considered and denied his request for discovery of police personnel records (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531). (AOB 89-91, relying on *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.) This Court may review the hearing record under seal to determine independently whether the trial court abused its discretion in its ruling upon the *Pitchess* motion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1286.)

Here, the trial court agreed to conduct an in-camera hearing and review personnel records for Corona Officers Anderson, Rasville and Stewart. The hearing was ordered sealed. However, the court thereafter observed that there were no citizen complaints regarding two of the three officers and that the third had some complaints but they were not of a discoverable nature. (3 PRT 645-653.) As Montes is aware, after it reviewed the records the trial court returned them to the Corona Police Department. (AOB 90, referring to 3 PRT 646.)

Assuming *Mooc* applies to this 1996 prosecution, this Court may exercise discretion and review the hearing record. Montes asks this Court to review the in camera hearing and "any records reviewed by the superior court," which presumably means the personnel records that are no longer in

the trial court's possession.[14] Review is limited to the record as it exists. Thus, to the extent Montes is requesting this Court go beyond the sealed hearing and view records that are not in the possession of the trial court and not part of this record, it is not an appropriate request for appellate review.

V. THE TRIAL COURT DID NOT ABUSE DISCRETION WHEN IT DECLINED TO SEVER MONTES'S TRIAL FROM CO-DEFENDANTS BECAUSE A JOINT TRIAL NEITHER COMPROMISED HIS DEFENSE NOR RESULTED IN PREJUDICE

Montes claims the trial court's denial of his severance motions constituted an abuse of discretion because it refused to consider Montes's offers of proof in support of the motions and denied 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). (AOB 92-120.) The claim should be rejected because the trial court did not abuse its discretion when it denied Montes's severance motion.[15]

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[14] Only by way of post-conviction requests to correct and augment the record did Montes request permission to review the sealed in camera proceeding. Those requests were denied by the trial court on December 5, 2003 (2nd ACT 240), and by this Court on March 14, 2004.

[15] Prior to filing the amended information, the trial court granted the People's motion to sever and ordered co-defendant Varela to be jointly tried but with a separately empanelled jury. Severance resulted because Varela made statements to Kim Speck that directly inculpated Montes as the shooter, and also incriminated Montes in his statement to the police. The trial court denied a similar motion for severance as to Montes and the remaining defendants. (4 CT 923-925; Pretrial Reporter's Transcript, hereinafter "PRT" 29-30, 40, 44; 3rd Aug. CT 161; Aug. RT of proceedings held August 23, 1996.)

A. STANDARD OF REVIEW

The Legislature has expressed a preference for joint trials. (*People v. Boyde* (1988) 46 Cal.3d 212, 231.) Severance may be necessary, however, when "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 [113 S.Ct. 933, 122 L.Ed.2d 317] (as related to severance under Fed. Rules Crim. Proc., rule 14, 18 U.S.C.); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) When a trial court exercises discretion in ruling on a severance motion, it should be guided by whether the following nonexclusive factors exist: (1) an incriminating confession, (2) prejudicial association with codefendants, (3) likely confusion resulting from evidence on multiple counts, (4) conflicting defenses, or (5) the possibility that at a separate trial a codefendant would give exonerating testimony. (*People v. Coffman & Marlow, supra,* 34 Cal.4th at p. 40, referring to *People v. Massie* (1967) 66 Cal.2d 899, 917.)

This Court recently addressed the proper standard to review the denial of a severance motion:

> We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167, 5 Cal.Rptr.2d 796, 825 P.2d 781.) If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41, 17 Cal.Rptr.3d 710, 96 P.3d 30; *People v. Keenan* (1988) 46 Cal.3d 478, 503, 250 Cal.Rptr. 550, 758 P.2d 1081.) If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder " 'resulted in "gross unfairness" amounting to a denial of due process.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 162, 99 Cal.Rptr.2d 485, 6 P.3d 150.)

(*People v. Lewis* (2008) 43 Cal.4th 415, 452; see also *People v. Avila* (2006) 38 Cal.4th 491, 575.)

While the use of separate juries for jointly tried defendants is an alternative to outright severance, the use of dual juries also rests in the discretion of the trial court. Denial of severance and empanelment of dual juries will not serve as a basis for reversal of the judgment absent "identifiable prejudice" or "gross unfairness," such that it deprived the defendant of a fair trial or due process. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287.) For example, there is no abuse of discretion or gross unfairness in denying a severance motion where

> both defendants denied committing the crimes, faced essentially the same charges and allegations, bore equal criminal responsibility, and relied on a defense of mistaken identity" and there was "no indication either defendant would have given exonerating testimony at a separate trial.

(*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 998.)

B. PROCEDURAL HISTORY OF SEVERANCE MOTION

Severance motions were initially filed by Montes's co-defendants. Co-defendant Varela's severance motion was filed on February 15, 1995. (3d Aug. CT, pp. 36-42.) Co-defendant Gallegos sought severance from Montes on February 25, 1995. (22 CT 6194-6205.) The prosecution opposed severance and the court denied both motions on March 19, 1995. (22 CT, pp. 46, 50; 3d Aug. CT, pp. 46, 50.)

On February 22, 1996, Montes filed his first severance or separate juries motion, on grounds a joint trial would violate his federal and state constitutional rights. (23 CT 6479-6546.) Montes's four primary grounds for severance were: (1) violation of the right to confrontation based on co-defendants' statements pursuant to *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20

L.Ed.2d 476]; (2) an unreliable individual penalty determination; (3) the need for separate juries to fairly consider conflicting defenses; and (4) he would be unnecessarily prejudiced because he was the only party facing the death penalty. (23 CT 6530-6545.) He repeated these grounds in a supplemental motion on February 23, 1996.[16] (24 CT 6551-6558, 6561-6563.) Alternative to complete severance, Montes also requested the court empanel a separate jury. (24 CT 6564.) Montes primarily argued that a joint trial gave the appearance he was more culpable than the other defendants (perhaps as the shooter or due to his background), even though the actual shooter was not known.[17]

In a third motion filed February 23, 1996, Montes specifically sought severance from his cousin and co-defendant Hawkins. (24 CT 6567-6622.) As with the prior motions, this motion argued a joint trial 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.). This motion suggested a joint trial created difficulties in the ability to investigate and prepare

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[16] In support of the irreconcilable defense argument, Montes also provided a sealed declaration by his counsel. (24 CT 6558; Exhibit K to Augment Motion filed June 14, 2007.)

[17] It is ironic Montes relied on the purported lack of knowledge as to Walker's actual shooter. First, because of severance Montes's jury did not learn that co-defendant Varela told others Montes shot Walker and threw away the gun. (34 RT 6200-6202.) Second, Montes admitted to George Varela that he killed Walker (25 RT 4474, 4463-4475), that he showed the newspaper article about the murder to Sylvia Varela and bragged "I did this," that he said the same thing to his father, and, that he proudly boasted he earned "his stripes" for the killing (17 RT 2902-2903; 18 RT 2892-2903, 2979; 22 RT 3883-3884; 34 RT 6209-6210).

Montes's penalty phase, because family members on Montes's father's side were reluctant to assist Montes at the possible expense of Hawkins.[18]

The People filed an opposition on March 27, 1996, and incorporated the opposition previously filed to the severance motions filed by co-defendants Gallegos and Varela. (24 CT 6643-6678.) The People also specifically objected to the court considering any declarations filed under seal. (24 CT 6644-6649.) On April 5, 1996, the court heard argument on whether it should consider the sealed declarations. (3 PRT 746-763.) The court then denied Montes's 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.)

On May 10, 1996, the court denied Montes's motions for severance or for separate juries. The court also again denied Montes's request to file declarations under seal. (24 CT 6725; 4 PRT 777-812.) However, the court did allow Montes to lodge the declarations and supporting investigation reports with the court in order to permit subsequent appellate review. (See 24 CT 6724; 4 PRT 808.) The court indicated it did not believe that Montes's due process rights would be unduly prejudiced or compromised as a result of a joint trial. The court also indicated any *Aranda/Bruton* issues could be dealt with by way of redaction, or exclusion, if necessary. (4 PRT 810.) The court also held severance was not appropriate on the basis of Montes's concerns about irreconcilable

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[18] Montes supported his motion for severance from co-defendant Hawkins with declarations from a number of experienced trial attorneys describing problems they encountered in capital trials where relatives were being jointly tried. (See CT 6578-6621.) Montes also provided two additional sealed declarations from his attorneys (both signed February 23, 1996). (24 CT 6570; 1st Aug. CT, pp. 7-10 and 11-12.)

differences with co-defendants or on grounds Montes alone faced the death penalty. Finally, the court also denied the request for separate juries. (4 PRT 811.) Also, in regard to Montes's separate motion seeking severance from co-defendant Hawkins, the court ruled Montes could receive a fair 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.) Then, on August 30, 1996, and after the court denied his renewed severance-related motions, Montes filed a petition for writ of mandate (case No. E018956). On September 3, 1996, the Court of Appeal summarily denied the petition.[19]

C. THE TRIAL COURT PROPERLY DECLINED TO CONSIDER THE SEALED MATERIAL

Before turning to whether the trial court abused its discretion when it denied Montes a separate trial, respondent first addresses Montes's claim that the trial court erred when it did not consider the sealed materials. (AOB 102.) Montes acknowledges there is no authority to support his contention that the factual basis for a severance motion may be presented by a sealed declaration or in camera offer of proof, but suggests courts have utilized that procedure. (AOB 102-103.) Respondent submits the trial court simply could not have abused its discretion when it was neither compelled nor authorized by statutory or case authority to do so.

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[19] Montes has requested this Court take judicial notice of the court of appeal files in this writ matter (Case No. E018956).

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MONTES'S SEVERANCE MOTION

It cannot be said the trial court abused its discretion or that gross unfairness occurred when Montes was denied a separate trial. Fundamentally, this was a "classic case" for a joint trial, where Montes and his codefendants were charged in each count with "common crimes involving common events and victims." (*People v. Lewis, supra,* 43 Cal.4th at pp. 452-453, quoting *People v. Coffman & Marlow, supra,* 34 Cal.4th at p. 40.)

Moreover, the trial court had already ordered a separate jury empanelled to hear evidence against co-defendant Varela to address the *Aranda/Bruton* issues arising from his statement to the police that inculpated Montes as the shooter. The court also indicated any remaining *Aranda/Bruton* issues could be dealt with by way of redaction or exclusion if necessary (4 PRT 810); Montes presents none at issue on appeal.

The trial court also properly determined severance was not appropriate on the basis of Montes's concerns about irreconcilable differences with co-defendants, or on grounds that Montes alone faced the death penalty. (4 PRT 811.) As to the issue of irreconcilable defenses, co-defendant Gallegos did not present an affirmative defense and other than testimony that questioned the blood stains found on his shoes (33 RT 6117; 34 RT 6182-6183), co-defendant Hawkins did not present affirmative evidence regarding the offense, although his mother testified and claimed the police stopped her car while she was driving her son to defense counsel's office so he could turn himself in to the police (33 RT 6125). And even if there existed antagonistic defenses, that alone does not warrant severance unless acceptance of one defense precludes another defendant's

acquittal. (*People v. Lewis, supra,* 43 Cal.4th at p. 461.) That was not the case here.

As to the issue that Montes alone faced the death penalty, this Court has observed that conducting joint trials of defendants eligible for the death penalty with those who are not eligible for the death penalty does not violate right to due process, impartial jury, fair trial, or reliable death verdict for the death-eligible defendant. (*People v. Tafoya, supra*, 42 Cal.4th at pp. 147, 163-164.) To that end, nothing in the record suggests the jury was unable to render an individualized guilt or penalty determination for Montes. Consequently, Montes's claim that the trial court abused its discretion, or otherwise violated his state and federal constitutional rights when it denied his severance motion should be rejected. (*People v. Lewis, supra,* 43 Cal.4th at p. 452.)

VI. BECAUSE THERE WAS NO DUTY TO PRESERVE A BLOOD SAMPLE TO SUPPORT A DEFENSE THAT MONTES HAD A DETECTABLE AMOUNT OF METHAMPHETAMINE IN HIS SYSTEM WHEN HE KILLED WALKER, MONTES'S DUE PROCESS CHALLENGE MUST BE REJECTED

During the guilt phase Montes made a motion to dismiss or have an ameliorative instruction based on the fact the police failed to obtain and preserve his blood sample following his arrest. (3 RT 401-402; 25 CT 6856-6870.) Montes repeats the arguments here. He also argues the failure to obtain the sample meant the trial court should have provided an instruction that it should distrust the prosecution as related to the lack of evidence in this regard, and, that the failure deprived him of penalty phase mitigating evidence, violated his right to due process of law (U.S. Const., 5th & 14th Amends.; Cal. Const., art I, § 7) and undermined the reliability of the penalty decision (U.S. Const., 8th Amend.). (AOB 134-141.) Respondent disagrees. There was no obligation to collect a blood sample.

As a result, the failure did not violate any constitutional rights and the trial court had no need to provide an ameliorative instruction to the jury.

Walker was killed sometime in the afternoon or early evening hours of August 27, 1994. Detectives Anderson and Stewart arrested Montes around 6:00 p.m the next day, August 28, 1994. Montes was then interviewed by Detective Stewart along with trial prosecutor Mitchell. (3 RT 38, 391.) Montes believed a blood test would likely have shown he ingested methamphetamine within 72 hours of his arrest, which would have included the time-frame for the murder. He thus filed a motion to dismiss, sanction the prosecution, or provide an ameliorative instruction because the police failed to obtain a blood sample from Montes at the time of his arrest and thus precluded potential mitigating penalty phase evidence. (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.) According to Detective Anderson, at the time of arrest Montes spoke quickly and had to be told to slow down. (3 RT 392-393.) Detective Stewart concurred that Montes spoke quickly and seemed hypertensive, but during the interview did not appear under the influence of methamphetamine. He also did not recall whether Montes ever stated that he had used or been under the influence of methamphetamine at the time of the murder. (3 RT 377, 380, 389-390, 392-393, 395-397, 400-401.)[20] Detective Stewart also explained he believed that a blood sample might have been useful to alleviate a defense of intoxication if a person was arrested soon after the crime, but not when as here, the arrest occurred 24 hours later. (3 RT 380-381; see also 23 RT 4156-4158; 24 RT 4261, 4273.) In addition, Montes's trial counsel Sandrin provided her own sworn

[20] Detective Stewart later recalled that Montes told him he was using speed the night before the murder. (3 RT 394-395.)

declaration that the prosecutor informed her Montes was "flying" at the time of the interview. (25 CT 6974.)

Following the hearing, the court denied the motion and ruled the police had no obligation to collect a blood sample. The court further concluded the evidence demonstrated Montes was not under the influence of methamphetamine. Consequently, the court declined to provide any ameliorative jury instruction. (3 RT 401-402.)

The standard on reviewing the trial court's determination that the police did not have an obligation to preserve evidence is whether substantial evidence supports the court's ruling. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1022.) Generally, the prosecution has a duty to preserve exculpatory evidence. This duty is limited to evidence that (1) possesses an exculpatory value apparent before the evidence was destroyed, and (2) is of such a nature the defendant cannot obtain comparable evidence by other reasonably available means. (*California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 2530, 81 L.Ed.2d 413, 417]; *People v. Cooper* (1991) 53 Cal.3d 771, 810.) Moreover, the evidence must have been destroyed in bad faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 337, 102 L.Ed.2d 281, 289]; *People v. Memro* (1995) 11 Cal.4th 786, 831; *People v. Ochoa* (1998) 19 Cal.4th 353, 417.) However, there is no duty to gather, as opposed to preserve, evidence that is favorable to the defense. (*People v. Harris* (1985) 165 Cal.App.3d 324, 329.)

Montes asserts the police had a duty to collect the evidence because it had apparent exculpatory value and thus was relevant to his defense. (AOB 137-138; referring to *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.) However, the loss of "potentially exculpatory" evidence will constitute a denial of due process only under circumstances of bad faith. (*Arizona v. Youngblood, supra*, 488 U.S. at p. 57.) No such bad faith existed.

In this case, Montes merely relies on his own self-serving statement to the police he used methamphetamine the night before the murder and on witness Speck's belief that Montes appeared to be under the influence. (AOB 137, referring to 3 RT 395 and 21 RT 3462.) This is contradicted by the observations of an experienced and trained detective who concluded that despite his speaking quickly, Montes did not appear be under the influence. (3 RT 377.) And even if the detectives were mistaken in a belief that the tests would not yield helpful results for an offense that occurred a day earlier, there simply is no evidence the decision to not collect a blood sample constituted bad faith.

Apart from the issue of bad faith, the prosecution did not have any duty to gather evidence Montes later decided may have been favorable to a possible defense. Montes offers no substantial evidence there even existed exculpatory value to the evidence he sought preserved. To the contrary and as explained above, the evidence suggested Montes was not under the influence of methamphetamine. Additionally, at the time of arrest the police did not know whether Montes even killed Walker - Montes denied doing so and even offered to help find Varela, which implied any assumed intoxication was irrelevant. (3 RT 399-400.)

Based on the above, there simply was no need to gather and preserve the evidence. And as a result, Montes's claim that the trial court abused its discretion or otherwise violated his state and federal constitutional rights when it declined to sanction the prosecution or provide an ameliorative jury instruction about the failure to obtain a blood sample, should be rejected, because substantial evidence supports the court's ruling. (See *People v. Griffin, supra,* 46 Cal.3d at p. 1022.)

Montes alternatively claims an ameliorative instruction was required in the penalty phase because the prosecutor mislead the jury when he argued that while there was some evidence to suggest alcohol or

methamphetamine consumption, there was no evidence to show Montes was impaired as a result of any intoxication. (AOB 140, referring to 44 RT 7894 (the actual quote appears on page 7874.) But Montes only requested the sanctions or some sort of ameliorative instruction as it related to the guilt-phase motion to dismiss. Montes did not object to the prosecutor's statements in this regard during the penalty phase or otherwise argue this constituted error or misconduct. Consequently, as related to penalty phase misconduct, the claim is forfeited. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1405; *People v. Frye* (1998) 18 Cal.4th 854, 969-970.)

VII. THE TRIAL COURT PROPERLY ORDERED MONTES PHYSICALLY RESTRAINED WITH A SHOCK BELT DURING TRIAL BECAUSE OF RECENT VIOLENT BEHAVIOR WHILE AWAITING TRIAL

On September 19, 1996, the trial court ordered, over objection, that Montes be physically restrained with the REACT electronic shock belt during the entire trial. (11 RT 1805-1848.) Montes claims the trial court abused its discretion by ordering Montes to be shackled with the shock belt. (AOB 142-183.) Specifically, he argues there was no manifest need for any physical restraints and that the shock belt was not the least restrictive restraining device available. (AOB 154.) He maintains this error violated his state and federal constitutional rights to due process, a fair trial by jury, personal presence, confrontation, compulsory process, assistance of counsel, and against self incrimination. (AOB 166, referring to U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 and 17.) Respondent disagrees.

A. STANDARD OF REVIEW

Physical restraints must be justified by a showing of necessity. (*People v. Medina* (1995) 11 Cal.4th 694, 730.) A trial court's need to physically restrain a defendant cannot be based on rumor or innuendo.

However, a formal evidentiary hearing is not required. (*People v. Lewis & Oliver, supra,* 39 Cal.4th at pp. 970, 1032.)

The showing of necessity must appear as a matter of record and may be satisfied by evidence that the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom. (*People v. Combs* (2004) 34 Cal.4th 821, 837.) Alternatively, while a defendant's record of violence or the fact he is a capital defendant cannot, standing alone, justify shackling, a defendant's violent acts while in custody pending trial, together with his extensive criminal history can support an order for shackling. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944.)

It is the trial court, not law enforcement personnel, that must make the decision to physically restrain an accused in the courtroom. (*People v. Hill* (1998) 17 Cal.4th 800, 841.) However, because his physical restraint while outside of court and not in the jury's presence could have no effect on his ability to receive a fair trial, decisions regarding security for transporting a defendant are clearly within the discretion of the law-enforcement personnel in charge of out-of-court activities. (*People v. Hill, supra*, 17 Cal.4th at pp. 800, 841, fn. 7.)

Where restraints are concealed from the jury's view, no instruction to ignore restraints should be given. (*People v. Livaditis* (1992) 2 Cal.4th 759, 775.) Absent evidence that the jury was aware the defendant was restrained, any error in the trial court's order is harmless. (*People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Coddington* (2000) 23 Cal.4th 529, 651.) And where restraints are used and observed by jurors during the penalty phase, the risk of substantial prejudice from jury's view of shackles is diminished because guilt has already been determined. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1214.)

B. PROCEDURAL HISTORY GOVERNING ORDER FOR RESTRAINTS

On August 29, 1996, and before jury selection began, the prosecutor requested Montes be ordered to wear restraints during trial. The initial request was for leg restraints. (4 PRT 950-951.) The prosecutor relied on prior incidents while awaiting trial where Montes assaulted Gallegos while together in a holding cell and Montes's possession of a shank in his cell on July 26, 1996. The prosecutor also noted that Montes and co-defendant Varela had a tenuous and strained relationship in that Montes had directed authorities to co-defendant Varela. (*People v. Slaughter*, *supra*, 27 Cal.4th at p. 1187) Additionally, on March 5, 1995, co-defendant Varela attacked and punched Montes in the face. Montes did not strike him back. (11 RT 1826.)

The trial court declined to order restraints based on these prior incidents, essentially because Montes had done nothing in the courtroom to suggest he would be violent or intended to escape. (4 PRT 951.) However, the court ordered Montes and the holding cells be thoroughly searched before the defendants were brought into the courtroom. (4 PRT 951-952.) The court also requested additional deputies be assigned to the courtroom during the trial. (4 PRT 953-954.)

Courtroom bailiff Deputy Fitzpatrick requested the court revisit the use of restraints on September 19, 1996. At that time, the prosecutor asked the court to order that Montes be restrained with either a leg brace or an electric shock belt. The court asked Deputy Fitzpatrick to gather any reports pertaining to her request and thereafter conducted a formal hearing. (11 RT 1805-1806, 1809, 11 RT 1842.)

According to Deputy Fitzpatrick, when she 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 no problems

with the defendants during the entire two years either. (11 RT 1822.) However, Deputy Fitzpatrick obtained incident reports from the jail that evidenced Montes's propensity for violence. (11 RT 1822.) The most recent incident testified to by Fitzpatrick was September 11, 1996, and concerned the discovery of a handmade "shank" (a broken piece of plastic with a handle) in Montes's 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.) She also testified about an incident on July 23, 1996, where Montes was found holding a toothbrush with three razor blades attached to the end. (11 RT 1813-1814.) She also testified about Montes's assault on co-defendant Gallegos on September 8, 1996, while they were in a holding cell with 19 other inmates. Montes was found with his waist chains off and in front of his body. Co-defendant 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.) She also testified about two assault incidents involving other inmates the following month, on October 5th and 7th. (11 RT 1815-1816; 2d Aug. CT, p. 41; 11 RT 1816; 2d Aug. CT, p. 44.) Although Montes was not identified as having been personally involved in either altercation, he did have blood on his hands following one of them. (2d Aug. CT, pp. 41, 44.)

Deputy Fitzpatrick also expressed concern because the court reporter told her that Montes watched her as she walked around the room. (11 RT 1817-1818, 1826.) Deputy Fitzpatrick was also aware that when attractive females came into the courtroom, Montes would stare at them. (11 RT 1827.) Deputy Fitzpatrick began to watch Montes, and it was her opinion that he was looking at Deputy Young's gun. (11 RT 1818.) Deputy Fitzpatrick believed that Montes should be restrained during the trial. (11 RT 1818-1819.) She also believed that a "REACT" belt was the most

appropriate restraint, because she was concerned that Montes might lunge towards one of the three bailiffs.[21] (11 RT 1819.)

Deputy Fitzpatrick also conceded that at the time of the hearing, she 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 she 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 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 also never seen Montes threaten any of the other co-defendants, either physically or verbally. (11 RT 1820-1821, 1926.)

Deputy Young also testified and expressed a belief that Montes should be restrained, both because of the nature of the offense and also because of the prior incidents while in jail. (11 RT 1837-1840.) Deputy Young was only slightly familiar with the REACT belt but did believe it was probably the most effective form of restraint. (11 RT 1840.)

In addition to the deputies' concerns, the prosecutor maintained there existed a high level of animosity between all of the defendants, evidenced by Montes's attack on co-defendant Gallegos and by co-defendant Varela's attack on Montes. (11 RT 1808.)

Montes objected to the use of the restraints because there had been no showing of any need during court proceedings, and also felt either it or the remote control box would be observed by jurors. (11 RT 1845.) Montes

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[21] Deputy Tapia also testified using a REACT belt. (11 RT 1829-1834.) Deputy Tapia was aware the belt had 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.)

also justified possession of shanks as a means of self-defense. (11 RT 1823.)

The trial court ordered Montes to be restrained. It observed that the restraints were different than the bulky shackles or chains that would effectively strap Montes down to his chair. (11 RT 1847.) In so ruling the court determined there was 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.

(11 RT 1847.)

C. ANALYSIS

Fundamentally, even if the trial court erred, the error was harmless. As noted above, absent evidence the jury was aware the defendant was restrained, any error in the trial court's order is harmless. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 543, 596; *People v. Coddington*, *supra*, 23 Cal.4th at pp. 529, 651.) In this case, no juror was aware of the

restraints. The trial court believed the belt would not be visible to the jurors. (11 RT 1847.) Montes notes that in a post-trial interview, Alternate Juror No. 3 told a defense investigator he noticed Montes was wearing "some kind of belt" during the trial, and that one of the bailiffs had a box with a button on it. (AOB 143, referring to 28 CT 7665.) However, Montes presents no evidence that any deliberating juror observed the belt or the box held by one of the bailiffs to control the belt (or that it was known the box controlled the belt). Consequently, any assumed error was harmless.

Regardless, even if this Court believes that the restraints might not have been needed, it cannot be said that the trial court abused its discretion when it ordered Montes restrained. First, the trial court had no obligation to conduct a formal evidentiary hearing (*People v. Lewis & Oliver, supra,* 39 Cal.4th at p. 1032), but it nevertheless conducted a lengthy and detailed hearing in this case. Second, the showing of necessity was a matter of record and Montes's violent acts while in custody pending trial, together with his extensive criminal history, supported the order for restraints. (See *People v. Hawkins, supra,* 10 Cal.4th at p. 944.)

Finally, Montes argues even if restraints were proper during the guilt phase, the trial court had to reconsider whether there existed a manifest need to restrain him during the penalty phase. (AOB 165-166.) First, Montes did not object to restraints in the penalty phase and forfeited this claim. (*People v. Duran* (1976) 16 Cal.3d 282, 289.) Second, he does not present any persuasive authority that a trial court must separately evaluate whether restraints may be imposed during the penalty phase. Montes merely relies on the fact that a trial court has the power and duty to control proceedings (AOB 165, referring to Pen. Code, § 1044.) But that is exactly what the court did when it ordered Montes be restrained. Lastly, to suggest there must exist a continuing manifest need, ignores the fact that a person in

restraints is literally restrained. It is no different than chancing that a person already found to pose a danger to the security of the courtroom and orderly administration of justice should have the restraints removed from time to time, to see how they behave. There is neither logic nor necessity to do so. Consequently, Montes's claim and his concomitant constitutional challenges must be rejected, because sufficient necessity was demonstrated. (See *People v. Hawkins, supra,* 10 Cal.4th at p. 944.)

VIII. THE TRIAL COURT PROPERLY EXCUSED THREE PROSPECTIVE JURORS FOR CAUSE BECAUSE THEIR VIEWS ON CAPITAL PUNISHMENT WOULD HAVE SUBSTANTIALLY IMPAIRED THE PERFORMANCE OF THEIR DUTIES

Over Montes's objection, the trial court excused three prospective jurors for cause, because their views on capital punishment substantially impaired their ability impose the death penalty. (See 4 RT 575-576 (S.G.); 5 RT 809 (C.J.); 7 RT 1286 (O.G.).) Montes now claims the court's improper excusal of these jurors violated his 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). (AOB 184.) The claim should be rejected.

This Court recently restated the standard to review the removal for cause of prospective jurors who were unwilling or unable to impose the death penalty:

> As we repeatedly have observed, "[i]n a capital case, a juror is properly excused for cause if that juror would 'automatically' vote for a certain penalty or if the juror's views on capital punishment would ' "prevent or substantially impair" ' the performance of his or her duties in keeping with the juror's oath and the court's instructions. (*People v. Stitely* (2005) 35 Cal.4th 514, 538, 26 Cal.Rptr.3d 1, 108 P.3d 182 (*Stitely*), quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, fn. 21, 88 S.Ct. 1770, 20 L.Ed.2d 776, and *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841.)" (*People v. Alfaro*

(2007) 41 Cal.4th, 1277, 1313, 63 Cal.Rptr.3d 433, 163 P.3d 118 (*Alfaro*). Recently the high court reviewed the underlying relevant principles: "First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. [*Witherspoon, supra*, 391 U.S. at p. 521, 88 S.Ct. 1770.] Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. [*Witt, supra*, at p. 416, 105 S.Ct. 844.] Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. (*Id.* at p. 424, 105 S.Ct. 844." *Uttecht v. Brown* (2007) 551 U.S. 1, ----, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (*Uttecht*).)

This Court continued:

> Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. [*Witt, supra*, 469 U.S. at pp. 424-434, 105 S.Ct. 844.] Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. [Citations.]" (*Uttecht, supra*, 551 U.S. 1, ----, 127 S.Ct. 2218, 2224.) The latter comment confirms our established rule that such a determination involves an assessment of a prospective juror's demeanor and credibility that is " 'peculiarly within a trial judge's province.' [Citation.] 'When applying these rules, the trial court's assessment of a prospective juror's state of mind will generally be binding on the reviewing court if the juror's responses are equivocal and conflicting' [citation] and the reviewing court generally must defer to the judge who sees and hears the prospective juror, and forms the 'definite impression' " the juror is biased even when the juror's views are not clearly stated. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1006-1008, 47 Cal.Rptr.3d 467, 140 P.3d 775 (*Lewis and Oliver*); *People v. Chatman* (2006) 38 Cal.4th 344, 365-366, 42 Cal.Rptr.3d 621, 133 P.3d 534; *People v. Schmeck* (2005) 37

Cal.4th 240, 257-263, 33 Cal.Rptr.3d 397, 118 P.3d 451 (*Schmeck*).)

(*People v. Salcido* (2008) 44 Cal.4th 93, 133 (as modified Aug. 27, 2008).

Applying those standards here, this Court should defer to the trial court's determination that these three prospective jurors were substantially impaired in their ability to impose the death penalty.

A. PROSPECTIVE JUROR S.G.

Montes's counsel 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 life in prison and death as 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 prosecutor 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 prosecutor's questions, Montes's counsel questioned the prospective juror about his ability to separate personal beliefs from his duties as a juror:

> [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 574-575; emphasis added.)

The trial court dismissed the prospective juror. In so doing the court stated, "I think he was lying. I don't think he can impose the death penalty." (4 RT 576-577.) Further, the court found S.G.'s views would substantially impair his ability to perform as a juror in this case. (*Ibid; People v. Salcido*, *supra*, 44 Cal.4th at pp. 133.)

The trial court acted within its discretion in excusing this juror based upon a deferential impression that the prospective juror held views that would substantially impair his ability to perform the duties of a juror in this case. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 135.) To the extent the prospective juror's views were conflicting, this Court must defer to the assessment of the trial court that the juror entertained views substantially impairing the ability to perform the duties of a juror. (*Ibid.*)

B. PROSPECTIVE JUROR C.J.

Prospective juror C.J. explained that in his questionnaire he rated himself as a "2" on a ten point scale, which meant he was against the death penalty, although not "strongly" against it which was option "1." (5 RT 803.) C.J. indicated that he was personally against the death penalty; he did not feel it served any purpose because executions are never carried out. (5 RT 804.) C.J. also stated he would automatically give life without parole, and would never impose the death penalty. (5 RT 804.) The following exchange with defense counsel then occurred:

> [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 prosecutor questioned C.J. regarding his views as to the death penalty:

> [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.)

The court dismissed C.J. and 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.)

The court acted within its discretion in excusing this juror based upon a deferential impression that the prospective juror held views that would substantially impair his ability to perform the duties of a juror in this case. (*People v. Salcido, supra*, 44 Cal.4th at p. 135.) Although the prospective jury stated he would vote against his moral beliefs, the trial court found this was not a sincere statement, and, that it did not affect the determination this person's ability to do so would be substantially impaired. Thus, to the extent the prospective juror's views were conflicting, this Court must defer

to the assessment of the trial court that the juror entertained views substantially impairing his ability to perform the duties of a juror. (*People v. Salcido, supra*, 44 Cal.4th at p. 135.)

C. PROSPECTIVE JUROR O.G.

During voir dire the following exchanges occurred:

[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; emphasis added.)

Montes then questioned O.G.. Montes's counsel first reviewed the fact that O.G. had previously indicated 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 prayed about the issue. She became convinced she should not be the person who decided whether someone should be executed. (7 RT 1282-1283.) The following exchange took place:

> [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; emphasis added.)

> In his challenge for cause, the prosecutor 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 1284.)

The prosecutor also argued the prospective juror should be dismissed because "she seemed really uncertain." (*Ibid.*) Following this argument, the court granted the challenge and dismissed O.G.. 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.

(7 RT 1285.)

The court acted within its discretion in excusing this juror based upon its deferential impression that the prospective juror held views that would substantially impair her ability to perform the duties of a juror in this case. (*People v. Salcido, supra*, 44 Cal.4th at p. 135.) To the extent the prospective juror's views were conflicting, this Court must defer to the

assessment of the trial court that the juror entertained views substantially impairing the ability to perform the duties of a juror. (*People v. Salcido, supra*, 44 Cal.4th at p. 135.)

Based on the above, the trial court properly excused these prospective jurors for cause. Consequently, Montes's claim should be rejected.

IX. THE PROSECUTOR DID NOT IMPROPERLY CHALLENGE AFRICAN-AMERICAN OR HISPANIC JURORS FOR A RACE-BASED PURPOSE

During jury selection, Montes and his co-defendants argued the prosecutor violated *Batson/Wheeler*[22] in the use of peremptory challenges against prospective African-American and Hispanic jurors on several occasions. The first time it denied the motion the court found no prima facie case had been established. (6 RT 935-944.) The second time the court found a prima facie case, but determined the challenges were race-neutral and denied the motion. (7 RT 1173-1174, 1307-1310.) For the third motion the trial court assumed (without actually finding) a prima facie case, but again found the prosecutor's explanation to be race-neutral, and denied the motion. (7 RT 1308-1310.) The fourth motion was the only one that focused on Hispanic jurors and the court again made a prima facie finding, and after listening to the prosecutor's explanations for excusing these potential jurors, denied the motion. (7 RT 1314-1323.)

Montes now claims the prosecutor violated his Sixth and Fourteenth Amendment rights to the United States Constitution and the California Constitution guarantees of a fair and impartial jury (Cal. Const., art. I, § 16). (AOB 204-230.) Respondent disagrees.

The trial court properly denied Montes's motion, because the record reveals the prosecutor excused African American and Hispanic prospective

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[22] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler*(1978) 22 Cal.3d 258.

jurors for genuine, race-neutral reasons. Assuming this Court undergoes a comparative analysis between challenged and seated jurors, it does not undermine that conclusion that the prosecutor did not improperly challenge these prospective jurors. Finally, if this Court deems the record inadequate to determine the prosecutor's true reasons for exercising his peremptory strikes, the matter should be remanded for a hearing to make that determination.[23]

A. PROCEDURAL SUMMARY

On September 11, 1996, and after the prosecution exercised its second peremptory challenge against African-American juror K.P., Montes raised a *Wheeler* challenge; co-defendants Hawkins and Gallegos joined. (6 RT 935-936.) The defendants claimed that prospective juror K.P. had been challenged based solely on race. At this time, the court observed there were two other prospective African-American jurors on the panel. The court reviewed K.P.'s questionnaire, and found no prima facie showing had been made that she was excused solely for race based reasons. The court commented that she appeared to have been unfair to the prosecution, that both she and her husband had criminal records, and that she emphatically believed "no defendant should ever take the stand." (6 RT 941-942.) The following day, Montes made a second *Wheeler* challenge, concerning preemptory challenges against African-American jurors D.M., W.J., I.T.,

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[23] The Court of Appeal rejected these very same arguments when raised by co-defendants on direct appeal. In considering this argument, the Court of Appeal did not engage in its own comparative juror analysis, but otherwise reviewed the entire voir dire record to determine if evidence supported the trial court's ruling. The Court of Appeal found there existed substantial factual basis to support the trial court's findings that the prosecutor did not exercise any of these peremptory challenges in a discriminatory manner. (*People v. Varela*, Opn. at pp. 13-24.) Respondent will separately request judicial notice of this opinion.

and L.W. (7 RT 1154-1155, 1160.) The prosecutor replied the motion was absurd and offensive and noted that he had already accepted the jury with two African-Americans on the panel. The court nevertheless concluded a prima facie showing had been made. The prosecutor then provided specific reasons for challenging these prospective jurors as well as his reasons for K.P. (7 RT 1163-1167.)

As to K.P., the prosecutor noted she was rated a 3 out of 10 on his scale, and offered reasons similar to those indicated previously by the court. The prosecutor stated he rated D.M. a "6," but excused him because he opposed the death penalty since he felt it was unfairly applied against poorer persons; the prosecutor had concern this would be antagonistic to the People given that Montes's background would be introduced at trial. As to W.J., the prosecutor expressed concern about his prior theft conviction, his education level and his inability to properly spell simple words. The prosecutor also felt the latter two reasons might affect his ability to understand the evidence and the logical inferences needed to be made. As to I.T., the prosecutor did not believe her support of the death penalty to be credible, given her religious conviction and belief that, "only God should take it [life] away." Finally, as to L.W., the prosecutor rated him a 6 out of 10, but felt that he could not state with certainty his background, and that he offered absolutely no opinion at all on the death penalty, other than that it served no purpose. As to this latter reason, the prosecutor also explained L.W. might not fairly consider the evidence and the aggravated nature of the crime. Additionally, L.W. believed justice had been served in the O.J. Simpson case for the wrong reason -- as a punishment against law enforcement. Finally, the prosecutor noted L.W. talked to himself. (7 RT 1167-1171, 1173.) The court then denied the *Wheeler* motion, finding the prosecutor offered credible reasons for

challenging the prospective jurors and that there was no evidence of any race-based exclusion. (7 RT 1173-1174.)

Montes brought a third *Wheeler* challenge based on the challenge of African-American prospective juror P.K.. (7 RT 1302.) The court found a prima facie showing had been made and the prosecutor responded that P.K. was opposed to the death penalty. The court denied the motion, finding there existed a race neutral basis to challenge the juror. (7 RT 1308-1310.) The prosecutor also noted the panel accepted by the parties now contained three black jurors. (7 RT 1310.)

Montes then made a fourth *Wheeler* motion regarding exclusion of Hispanics. Co-defendants Hawkins and Gallegos joined in that motion. (7 RT 1308, 1310, 1314.) When he made this motion, Montes did not even have the proper names to argue the motion (7 RT 1310-1311), was not entirely sure whether prospective juror G.H. was even Hispanic (7 RT 1320-1321), and ultimately conceded that there existed a non race-based reason to exclude prospective juror Rios (7 RT 1313-1314, 1316, 1318).

The court nevertheless ruled that a prima facie showing had been made. (7 RT 1315-1316.) However, the court specifically commented that C.P. was reluctant to apply the death penalty, and that D.Q. may have had an inherent bias against the police.[24] (7 RT 1316.) Additionally, the prosecutor noted he challenged D.Q. because of her body language, attitude, and experience with law enforcement (7 RT 1317-1318). As to L.C., the prosecutor explained he had difficulty determining whether he would challenge him, but noted that he felt L.C. was not sincere in claiming he supported the death penalty. The prosecutor explained D.L. offered no

[24] The prosecutor noted D.Q. was not even Hispanic. The trial court presumed her to be Hispanic for purposes of argument. (7 RT 1311, 1314-1315.)

opinion whatsoever on the death penalty or other issues affecting criminal justice, as well as concerns with his educational level and inability to spell simple words like "trial." The prosecutor expressed similar concerns about G.H.'s education level and the potential inability to follow complicated instructions. (7 RT 1318-1322.) The court then denied the motion, finding race neutral explanations were provided.[25] (7 RT 1322-1323.)

Here and as Montes concedes, when the prosecutor initially accepted the jury panel, two African-American jurors were seated in the jury box, Juror No. 4 (see 5 RT 665) and Juror No. 7. (See AOB 214 and Appendix at Exhibit A; 5 RT 665; 7 RT 1156.) The prosecutor also accepted the panel a second time, after defense challenges were made. (7 RT 1157.) The prosecutor then accepted the panel a third time, and only challenged a prospective juror who had replaced one that the defense had challenged. (7 RT 1159.) In addition, at the time the jury was empanelled, three African-Americans were seated on the jury. (See 7 RT 1164, 1166, 7 RT 1307, 1310.) It should be observed that acceptance of a jury panel with minority members is an indication of the prosecutor's good faith in exercising peremptory challenges. (*People v. Lewis, supra,* 43 Cal.4th at pp. 415, 480; *People v. Huggins* (2006) 38 Cal.4th 175, 236.) In any event and as shown below, the trial court properly denied the *Batson/Wheeler* motions.

B. STANDARD OF REVIEW

As this Court recently observed,

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[25] Following the defense challenges, prosecutor made his own *Wheeler* challenge against defense peremptories to exclude White males. The court found a prima facie showing had been made. (7 RT 1323; see also *Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 2359, 120 L.Ed.2d 33] (prosecution has right to raise challenge); see also *People v. Wheeler, supra*, 22 Cal.3d at p. 282, fn. 29.) Following explanation, the court denied the prosecutor's motion. (7 RT 1387.)

> The *Batson* three step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. (*Rice v. Collins* (2006) 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824.) The three step procedure also applies to state constitutional claims. (*People v. Bonilla, supra*, 41 Cal.4th at p. 341, 60 Cal.Rptr.3d 209, 160 P.3d 84; *People v. Bell* (2007) 40 Cal.4th 582, 596, 54 Cal.Rptr.3d 453, 151 P.3d 292.)

(*People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

In regards to the procedure employed when, as here, a trial court makes a prima facie showing:

> [T]he question presented at the third stage of the Batson inquiry is ' "whether the defendant has shown purposeful discrimination." ' (*Miller-El v. Dretke*, 545 U.S., at 277, 125 S.Ct. 2317.)" (*Snyder v. Louisiana, supra*, 552 U.S. ___, ___ [128 S.Ct. at p. 1212].) "[T]he critical question 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 v. Cockrell* (2003) 537 U.S. 322, 338–339.) The credibility of a prosecutor's stated reasons "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. (*Id.* at p. 339.)
>
> The existence or nonexistence of purposeful racial discrimination is a question of fact. (*See Miller-El v. Cockrell, supra*, 537 U.S. at pp. 339–340.) We review the decision of the trial court under the substantial evidence standard, according deference to the trial court's ruling when the court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror. (*People v. Jurado* (2006) 38 Cal.4th 72, 104–105, citing *People v. McDermott* (2002) 28 Cal.4th 946, 971; *People v. Cash, supra*, 28 Cal.4th at p. 725.)

> "[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) A prosecutor's reasons for exercising a peremptory challenge "need not rise to the level justifying exercise of a challenge for cause." (*Batson, supra*, 476 U.S. at p. 97.) " '[J]urors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.' " (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6.)

(*People v. Hamilton* (2009) 45 Cal.4th 863, 900-901.)

With respect to a prosecutor's reasons for exercising a peremptory challenge, his explanation need not be persuasive, so long as the reason was not inherently discriminatory. (*Rice v. Collins* (2006) 546 U.S. 333[126 S.Ct. 969, 973-974, 163 L.Ed.2d 824].) Indeed, it should be considered that the choice to use a peremptory challenge is "subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 238 [125 S.Ct. 2317, 162 L.Ed.2d 196].) These principles should be considered in conjunction with the presumption that the prosecutor used peremptory challenges in a constitutional manner. (*People v. Morrison* (2004) 34 Cal.4th 698, 709.)

C. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT THERE EXISTED A NON RACIAL BASIS TO EXCLUDE THE CHALLENGED JURORS

As in *Lenix* and the foregoing cases, analysis of this record demonstrates substantial evidence supported the trial court's finding the prosecutor's proffered reasons were not pretextual. Given the substantial evidence supporting the trial court's decision, Montes resorts to conducting a comparative juror analysis in a futile attempt to find some evidence of discriminatory intent on behalf of the prosecutor.[26] (AOB 212.) A comparative juror analysis does not yield circumstantial evidence to suggest that the prosecutor's challenges were racially motivated. To the contrary, the analysis further demonstrates there is substantial evidence to support the trial court's decision that the strikes were not made with discriminatory intent.

A comparative juror analysis was conducted for the first time on appeal in *Miller El v. Dretke* (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196] and then in *Snyder v. Louisiana* (2008) __ U.S. __ [128 S. Ct. 1203, 170 L. Ed. 2d 175]. In *Miller El*, the Court conducted such an analysis, noting that if a prosecutor's proffered reasons for striking a minority juror applied to a similarly situated juror who is permitted to serve, that is evidence tending to prove purposeful discrimination. (*Miller*

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[26] Respondent notes that comparative juror analysis is not needed when there has been no prima facie showing, or a first stage *Wheeler/Batson* case; neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons. However, "comparative juror analysis must be considered for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix*, *supra*, at p. 687.)

El v. Dretke, *supra*, 545 U.S. at p. 241.) *Snyder* utilized a comparative juror analysis for the first time on direct appeal, but recognized that

> a retrospective comparison of jurors based upon a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.

(*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

The Court elected to engage in comparative analysis in that case because the only remaining justification given by the prosecutor, not including demeanor, was concern over hardship. Hardship concerns were "thoroughly explored" by the trial court there, so that shared characteristic could be fairly addressed. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

This Court has generally declined to conduct such an analysis for the first time on direct appeal. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1324-1325.) However, in light of the use of comparative analysis in *Miller El* and *Snyder*, this Court has recently found comparative juror analysis is one form of relevant, circumstantial evidence that may be considered on the issue of intentional discrimination. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) This Court noted,

> [t]hus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.

(*Ibid.*)

A comparative analysis for the first time on appeal is of limited value where a trial court makes a prima facie determination and the prosecutor offered reasons in that regard. That is because while there may be some evidence and reasons offered in the record, the prosecutor lacked any real

meaningful opportunity to address the issue for the purpose of comparing the challenged juror to others and thus preserving all reasons, not to mention a record, on that basis.

Like the decision in *Snyder*, this Court also recognized the "inherent limitations" of conducting a comparative juror analysis on a cold appellate record. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) The most troubling aspect of conducting such an analysis on direct appeal is failing to give the prosecutor the "opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 623.) This is especially true in light of the fact that experienced advocates may interpret the tone of the same answers in different ways and a prosecutor may be looking for a certain composition of the jury as a whole. (*Id.* at pp. 622-623.)

As this Court has observed:

> There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact.

(*People v. Lenix*, *supra*, 44 Cal.4th at pp. 622-623.)

As further recognized by this Court:

> [A]lthough a written transcript may reflect that two or more prospective jurors gave the same answers to a question on voir dire, "it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." [Citation.] Observing that "[v]oir dire is a process of risk assessment" [citation], we further explained that, "[t]wo panelists [i.e., prospective jurors] might give a similar answer on a given point.

> Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding."

(*People v. Cruz, supra*, 44 Cal.4th at pp. 658-659, quoting *People v. Lenix, supra*, 44 Cal.4th at p. 623.)

For those reasons, a comparative juror analysis is not treated the same when conducted in the trial court as opposed to the first time on appeal.

> Defendants who wait until appeal to argue comparative analysis must be mindful that such evidence will be considered in view of the deference accorded to the trial court's ultimate finding of no discriminatory intent.

(*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

> Moreover, appellate review is
>
> necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment.

(*Ibid.*)

In order to discern the prosecutor's intent, all relevant evidence must be considered. A comparative juror analysis on its own will not be sufficient to overturn a trial court's factual findings. (*People v. Lenix, supra,* 44 Cal.4th at p. 626.) Rather, such an analysis is an additional form of evidence to be considered by the reviewing court. (*Ibid.*) Comparative juror analysis is merely a form of circumstantial evidence on the issue. (*Id.* at p. 627.) The consideration of such circumstantial evidence must be treated with care as information may be open to more than one reasonable deduction. If the evidence reasonably justifies the trial court's findings, even if it may be reconciled with a contrary finding, reversal is not warranted. (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 627-628.)

In sum, both this Court and the United States Supreme Court have issued warnings about the unreliability of comparative analysis without a complete record of such an analysis having been developed in the trial court. Assuming, however, that the record is sufficient to conduct a comparative analysis of prospective jurors, Montes's claim that the People exercised their peremptory challenges in a discriminatory manner should be rejected. By the same token, however, the record is also inadequate to grant the requested relief and if the Court agrees with Montes, the matter should be remanded to develop a more complete record on this limited issue.

1. African-American Prospective Jurors

As to these prospective jurors, the trial court stated,

> [t]he Court finds that the district attorney has honestly and fairly used his peremptory challenges as to each of these jurors who are challenged for cause. I do not discern that race was a factor. The district attorney has stated race-neutral reasons. I believe he's honestly stating those reasons. In evaluating those reasons, it's completely understanding why he would have asked each of these jurors to be excused by using his peremptory challenges. The Court finds that there is a race-neutral reason -- honest race-neutral reason for excusing each of these jurors. The Court finds no evidence of race discrimination on behalf of the People in the use of their peremptory challenges, and the motion pursuant to the *Wheeler* decision and *Batson* decision will be denied.

(7 RT 1173-1174.)

a. Prospective Juror D.M.

Montes asserts the prosecutor's stated reasons that D.M. allegedly opposed the death penalty were not sufficient, because D.M. believed it should be imposed in some instances. (7 RT 1169, 1173; 16 CT 4582-4583.) Montes compares D.M. to juror No. 2 who rated herself "neutral" on the death penalty, with a score of 5 out of 10 (9 CT 2326) and had mixed feelings about the death penalty (9 CT 2326; see also juror No. 8 (7 CT

1758) and prospective juror J.B. (14 CT 4010) who scored themselves as a 5 on the 10 point scale). (AOB 215-216.) J.B. also expressed hesitancy about the death penalty but claimed he would impose it if he believed the person deserved it. (14 CT 4010.)

However, what differentiated D.M. was the fact that he believed the death penalty was unfairly applied to poorer persons. (7 RT 169.) In other words, D.M. stated an objective opposition and bias against its application, based on economic disparities. Montes does not draw any comparison between this prospective juror and those seated jurors who may have also expressed the same concern. For example, J.B. did not express any reservations based on economic disparity. He merely observed that no one had the right to take another's life and would reconsider death if he did not feel "100% sure" of guilt and that his decision would be based on the circumstances of the crime, while considering the evidence and the instructions provided. (14 CT 4009-4016.) Seated Juror No. 8 merely stated the death penalty depending "on the severity of the crime and all circumstances" (7 CT 1758), and expressed no concerns about economic disparity. Seated Juror No. 2 expressed some reservations about the death penalty, but not based not on economic disparity – instead her concern was balancing the fact that it is not right to kill another but that taxpayers should not support murderers in prison for the rest of their lives. (9 CT 2326.) She only expressed ambivalence because of the fact that Montes alone faced the death penalty, but understood this was because of the ages of the other defendants. (9 CT 2330-2331.)

On the other hand, the prosecutor aptly observed D.M.'s expressed concerns that "rich people very seldom are put to death" would be very relevant in this case and that, "I don't think [D.M.]'s personal opinions about how the death penalty is applied and whether or not that is a proper

circumstance to be taken into consideration is someone I want on this jury." (7 RT 169.)

A prosecutor may constitutionally exercise a peremptory challenge based on a juror's ambivalence towards the death penalty. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117; *People v. Catlin* (2001) 26 Cal.4th 81, 116.) And concerns the juror believes there exists disparate treatment in death penalty cases are legitimate reasons. (*People v. Lewis & Oliver, supra,* 39 Cal.4th at pp. 970, 1016.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

b. Prospective Juror L.W.

Like D.M., L.W. scored himself as neutral in his death penalty views, with a score of 5 out of 10. (11 CT 3051.) Montes merely states L.W.'s neutrality was comparable to the ratings provided by other seated jurors. (AOB 217.) This is an insufficient basis from which to make a comparative analysis. Montes does not identify for comparison purpose any stricken panelists or seated jurors in this claim of disparate treatment. Consequently, respondent respectfully submits there is no need to even engage in a comparative analysis with respect to this prospective juror. (*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

Regardless, although L.W. believed each case should be decided on an individual basis, he believed the death penalty served no purpose. (11 CT 3052.) As noted above, whether L.W.'s stated neutrality on the death penalty was comparable to other prospective and seated jurors is inconsequential. The prosecutor expressed several concerns about L.W.: L.W. appeared to talk to himself during voir dire and felt that O.J. Simpson was properly acquitted because police officers "took the Fifth Amendment." (7 RT 1173.) In addition, L.W.'s stated belief that he did

not think the death penalty was useful or served a purpose raised concerns that L.W. would not fairly listen to argument in favor of a death sentence. (7 RT 1171-1172.) As the prosecutor observed, "My concern is that [the] People would not have a viable alternative of death if he were to sit on the jury." (7 RT 1172.)

As discussed above, these reasons stood in marked contrast to the responses of the seated, none of which expressed the same concern that the death penalty did not serve any useful purpose. In fact, seated Juror No. 2 expressed the opposite concern - taxpayers should not shoulder the financial burden to house murderers in prison for the rest of their lives. (9 CT 2326.)

A prosecutor may constitutionally exercise a peremptory challenge based on a juror's ambivalence towards the death penalty. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 117; *People v. Catlin, supra,* 26 Cal.4th at p. 116.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

c. Prospective Juror K.P.

The prosecutor challenged K.P. because she rated herself a 3 out of 10 on the death penalty questionnaire. More importantly, the prosecutor noted 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.)

Montes compares K.P. to other seated jurors who had family members convicted for misdemeanor offenses. (AOB 218-219, referring to Juror No.

2 (father driving under influence conviction and suspension of driver's license (9 CT 2316)); Juror No. 8 (brother convicted of driving without a license (7 CT 1748)); Juror No. 11 (husband convicted years earlier of driving under the influence (15 CT 2394)); prospective Juror also named D.M. (stepson drug intervention (13 CT 3507)); and also prospective Juror J.G. (arrested and charged with domestic violence but charges later dismissed (16 CT 4364).) But Montes also concedes K.P. had her own prior conviction for petty theft and traffic warrants, and, that her husband had been incarcerated for possession of narcotics and spousal abuse. (15 CT 4286.)

Regardless of the fact that other jurors may have had family members with misdemeanor crimes, this prospective juror's own theft conviction differentiated her from other jurors. When coupled with her husband's violent abusive act these were objective reasons why the prosecutor did not want K.P. on the jury. Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

d. Prospective Juror W.J.

The prosecutor challenged W.J. primarily on his poor education, noting that he misspelled many words in his questionnaire, including "honest." He also expressed concern that W.J. might have difficulty following complicated instructions and not have the necessary skill-set to process the evidence and to exercise good judgment. (7 RT 1169-1170.) The prosecutor also noted W.J. had a prior misdemeanor stolen property offense and conviction and yet could not even spell "offense." (7 RT 1170; 6 CT 1592.) W.J. graduated from high school and attended college, studying computers. Montes compared his education to other jurors accepted by the prosecutor. (See AOB 219-221.) However, the court

concurred with the prosecutor and found that W.J. had trouble comprehending simple and straightforward questions asked on voir dire by co-defendant Hawkins. (7 RT 1170.)

Regardless of the fact that other seated jurors may have had a similar education level, W.J.'s own prior stolen property conviction and inability to understand simple questions were objective concerns that differentiated him from seated jurors that may have had comparable education. (*People v. Turner* (1994) 8 Cal.4th 137, 169 (inability to understand or follow court's instructions.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

e. Prospective Juror I.T.

I.T. had a brother incarcerated at San Quentin for murder, but did not think would influence her decision-making. (1 CT 34-35; 7 RT 1083-1085.) However, she described herself as generally opposed to the death penalty with a low score of 2 out of 10. And despite claiming she would follow the law and could apply the death penalty when warranted, she believed that it did not comport with her Christian religious views. (1 CT 44-45.)

Montes concedes that I.T. expressed reservations about the death penalty, and, that standing alone her challenge would be justified. (AOB 221-222.) In other words, he uses it only to bootstrap onto his other claims. The fact remains that I.T.'s expressed reservation was an objective concern by the prosecution. A prosecutor may constitutionally exercise a peremptory challenge based on a juror's ambivalence towards the death penalty. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 117; *People v. Catlin, supra,* 26 Cal.4th at p. 116.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a

contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

f. Prospective Juror P.K.

Similar to I.T., P.K. scored himself as a 2 on a 10 point scale and explained that while he would follow the law, he was opposed to the punishment in light of its application and history in this country. (10 CT 2664-2666.) But for reasons similar to I.T. above, this was an objective concern by the prosecutor.

A prosecutor may constitutionally exercise a peremptory challenge based on a juror's ambivalence towards the death penalty. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 117; *People v. Catlin, supra,* 26 Cal.4th at p. 116.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

2. Hispanic Prospective Jurors

As to these prospective jurors, the trial court stated,

> I believe the District Attorney's reasons have been honestly stated to the Court. I believe he's being honest in why he dismissed each of these jurors and why he used his peremptory challenges as to each of the jurors. The Court finds as to each of the jurors that have been mentioned by counsel, assuming they all are Hispanic, that there are appropriate race-neutral reasons for the district attorney to use peremptory challenges on each of them. The Court finds there has been no violation. The *Wheeler/Batson* motion for mistrial pursuant to those decisions is denied.

(7 RT 1322-1323.)

a. Prospective Juror D.C.[27]

Montes describes D.C. as a prosecution-oriented venire person because she rated herself as a strong proponent of the death penalty (8 on a 10 point scale and believed in an "eye for an eye"). (AOB 223, referring to 12 CT 3284-3286.) But because Montes does not identify for comparison purpose any stricken panelists or seated jurors in this claim of disparate treatment, Respondent respectfully submits there is no need to even engage in a comparative analysis with respect to this prospective juror. (*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

Regardless, the prosecutor had reservations because D.C. appeared "ditzy" in her body language and demeanor, and had the impression she was having a good time. (7 RT 1317.) The prosecutor excused her when the composition of the jury changed:

> 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.)

In other words, he was concerned she would not take the proceedings in the serious manner he envisioned and that she would be focused on the more social aspect of interacting with other women on the panel. In addition, both the court and the prosecutor observed she may have had a bias against police because of a molestation investigation involving her child and the fact the police closed the file when she declined to bring her child to the police station. (7 RT 1316-1318.)

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[27] Montes refers to this person as prospective Juror D.C., but the record pages his argument cites to refer to this prospective juror with the last name of Quintos. (See 12 CT 3267.)

The prosecutor expressed legitimate reasons for challenging D.C. based on her demeanor. It is proper to make a peremptory challenge in response to "' bare looks and gestures,'" "or the demeanor of a prospective juror." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1203, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Moreover, a concern that a juror harbored bias or negative experiences with law enforcement are also objective reasons for exercising a peremptory challenge. (*People v. Turner, supra*, 8 Cal.4th at p. 171.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

b. Prospective Juror L.C.

L.C. zealously support the death penalty, scoring himself as a 10 on a 10 point scale. (12 CT 3335.) L.C. was also an elder of the Seventh Day Adventist Church. (12 CT 3319, 3322.) But because Montes does not identify for comparison purpose any stricken panelists or seated jurors in this claim of disparate treatment, Respondent respectfully submits there is no need to even engage in a comparative analysis with respect to this prospective juror. (*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

Regardless, the prosecutor believed L.C.'s views on the death penalty were somewhat inconsistent with his religion and his stated belief that life in prison was somehow a more aggravating sentence than death. The prosecutor explained that,

> At first look at his questionnaire he says he's positively in favor of it. I find his responses contradictory. And I had a concern in regards to that. Him being a religious man, being an elder in a church, and then finding that life without parole is a more aggravated sentence in this case, the People are at a disadvantage in arguing death to that man.

(7 RT 1318-1319.)

Montes asserts "there was no basis for the prosecutor to allege a purported inconsistency between L.C.'s support for the death penalty and his religion" because L.C. stated religious denomination did not take a position on the death penalty. (AOB 225; 12 CT 3336.) But whether this particular religious denomination actually supports the death penalty is not the issue. There is no argument or evidence in the record to demonstrate the prosecutor knew this to be fact and ignored it. Instead, the prosecutor expressed a belief that L.C. was being less than candid on this issue, as well as on his views as to whether life without parole is more aggravating if he sincerely supported capital punishment. Certainly these concerns were highlighted by L.C.'s potential religious bent or bias. (*People v. Cash* (2002) 28 Cal.4th 703, 725.) The fact remains that this was an objective concern by the prosecution. Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

c. Prospective Juror D.L.

D.L. expressed neutrality on the death penalty, scoring himself as a 5 out of 10, but indicated he would follow the law. (12 CT 3232-34, 3237.) The prosecutor was concerned that D.L. lacked an opinion on the death penalty or on issues which people generally view as important (such as whether race was an issue in the O.J. Simpson case or the public animosity and discourse about the immigration issue) and was also troubled by D.L.'s lack of education – merely completion of high school (12 CT 3216-3217) and the fact he misspelled simple words on the questionnaire (such as "jury" or "trial"). (7 RT 1319-1320; see 12 CT 3224.) D.L. also misspelled, "credibility" (12 CT 3227) and "involved" (12 CT 3229).

Montes does not make any direct comparison to other jurors, beyond the general statement that D.L.'s spelling was no worse than that of many other jurors. (AOB 226.) Because Montes does not identify for comparison purpose any stricken panelists or seated jurors in this claim of disparate treatment, Respondent respectfully submits there is no need to even engage in a comparative analysis with respect to this prospective juror. (*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

Regardless, the fact is that the prosecutor perceived D.L. as being totally unmotivated about important issues and his method of answering questions served as a legitimate concern. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 909 (manner of answering questions was a legitimate factor for disqualification).) At worst, the challenge here was based on the prosecutor's hunch. But "hunches" and even "arbitrary" exclusion is permissible if the reasons are not based on impermissible group bias. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.)

d. Prospective Juror G.H.

G.H. had prior 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 10 point scale. (16 CT 4608.) But because Montes does not identify for comparison purpose any stricken panelists or seated jurors in this claim of disparate treatment, Respondent respectfully submits there is no need to even engage in a comparative analysis with respect to this prospective juror. (*People v. Lenix, supra,* 44 Cal.4th at p. 624.)

Regardless, the prosecutor expressed concern because of G.H.'s lack of education (16 CT 4593 (junior college education stated as "Cerritos J.C. Auto Body Repair")) and the fact he could not legibly write on his questionnaire and was unable to even spell his job as a "manager." (7 RT 1321-1322; see 14 CT 4592.) Thus, the prosecutor had legitimate concern

G.H. might have difficulty understanding the instructions and complicated issues in this case. (See *People v. Turner, supra,* 8 Cal.4th at p. 169.) Because the evidence reasonably justifies the trial court's finding, even if it may be reconciled with a contrary finding, reversal on the basis of an impermissible racial challenge is not warranted. (*People v. Lenix, supra,* 44 Cal.4th at pp. 627-628.)

As demonstrated by the foregoing, the prosecutor justified all of these challenges with

> genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice.

(*People v. Ervin* (2000) 22 Cal.4th 48, 74-75.)

Consequently, the trial court properly denied Montes's motion, because the record reveals the prosecutor excused African American and Hispanic prospective jurors for genuine, race-neutral reasons. But if this Court determines the record is inadequate to conclude the prosecutor exercised its peremptory challenges for genuine, race-neutral reasons, the matter should be remanded for a hearing to allow the trial court to make that determination. (See *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.)

X. CLAIM X IS NOT A CLAIM OF ERROR

Montes's argument X is merely a heading without argument and is not a claim of error.

CLAIMS ABOUT GANG EVIDENCE

XI. FAILURE TO TIMELY PROVIDE THE IDENTITY OF THE GANG EXPERT DID NOT REQUIRE A CONTINUANCE OR REQUIRE OTHER REMEDIAL ACTION

Montes claims the prosecutor violated discovery obligations by untimely providing information about Beaumont Police Department gang

expert Sergeant Scott Beard. He further maintains the trial court erred when it refused to continue the matter or take ameliorative action to offset the discovery violation, and thus denied him the right to present a defense and to due process of law. (AOB 234; see 238, referring to U.S. Const., 5th & 14th Amends). The trial court properly declined to grant Montes a continuance or take other ameliorative action.

A. PROCEDURAL HISTORY

Before trial Montes and his co-defendants sought to exclude all gang-related evidence. (3 RT 402.) At that time the prosecutor believed the gang-related documentary evidence it intended to present "speak for themselves" and he did not intend to present a gang expert because he was not going to offer predicate crimes or other offenses and just wanted to establish limited evidence about the affiliation amongst the defendants. However, the court and the defendants all observed expert testimony might be required and the prosecutor indicated he would find someone to testify. The court and parties discussed the propriety of a gang expert and the court noted that the defense waited until the eve of trial to seek exclusion of gang evidence when it could have raised the issue months earlier and the prosecutor could have sought an expert to provide the proper foundation. In any event, the court ruled gang affiliation evidence was admissible and the court ordered the prosecutor to provide information about their expert by the next Monday, or September 9th. (3 RT 406-417.)

The trial then began on September 13, 1996. (4 CT 953.) The defense did not obtain information about proposed gang expert Sergeant Scott Beard, however, until the morning of November 4th. At that time, the trial court held an Evidence Code section 402 hearing on the expert's qualifications and the admissibility of his testimony. (31 RT 5706-5751.) When it came time for the foundational cross-examination, Montes's counsel Sandrin indicated that she knew nothing about the expert until that

morning and requested additional time to prepare for the hearing and her cross-examination. The trial court denied a continuance, stating counsel could ask questions and that this was a "very limited area." (31 RT 5718.) At the conclusion of the hearing, the court found Sergeant Beard qualified as a gang expert. (32 RT 5751.) His testimony before the jury commenced the next day. (32 RT 5789.)

B. ANALYSIS

The failure to provide witness information is a discovery violation, as defined by Penal Code sections 1054 to 1054.7. Penal Code 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. (Pen. Code, § 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. (*Izazaga v. Superior Court, supra*, 54 Cal.3d at p. 376, fn. 11; see also, *People v. Gonzalez* (2006) 38 Cal.4th 932, 956.)

Remedies and sanctions for discovery violations are set forth in Penal Code section 1054.5. These include delaying or prohibiting the testimony of a witness and continuance of the matter. "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; *People v. Beames* (2007) 40 Cal.4th 907, 921; *Ungar v. Sarafite* (1964) 376 U.S. 575, 589 3[84 S.Ct. 841, 11 L.Ed.2d 921] (no mechanical test for deciding whether a court's denial of a request for continuance was so arbitrary that it violates due process. Each case decided upon own facts with particular attention to the reasons given the trial judge at the time the request is denied).) An order denying a continuance is

"seldom successfully attacked." (*People v. Beames, supra*, 40 Cal.4th at p. 920.)

Montes claims the trial court should have granted his request for a continuance of the Evidence Code section 402 hearing or some other ameliorative action so that he could better prepare and prevent the gang expert from testifying at trial. (AOB 234, 237-240.) Montes has not shown the trial court abused its discretion.

Montes obviously knew the prosecution intended to proffer gang expert testimony; indeed the prosecutor obtained the gang expert as a result of defense concerns about the gang evidence that the court had ruled would be admissible. Montes was also aware of the gang-related evidence that existed in this case and what presumably would be considered by the expert. The only issue was the identity of that expert and the basis of his or her opinion. Whether that witness had sufficient foundation to qualify as an expert and the basis of the opinion was the whole purpose of the Evidence Code section 402 hearing. That Montes allegedly lacked sufficient time to prepare for cross-examination did not equate to an inability to present a defense or constitute a due process violation. The very purpose of the Evidence Code section 402 hearing was to assess the witnesses' qualifications and to determine whether he would ultimately testify. Sergeant Beard's background, training and experience, as well as the basis of his opinion, were adequately presented for foundational considerations and then subsequent explored and challenged during cross-examination (see *infra,* at Argument XII).

It cannot be said the denial of a continuance to prepare for the foundational cross-examination during the Evidence Code section 402 hearing was for reasons so arbitrary that it violated due process. The trial court observed this was a very limited area of inquiry, and, that there was no need to further delay the proceedings. Moreover and despite Montes's

suggestion, additional time to prepare for a foundation cross-examination would not likely have resulted in Sergeant Beard being found unqualified as an expert witness. (*People v. Chavez* (1985) 39 Cal.3d 823, 828, citing *People v. Hogan* (1982) 31 Cal.3d 815, 851-852, and citing Jefferson, Cal. Evidence Benchbook (1972) § 29.3, p. 502; emphasis in original (abuse of discretion in determining witness qualifies as expert is "found only 'where the evidence shows that a witness *clearly lacks* qualification as an expert . . .'".)

For similar reasons, a lack of continuance for trial did not violate due process. And in addition, there were no gang enhancement allegations charged in this case and the purpose of the gang-related evidence was merely to explain Montes's motive for the killing. Any continuance afforded Montes would not have likely resulted in a more effective foundational challenge during the hearing against the admissibility of Sergeant Beard's testimony or his opinion about the gang-related evidence he relied upon. Montes simply cannot demonstrate abuse of discretion or that prejudice resulted.

XII. THE TRIAL COURT PROPERLY RULED SERGEANT BEARD QUALIFIED AS A GANG EXPERT

As discussed in Argument XI, on November 4, 1996, the trial court conducted an Evidence Code section 402 hearing concerning the proposed testimony of the prosecution's gang witness, Sergeant Beard. During the hearing, Sergeant Beard explained his training and experience as related to gang evidence. He noted that he had never testified as a gang expert. (31 RT 5717-5718.) However, he was the Beaumont police "one-man gang unit" before others worked for him in this capacity, he had received 20-30 hours of gang related training, and personally knew about the defendants' gang. (31 RT 5706-5709, 5719.) Sergeant Beard also discussed evidence in this case which suggested the common association between the

defendants, specifically, the notebooks seized from the defendants with gang graffiti, the defendants' tattoos, and co-defendant Hawkins's known gang membership. And although Montes and co-defendant Gallegos claimed to merely associate with the gang, Sergeant Beard also explained the practice of "jumping in" or otherwise initiating a new person into the gang. (31 RT 5706-5736.)

In addition to arguing the proposed testimony was not relevant to any contested issue (*infra,* Argument XIII) Montes argued that Sergeant Beard lacked the necessary qualifications to provide expert testimony in this area. (32 RT 5746-5747.) The trial court found that Sergeant Beard sufficiently qualified to testify as a gang expert. (32 RT 5750-5751.) Montes argues the trial court erred. (AOB 241.) The argument is without merit.[28]

A. ANALYSIS

Assuming this Court does not apply the law of the case doctrine, Montes's claim should be rejected. Whether an individual is qualified to render an expert opinion is a question for the trial court, which will very rarely be set aside on appeal. (*People v. Chavez*, *supra*, 39 Cal.3d at pp. 823, 828.) A reviewing court must uphold the trial judge's ruling on the question of an expert's qualifications absent a clear or manifest abuse of discretion. (*People v. Clark* (1993) 5 Cal.4th 950, 1018; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) Such abuse is "found only where " "'the evidence shows that a witness *clearly lacks* qualification as an expert . . . .'"" (*People v. Chavez*, *supra*, 39 Cal.3d at p. 828, citing *People v. Hogan* (1982) 31 Cal.3d 815, 851-852, and citing Jefferson, Cal. Evidence Benchbook (1972) § 29.3, p. 502; emphasis in original.)

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[28] The Court of Appeal addressed and rejected this very question in the co-defendants' direct appeal. The Court of Appeal reviewed the facts and evidence and concluded that Sergeant Beard properly qualified as an expert witness. (*People v. Varela, Opn.* at pp. 28-31.)

It cannot be said the trial court clearly or manifestly abused its discretion. Gang expert testimony is admissible when it relates to matters beyond common experience and is helpful to the trier of fact. (Evid. Code, § 720, subd. (a), § 801; *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Sergeant Beard had personal knowledge about Montes and the other defendants as to their involvement with gangs. Further, his testimony helped explain the significance of the defendants' gang-related tattoos and gang monikers and the graffiti discovered during the investigation. Sergeant Beard also educated the jury about the sociology and psychology of gang culture as related to the limited issues before the jury. As a result, his testimony helped the jury better understand the behavior and conduct of all the defendants. (See *In re Sergio R.* (1991) 228 Cal.App.3d 588, 597, citing *People v. Lucero* (1988) 44 Cal.3d 1006, 1018-1020 (membership relevant to explain motive as related to premeditation and deliberation); see also *People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 932, 945 ("'It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect'").) On this record, it cannot be said the trial court abused its discretion when it ruled Sergeant Beard's testimony admissible.

XIII. THE TRIAL COURT PROPERLY ADMITTED GANG EVIDENCE

The trial court overruled Montes's objection at trial to the admission of gang evidence under Evidence Code section 352 and specifically, his argument that the 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. He now raises these same arguments on

appeal. (AOB 244, referring to 25 CT 7026-7031; 33 RT 6066 (ruling).) The arguments should be rejected.[29]

A. PROCEDURAL HISTORY

As addressed in Arguments XI and XII, Montes filed an in limine motion to exclude gang evidence, contending it was irrelevant and more prejudicial than probative. Co-defendants Hawkins and Gallegos joined in the motion. (PRT 178; 3 RT 402.) During argument on the motion, the People explained the association served to explain the defendants' conduct during the homicide and in the manner they interacted at the party, and the common gang relationship or association amongst the defendants was also relevant to the jury's determination of aiding and abetting liability. (3 RT 402-404.) The People further explained this association was evident by the defendants' monikers and documentary evidence such as tattoos and notebooks seized from the defendants' residences. (3 RT 404-407.) And even though the People believed the documentary evidence spoke for itself, the People indicated it would be willing to present expert testimony, limited to discussing the common association amongst the defendants. (3 RT 407-408.)

Following additional argument related to the propriety of having expert testimony on this limited issue, the court ruled the defendants' association was "directly relevant" to the material issues in the case, that

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[29] These same arguments were reviewed and rejected by the Court of Appeal against his codefendants. The Court of Appeal explained that the trial court did not abuse its discretion when admitting the gang evidence because it was both relevant and not cumulative in proving the relationship between the defendants and their involvement in the charged crimes. (*People v. Varela*, Opn. at p. 29.) Further, it found the evidence relevant to the prosecution's theory of liability, as well as to establish Montes had a motive independent of finding transportation to the party and to steal money, specifically, a desire to join the VBR gang. (*Id.* at p. 27.)

the evidence was more probative than prejudicial, and that it would provide a limiting instruction. (3 RT 417-418.)

The court then ordered an Evidence Code section 402 hearing to determine the admissibility of testimony to be provided by gang expert Sergeant Scott Beard. (31 RT 5532-5533, 5699.) As explained above, Sergeant Beard first discussed his training and experience as related to gang evidence. He noted he had never testified as a gang expert. (31 RT 5717-5718.) However, he was the Beaumont police "one-man gang unit" before others worked for him in this capacity, he had received 20-30 hours of gang related training, and personally knew about the defendants' gang. (31 RT 5706-5709, 5719.) Sergeant Beard also discussed evidence in this case which suggested the common association between the defendants, specifically, the notebooks seized from the defendants with gang graffiti, the defendants' tattoos, and co-defendant Hawkins's known gang membership. And although Montes and co-defendant Gallegos merely associated with the gang, Sergeant Beard also explained the practice of "jumping in" or otherwise initiating a new person into the gang. (31 RT 5706-5736.) The court ruled Sergeant Beard was sufficiently qualified as a gang expert and could offer limited testimony in this regard. (31 RT 5750-5751.)

At trial, Sergeant Beard provided some general information about VBR. Sergeant Beard also testified about the existence of the gangs, and that the gang monikers and graffiti contained in the notebooks seized from the residences of Hawkins and Montes were indicative of gang activity. (32 RT 5792-5795.) He testified concerning an address book seized from co-defendant Hawkins's residence, specifically pointing to a list of gang monikers that had been written in the back of the book. (32 RT 5797-5798.) Sergeant Beard also examined a notebook obtained from Montes's residence (Exhibit 36) which contained what Sergeant Beard characterized

as "gang-graffiti, gang-type writing." (32 RT 5802-5806.) According to Sergeant Beard, Montes's notebook included entries such as "Eastside" and "Colton." (32 RT 5803.) It also had the name "Huero." (32 RT 5804.) Sergeant Beard also discussed the various tattoos on co-defendants Hawkins and Gallegos, as well as on Montes. (32 RT 5801-5802, 5807.) Among other things, co-defendant Hawkins had the name "Huero" tattooed on him, but Sergeant Beard had no idea if the "Huero" in Montes's notebook was co-defendant 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 Montes's objection, Sergeant 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. Sergeant Beard believed that VBR operated under one of those principles. (32 RT 5808.)

According to Sergeant Beard, co-defendant Hawkins was a member of VBR, and co-defendant Gallegos was an "associate." (32 RT 5819, 5822.) However, neither Montes nor co-defendant 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.) Sergeant Beard was not familiar with Colton gangs. (32 RT 5805, 5810-5811.)

At the conclusion of Sergeant 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.)

At the conclusion of the trial, the court also provided a similar limiting instruction, which further admonished the jury that it could not consider the evidence as showing a disposition to commit the charged crime. (6 CT 1324; 38 RT 6810.)

During closing argument the prosecutor suggested that the association or companionship amongst the defendants was circumstantial evidence of a shared intent, and also explained the connection between the defendants and served to explain their conduct, for purposes of aider and abettor liability. (36 RT 6483-6484, 6514.)

B. THE TRIAL COURT PROPERLY ADMITTED THE GANG EVIDENCE

In a criminal case, it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to prove motive or intent. (*People v. Sandoval* (1992) 4 Cal.4th 155; *People v. Funes* (1994) 23 Cal.App.4th 1506; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1054; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1456; *People v. Harris* (1985) 175 Cal.App.3d 944, 957; *People v. Plasencia* (1985) 168 Cal.App.3d 546, 552-553; *People v. Contreras* (1983) 144 Cal.App.3d 749, 755; *People v. Frausto* (1982) 135 Cal.App.3d 129, 140.) A trial court's exercise of discretion under Evidence Code section 352 in admitting evidence of gang membership and activity will not be disturbed where it was reasonable under the circumstances. (*People v. Funes*, *supra*, 23 Cal.App.4th at p. 1519.)

Any suggestion by Montes that the above evidence should not have been admitted because this was not a gang case is devoid of merit because the court's decision to admit limited gang association evidence simply did not constitute an abuse of discretion. Gang affiliation was quite relevant to show why Montes and the others participated in a pre-orchestrated effort to

attack a helpless and innocent victim – not just to steal money and get a ride to the party but also so that Montes could earn his way into the gang. This latter theory was supported by, *inter alia*, evidence of the group manner in which co-defendant Hawkins and the others eyed Walker's wallet and were together at the store, and left together shortly after Walker, how they huddled together and left the party, how at least two others were with Montes outside near the trunk at the time of the killing, the existence of a common gang-related association amongst all the defendants, including tattoos and monikers on the notebooks, the known gang membership and/or gang association. Plus, the evidence was necessary to place into proper context what Montes meant when he bragged that he had earned his stripes when he killed Walker.

Such gang association evidence had a tendency in reason to show both the motive and intent behind the attack, and could have been admitted for this greater purpose, in addition to better explaining the conduct of the shooter and those who aided and abetted his crime. Moreover, any potential prejudice which may have existed was diminished by the limiting instruction which advised the jury it could only consider the evidence, if believed, to show the existence of an association between Montes and the others.

Assuming arguendo that the court abused its discretion in admitting the gang evidence, Montes has failed to show prejudice. Improper admission of gang evidence is judged under the *People v. Watson* (1956) 46 Cal.2d 818, harmless error standard. (*People v. Champion* (1995) 9 Cal.4th 879, 923; *People v. Contreras*, *supra*, 144 Cal.App.3d at p. 758; see also *People v. Venegas* (1998) 18 Cal.4th 47, referring to *People v. Watson*, *supra*, at pp. 836-838.)

Here, the evidence would have still shown the relationships between the defendants, that Montes and the others were placed at the scene just

before the victim's disappearance, that co-defendant Hawkins served as the sole link between defendants and Walker, and that co-defendant Gallegos supplied the murder weapon used to rob, carjack and kidnap Walker. The evidence also established that all of the defendants drove to the party in Walker's car as he lay trapped in the trunk, that all left while co-defendant Varela helped them dispose of the body and car, and that all returned together from the scene of the murder. Further, co-defendant Hawkins had boasted about wanting to "smoke" a convenience clerk before he left the party and when he argued with Montes he pulled out a derringer after they returned to the party. (25 RT 4453-4454.) When coupled with Montes's actions after the murder and his admissions to having killed Walker, this evidence was more than sufficient to find him guilty as charged.

Moreover, any potential prejudice was vitiated by the fact that the trial court provided a limiting instruction at the time of Sergeant Beard's testimony, as well as general jury instructions on expert and witness testimony and the burden of proof at the conclusion of the trial. (See *People v. Adams* (1976) 59 Cal.App.3d 559, 567.) As noted in *People v. Stoll* (1989) 49 Cal.3d 1136, 1155,

> Of course, *any* expert may be cross-examined at trial as to the material and reasoning underlying his opinion. ([Evid. Code,] § 721, subd. (a).) Admission of expert opinion into evidence does not preclude the trier of fact from `reject[ing] the expert's conclusions because of doubt as to the material upon which [they] were based.' [Citation.]" (Emphasis in original.)

Montes and the others were thus able to cross-examine Sergeant Beard as to the foundation for his opinions, had an opportunity to offer contrary expert testimony on this very subject, and could sufficiently argue to the jury that it need not accept Sergeant Beard's expert testimony.

In light of the above, Montes has simply not shown the court abused its discretion in admitting the gang evidence. Moreover, even assuming

error, there is no reasonable probability of a different outcome had the evidence been excluded. Consequently, Montes's claim lacks merit and his concomitant constitutional challenges should be rejected because he has failed to establish that any prejudice occurred. (See *People v. Champion, supra,* 9 Cal.4th at p. 923.)

XIV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THE AUTOPSY PHOTOGRAPHS ADMISSIBLE

Montes objected at trial to the admission of autopsy photographs (People's No. 10, photos A-I and No. 11, photographs A-F) on grounds that they were irrelevant and prejudicial under Evidence Code section 352, that their admission violated his federal constitutional rights to due process because of their inflammatory nature, and that they violated his eighth amendment right because it rendered the death verdict arbitrary and capricious. (11 RT 1854, 1862, 1865.) Montes makes the same arguments on appeal. (AOB 257-268.) They should be rejected.[30]

A. RELEVANT PROCEEDINGS

During the initial pre-trial discussion, Montes objected to admission of autopsy photographs in exhibits 10, claiming only that the pathologist report detailed and described the wounds in a less inflammatory manner. (11 RT 1854-1855.) Exhibit 10 contained several photographs of the victim at the time of the autopsy: 10-A (on back and fully clothed, with rear of shirt bloodied, depicting gunshot wound near right eye) ; 10-B (turned on right side, depicting bloodied shorts and pulled up bloodied T-

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[30] The Court of Appeal rejected this very argument in the direct appeal of co-defendants. The Court of Appeal observed that the autopsy photographs were "highly relevant" to assist the jury in understanding the pathologist's testimony, relevant as circumstantial evidence of the intent to kill for purpose of the felony-murder and special circumstance allegations, and their probative value outweighed any prejudicial impact that may have existed. (*People v. Varela,* Opn., at pp. 31-34.)

shirt); 10-C (on back); 10-D (head close-up, depicting shaved wound area and ruler); 10-E (right profile, depicting shoulders and head); 10-F (aerial view of 10-E depicting open eyes); 10-G (left head profile, depicting open eyes and cheek wound, and blood from mouth and nose toward back of head, and pooled near ear and neck); 10-H (left side head and upper torso, and depicting cheek wound and open eyes).

As to those photos that depicted the victim's wounds, the prosecutor explained he selected the least gruesome photos and chose only one photo for each entrance wound (10 D-I). The prosecutor also explained the photos complemented the pathologist's testimony and would aid the jury in determining the manner the victim was killed and whether there existed intent to kill. Specifically, the prosecutor noted the photos depicted the victim while he was still in the trunk and the photos rebutted any claim that the victim was killed before the kidnapping occurred. Additionally, the photos depicted that Walker had been shot as he tried to sit up or flee from the trunk. The prosecutor also explained that the photos would enable the jury to better understand and consider the pathologist's opinion, based on the victim's probable location and position at the time of his death, as well as the appearance, location and likely order of the wounds. (11 RT 1855-1856, 1856-1859.) At one point, the prosecutor advised the court that he did not seek to admit the more gruesome photographs depicting the victim's skull and internal abdomen, because such evidence would be presented through the autopsy surgeon's testimony. (11 RT 1861.)

Montes responded that he would not contest the existence of the wounds and the manner in which they may have occurred, and that the photos were, therefore, irrelevant, cumulative to testimony, and likely to inflame the jury. (11 RT 1860.) The other defendants joined in the motion. (11 RT 1860.)

The court reviewed the photographs and ruled them relevant to material issues and not cumulative, and, determined that their probative value outweighed any prejudicial impact. The court even admitted exhibit 10-F, a photograph that "bothered" the prosecutor because it depicted a "death stare." (11 RT 1860.) The prosecutor had indicated he had tried to find another photograph that depicted this without the "death stare" and even offered to cover the victim's eyes. The prosecutor sought to admit the photograph because it depicted the number of shots, closeness of range, probable order of the shots and whether more than one shooter may have been involved. (11 RT 1857-1858.) The court did not believe the "death stare" was "overwhelmingly prejudicial or gruesome" and found the photo to be probative. (11 RT 1860.)

Montes also objected to admission of photographs contained in exhibit 11 that depicted the wounds and projectiles. (11 RT 1862.) Exhibit 11 contained several photographs that depicted the victim's wounds: 11-A (on back, multiple wounds visible and ruler near wound on left side of back); 11-B (same, with ruler near right side of back); 11-C (back of victim, prior to cleaning of body); 11-D (patterned cloth material); 11-E (right side, exit wounds); 11-F (close-up of bullet underneath skin on victim's back and ruler nearby).

The prosecutor explained that these photographs corroborated the x-ray photograph (Exhibit 14-A) and the pathologist testimony as it related to the location of the projectiles recovered from Walker's body. (11 RT 1862.) The court then weighed the relevancy of the photographs against any prejudicial effect, pursuant to Evidence Code section 352, and ruled these photographs to be admissible. (11 RT 1864-1865.)

Montes also objected to the admission of photographs that depicted probes showing the direction of the victim's wounds (exhibits 12 A-C).

The court ruled these photographs were inadmissible under Evidence Code section 352. (11 RT 1865-1871.)

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN RULING ON THE ADMISSIBILITY OF THE AUTOPSY PHOTOGRAPHS

"Murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Moon* (2005) 37 Cal.4th 1, 35, internal citations & internal quotation marks omitted.) Admission of photographs is discretionary, and a trial court's ruling will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Moon, supra,* 37 Cal.4th at p. 34; *People v. Sanchez* (1995) 12 Cal.4th 1, 64; *People v. Crittenden* (1994) 9 Cal.4th 83, 132-134; see also *People v. Hendricks* (1987) 43 Cal.3d 584, 594.) "[E]xcept in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency." (*People v. Adamson* (1946) 27 Cal.2d 478, 486.)

When as here, a party claims victim photographs are so gruesome or unduly prejudicial, it has been aptly noted that,

> [a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box.

(*People v. Guiuan* (1998) 18 Cal.4th 558, 576, J. Kennard, concurring and quoting *People v. Long* (1994) 38 Cal.App.3d 680, 689.)[31]

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[31] The full quote from Long is,

A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. . . . The average juror is well able to stomach the unpleasantness of exposure to the facts of a

(continued...)

In felony-murder cases such as this, there is no broad rule which excludes crime scene photographs. Rather, the usual principles of relevance apply to this type of evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 17-18; referring to *People v. Turner*(1984) 37 Cal.3d 302.) This principle should equally apply to autopsy photographs in a felony-murder prosecution; the trial court must still determine if the photos are relevant to the case, and if so, whether there is any reason to exercise discretion and rule the photos inadmissible.

Any suggestion that the challenged autopsy photographs in this case were irrelevant because the death itself was not contested and the photographs did not relate to the cause of death or to nature and extent of the wounds (AOB 263), should be rejected. The photographs were relevant to the issue of whether the killer harbored a specific intent to kill, for purposes of felony-murder and the special circumstance findings. (*People v. Wilson* (1992) 3 Cal.4th 926, 937-938; see also *People v. Hendricks*, *supra*, 43 Cal.3d at p. 594 (photographs relevant to prove necessary elements of malice and premeditation); *People v. Sanchez*, *supra*, 12 Cal.4th at pp. 1, 65 (same).) Consequently, the trial court properly determined the photos were relevant.

Moreover, any suggestion the photos were cumulative to other testimony as related to the cause of death and the nature and extent of the victim's wounds (AOB 264) should also be rejected. This Court has routinely rejected these types of claims. (See e.g., *People v. Crittenden*,

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(...continued)

> murder without being unduly influenced. The supposed influence on jurors of allegedly gruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.

(*People v. Long*, *supra*, 38 Cal.App.3d at pp. 680, 689.)

supra, 9 Cal.4th at pp. 132-134; *People v. Jackson* (1996) 13 Cal.4th 1164, 1216.) Further, the prosecutor correctly observed the photographs corroborated the pathologist's credibility and the accuracy of his conclusions regarding the manner of death. It is entirely proper to admit such evidence to corroborate expert testimony. (*People v. Stanley* (1995) 10 Cal.4th 764, 838; *People v. Kaurish* (1990) 52 Cal.3d 648, 684; *People v. Allen* (1986) 42 Cal.3d 1222, 1256.)

Finally, any suggestion the photographs were unduly prejudicial should also be rejected. Under Evidence Code section 352, a court may exclude relevant evidence

> if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice.

(*People v. Green* (1980) 27 Cal.3d 1, 24.)

Appellate courts rarely find an abuse of discretion in Evidence Code section 352 issues. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22.)

> In applying this statute we evaluate the risk of 'undue' prejudice, that is, 'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,' not the prejudice 'that naturally flows from relevant, highly probative evidence.'

(*People v. Salcido*, *supra*, 44 Cal.4th at pp. 93, 148.)

When such an objection is raised, the record should affirmatively show that the trial court weighed prejudice against the probative value. (*People v. Wright* (1985) 39 Cal.3d 576, 582.)

Here, the trial court expressly engaged in weighing the probative value of the photos against their potential prejudicial impact and this record fails to demonstrate an abuse of discretion when the trial court ruled admissible the autopsy photographs. As similarly noted in *People v. Lucas* (1995) 12 Cal.4th 415 (mod. of opn. 12 Cal.4th 825a),

> Here, as to the challenged evidence, the court heard extensive argument on both prejudice and probative value. The court was initially of the view that several of the photographs were `inflammatory and unduly prejudicial,' and ultimately decided that two of the photographs could be admitted only if the victim's face was excised. The record demonstrates that the trial court `understood and fulfilled its responsibilities under Evidence Code section 352. Nothing more was required.' (*People* v. *Garceau*, (1993) 6 Cal.4th 140, 182 [24 Cal.Rptr.2d 664, 862 P.2d 664].)

(*People v. Lucas*, *supra*, 12 Cal.4th at pp. 448-449; see also *People v. Sanchez*, *supra*, 12 Cal.4th at p. 64, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 199.)

Moreover, the court here exercised its discretion and excluded other photographs pursuant to Evidence Code section 352; that it chose not do so in regards to these particular photos may be debatable amongst jurists, but it is not an arbitrary or capricious decision that amounted to an abuse of discretion. In fact, because the court examined and contrasted all of the photos and ruled some inadmissible, it is a clear indication that the court made a careful and reasoned determination that the admitted photos were not unduly gruesome or inflammatory. The court's comparison also enabled it to assess the prosecutor's stated reasons for selecting these particular photos (i.e., they were chosen to assist the jury in understanding the pathologist's testimony). (*People v. Allen*, *supra*, 42 Cal.3d at p. 1258, fn. 13.)

In short, the photographs admitted were relevant, not cumulative and not prejudicial. As a result, the trial court properly exercised its discretion when it ruled the photographs admissible. (*People v. Sanchez*, *supra*, 12 Cal.4th at pp. 64-65.) Consequently, Montes's challenge against their admission and his additional constitutional arguments should be rejected. (See *People v. Lucas, supra,* 12 Cal.4th at pp. 448-449.)

XV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED ADMISSIBLE VICTOR DOMINGUEZ'S STATEMENT TO GEORGE VARELA THAT HE WAS "RIDING WITH A 187," BECAUSE IT SERVED THE NON-HEARSAY PURPOSE TO EXPLAIN VARELA'S SUBSEQUENT ACTS, AND, WAS CIRCUMSTANTIAL EVIDENCE THAT CORROBORATED MONTES'S OWN STATEMENTS ABOUT THE MURDER

The day after the murder, George Varela dropped Montes off at Montes's home. They saw Victor Dominguez there, who told George Varela he was "riding with a 187," a reference to Penal Code section 187, the section for murder. The trial court ruled the evidence admissible and provided the jury a limiting instruction the evidence was to be considered only to explain George Varela's further actions. (12 RT 1934.) Montes claims the trial court erred when it ruled this hearsay evidence admissible and prejudiced him because it identified Montes as the person who killed Walker. (AOB 271-273.) Respondent disagrees.

> 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.)

As to whether the statement is relevant, "[w]e review a trial court's relevance determination under the deferential abuse of discretion standard." (*People v. Jablonski* (2006) 37 Cal.4th 774, 821, referring to *People v. Heard* (2003) 31 Cal.4th 946, 973; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

> This standard is particularly appropriate when, as here, the trial court's determination of admissibility involved questions of relevance, the state of mind exception to the hearsay rule, and undue prejudice. (citation.) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Guerra, supra,* 37 Cal.4th at p. 1113, referring to *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Prior to opening statements Montes objected to the prosecutor introducing Dominguez's statement. The prosecutor argued it was a non-hearsay statement that helped explained George Varela's subsequent conduct, as well as phone calls made from the Varela residence to the Montes and the Domiguez homes just after they arrived:

> It's not offered for -- it's actually a non-hearsay statement. It's a declaration made by an individual not offered for its truth, but offered to explain subsequent conduct of George Varela. It will also come in to corroborate circumstantial evidence of phone calls being made from the Varela residence -- to the Montes and Dominguez residence from the Varela residence wherein I went into my opening statement (to the Varela jury) also about phone calls that were made by Mr. Montes where he's bragging about the killing or telling people that he killed someone. I think it's circumstantial evidence that that [sic] actually did occur when the individual comes up, related to Mr. Montes -- when he approaches the residence and says -- indicating that he has some knowledge, you're riding with a 187. Also explains subsequent conduct of Mr. George Varela.

(12 RT 1933-1934.)

The trial court ruled,

> Okay. I tend to agree it is probably admissible. I'm not going to order the D.A. to delete it from his opening statement. If you want to have a 402 hearing when the witness ultimately comes to testify and make a definitive ruling, I'll do that.

(12 RT 1934.)

The prosecutor then commented in his opening statement,

> 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.)

Although the trial court invited Montes to request an Evidence Code section 402 hearing before George Varela testified, Montes declined to do so. At trial, George Varela explained that the day after the murder, he drove Montes and co-defendant Gallegos back to Beaumont and at that time Montes showed him a newspaper clipping about the murder and said that he had committed the crime. Montes even described to George Varela how he had shot the victim. (25 RT 4464-4468.) According to George Varela, he did not believe Montes when he made this statement. (25 RT 4469-4470.) After they dropped off co-defendant Gallegos, George Varela took Montes home. (25 RT 4470.) When they arrived, Dominguez was outside and walked toward their car. (25 RT 4471.) Referring to Montes, Dominguez told George Varela[32] that he was "riding with a 187." George Varela and Montes got out of the car and all three went into Montes's house. (25 RT 4473.) By then, George Varela changed his mind and realized Montes's probably did commit the murder. (25 RT 4473.) Montes's father was inside the house and he exchanged words with Montes. Shortly after, Montes exclaimed that, "I had to do it. I'm not going to let four vatos go down for some (or one) white boy." (25 RT 4474-4475.) Dominguez and George Varela then left and went to Dominguez's house. (25 RT 4476.) This was about the same time that the police arrived to arrest Montes. (25 RT 4476-4478.)

It cannot be said that the trial court abused its discretion when it ruled Dominguez's "187" statement admissible. First, the evidence tended to explain George Varela's subsequent conduct: he went into the house under

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[32] Montes interposed a hearsay objection. The court overruled the objection and instructed the jury that the statement was admitted only to explain the witness's further actions. (25 RT 4472.)

a new impression that Montes had actually been truthful before, and, when combined with Montes's statement to his father, realized Montes may actually have been the killer. After Montes's confirmation of that fact to his father, George Varela and Dominguez left the house and noticed the police were arriving to arrest Montes. George Varela chose not to share the statement with the police at that time, only because he thought the police had everything they needed to arrest Montes. (25 RT 4478-4479.)

Even if the evidence did not sufficiently demonstrate George Varela acted in conformity with his belief or his state of mind, of more importance is that the statement also corroborated and placed into proper context Montes's own admissions George Varela and others about the murder.[33] Thus, it cannot be said that when it ruled the statement admissible, the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra, supra,* 37 Cal.4th at p. 1113.)

Montes nevertheless suggests prejudice existed because the jury could have used the statement in a hearsay manner to prove Montes actually killed Walker. (AOB (AOB 273.) But we must presume jurors follow limiting instructions. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120) Montes has not rebutted that presumption.

Further, it was not Dominguez's statement that "prejudiced" Montes in the manner he suggests. What proved more damning was the evidenced that demonstrated the motive and the fact that Montes killed Walker: Montes and the others were related by a gang relationship, co-defendant Hawkins knew Walker, the defendants were placed at the scene just before

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[33] That the trial court ruled it was admissible to explain further actions is not dispositive. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 ("a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason").)

the victim's disappearance, co-defendant Gallegos supplied the murder weapon, the defendants arrival in Walker's car and subsequent return with co-defendant Varela's assistance, boasting of co-defendant Hawkins about wanting to "smoke" a convenience clerk before he left the party, as well as Montes's own desire to earn his way into the gang, his actions after the murder, and his subsequent confession about the murder to multiple persons and his boasting of earning his gang stripes. In light of the overwhelming evidence of Montes's guilt, any assumed error should be considered harmless.

XVI. ADMISSION OF GEORGE VARELA'S SUBJECTIVE BELIEF THAT MONTES KILLED WALKER CONSTITUTED HARMLESS ERROR

As discussed in Argument XV, the trial court ruled admissible George Varela's testimony that Dominguez told him he was "riding with a 187," because it served to explain George Varela's actions and corroborated Montes's own actions and admissions. During that portion of George Varela's testimony, the prosecutor also elicited over a relevancy objection that George Valera's then become convinced Montes actually killed someone. (26 RT 4737.) Montes claims this was inadmissible lay opinion as to whether Dominguez was truthful. In other words, that George Varela believed Montes actually killed Walker was irrelevant and inadmissible. (AOB 274-276.) Any assumed error in the admission of this evidence was harmless.

The admission of evidence challenged on relevancy grounds is reviewed for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.)

> Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Guerra, supra,* 37 Cal.4th at p. 1113, referring to *People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10.)

It cannot be said that when it ruled the evidence admissible, the trial court abused its discretion, or, that any prejudicial error occurred.

Here, George Varela testified over Montes's relevancy objections (25 RT 4472-4473, 26 RT 4737) that after Victor Dominguez told him he was "riding with a 187," he changed his mind about not believing Montes's story that he had killed Walker, and "finally realized that he [Montes] did it." (25 RT 4473; 26 RT 4737.) Respondent acknowledges George Varela's testimony in this regard was an improper lay opinion about Dominguez' veracity and his own subjective belief as to whether Montes killed Walker was not admissible. (AOB 276.) However, that the trial court erred when it ruled the evidence admissible, does not mean that it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra, supra,* 37 Cal.4th at p. 1113.) Montes offers no compelling reason to conclude otherwise.

In any event, any error in the admission of the evidence was at best, harmless. Montes claims that the evidence "may have led the jury to believe that Montes was the one most culpable for Walker's death." (AOB 276.) But as noted above in Argument XV, it was not George Varela's testimony that served to prejudice Montes in the manner he suggests. In addition to the evidence discussed above that linked the defendants to the crime, Montes was more culpable than the others because he was the one who shot and killed Walker. He did so to earn his way into the gang and bragged about his crime afterwards. In light of the overwhelming evidence of Montes's guilt, any assumed error should be considered harmless.

XVII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED KIM SPECK COULD TESTIFY ABOUT HER REACTION TO MONTES'S STATEMENTS CONCERNING THE MURDER, BECAUSE IT HELPED EXPLAIN SPECK'S SUBSEQUENT ACTIONS

Kim Speck testified that she and co-defendant Salvador Varela purchased a newspaper that contained an article about the murder. When Speck showed the article to Montes, he jokingly denied participation and then claimed he was not involved. (20 RT 3411; 21 RT 3504-3505.) Speck explained she did not believe Montes based on her prior conversation with Salvador Varela. (21 RT 3622.) Montes now claims Speck's testimony violated his right to confront Varela under the Fifth, Sixth, Eighth and Fourteenth Amendments, because it implied that co-defendant Varela told her Montes had killed Walker. (21 RT 3656-3657.) (AOB 277-283.) Montes alternatively claims Speck provided inadmissible lay opinion and that her impression about Montes's involvement was both irrelevant and prejudicial. (AOB 283-285.) Respondent disagrees.

A. BACKGROUND

As discussed in Argument V, co-defendant Varela told the police that Montes shot Walker. At the preliminary hearing, Kim Speck also testified that co-defendant Varela told her the morning after the shooting that Montes shot Walker. (21 CT 5993.) On August 23, 1996, the trial court ruled Varela's out-of-court statements about the murder implicated the other defendants and would violate their rights to confrontation and cross-examination. (Aug. RT of Proceedings held August 23, 1996, at p. 30.) Thereafter, the court empanelled a separate jury to hear and determine the Varela case. (Aug. RT of proceedings held August 23, 1996, at p. 44; 22 CT 6125.)

Montes's jury learned that after Montes and the others came back to the party Saturday night, co-defendant Varela's demeanor had a drastic

change: he seemed worried, panicked and pale. Speck knew that something was wrong and pressed him to talk about it. Sometime that night they discussed privately what bothered co-defendant Varela.[34] (21 RT 3581-3585.) The next morning, Speck and co-defendant Varela left to go to a donut shop while Montes and co-defendant Gallegos remained in the apartment. While out Speck grabbed a newspaper, because of something co-defendant Varela had said to her the night before. (20 RT 3400-3406; 21 RT 3534, 3553, 3563.)

Speck found the article she was looking for in the local section, about a body being found in the trunk of a car off Palisades Road. (20 RT 3406-3407.) Speck read the article and "was shocked." (20 RT 3407.) Based on the information she learned from co-defendant Varela and the article, Speck believed that some of the people at the party had been involved with the murder. (21 RT 3442.)

Back at the apartment, co-defendant Varela showed the article to Montes. In front of codefendants Gallegos and Varela, Montes spoke to Speck about the article. He jokingly commented, "Can you believe that they're trying to pin this on me?" (20 RT 3409-3411.)[35] At some point Montes was also on the phone with his dad, and it appeared to Speck that they discussed the article. Montes told Speck that his dad was angry with him and his dad mentioned that Montes "better be ready to go 12 rounds when he got home." (20 RT 3413-3416.) Sometime after this conversation, Montes bragged that he had "earned a stripe," in reference to the killing.

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[34] Speck was co-defendant Varela's girlfriend at the time of the incident. (21 RT 3446.) Speck admitted that when she first spoke to the police she lied in order to protect co-defendant Varela. (21 RT 3449.)

[35] During cross-examination, Speck admitted that when Montes made this statement, he also said, "Man, I don't believe it, I didn't kill that guy." (21 RT 3504-3505.)

(21 RT 3500-3501, 3506, 3540-3541.) Speck and the three others remained in the apartment. (20 RT 3416.) Later that afternoon, Montes and the others left with George Varela (who Speck and co-defendant Varela had picked up at the convenience store). (20 RT 3416-3418.)

During Speck's re-direct, the prosecutor asked her about the conversation she had co-defendant Varela about the murder, and about her reaction to Montes's statements:

> [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.*

[MR. MITCHELL]: *Why not?*

[MS. SPECK]: *Because I knew.*

(21 RT 3621-3622, emphasis added.)

The trial court overruled Montes's relevance and Evidence Code section 352 objections and his motion to strike the latter "because I knew" response. (21 RT 3621-3622.)

Montes then requested the above colloquy be stricken from the record and moved for a mistrial. Despite the fact that co-defendant Varela's statements were never admitted, Montes argued to the trial court that Speck's testimony violated his right to confrontation because he could not confront and cross-examine co-defendant Varela about what he told Speck, and maintained the above colloquy implied to the jury that Speck knew Montes killed Walker because co-defendant Varela told her so. (21 RT 3656-3657.) The prosecutor explained Montes's concerns were simply not accurate. As the prosecutor explained:

> He draws the wrong conclusion from that evidence. That wasn't what I was seeking to elicit from her. I never got out what I wanted to elicit from her because of the objections that were sustained. Her actions in response to that statement being the basis of her actions were not offered for the truth, so it's not offered for hearsay purposes, so it's not an *Aranda-Bruton* or confrontation violation. It explains her actions and nothing more. She's indicated what her reasons or actions were.

(21 RT 3657.)

The trial court refused to strike the statement or grant a mistrial. (21 RT 3657.) The court agreed with the prosecutor and stated that no *Aranda-Bruton* violation occurred. The court also stated that, "I think the way you construe it [to mean co-defendant Varela told her that Montes committed the murder] is not the way a reasonable construction it would have be [sic] viewed." (21 RT 3657.)

B. SPECK'S STATEMENT DID NOT VIOLATE MONTES'S RIGHT TO CONFRONTATION

Montes argues the trial court violated his right under *Aranda/Bruton* to confront co-defendant Varela because he could not cross-examine co-defendant Varela about statements that he made to Speck. (AOB 280-283.) However, Montes did not make a timely objection on these grounds. He only objected on grounds of relevancy and Evidence Code 352, and did not register his confrontation objection until much later. A claim based on a purported violation of the Confrontation Clause must be timely asserted at trial or it is waived on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; Evid. Code, § 353, subd. (a).)

In any event, Montes and co-defendant Varela were tried by different juries.

> The United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a second defendant when determining the latter's guilt, admission of such a confession at a *joint trial* generally violates the confrontation rights of the nondeclarant.

(*People v. Fletcher* (1996) 13 Cal.4th 451, 455.)

Because there was no joint trial, there was no *Aranda/Bruton* violation. (*People v. Brown* (2003) 31 Cal.4th 518, 537.) Moreover, co-defendant Varela's statements to Speck were never admitted before the jury. As a result, there was nothing to confront. Consequently, the confrontation argument should be summarily rejected.

Montes nevertheless argues Speck's testimony served to imply that co-defendant Varela inculpated Montes in the murder, which is why Speck did not believe Montes when he denied involvement. (AOB 283.) Regardless, because no hearsay statements of a co-defendant were

presented, any such implication did not violate Montes's right to confrontation under an *Aranda/Bruton* theory.

Nor can it be said that there existed a violation of a constitutional right to confront witnesses. "The primary reason an accused is entitled to confront adverse witnesses is to permit cross-examination." (*People v. Brown, supra*, 31 Cal.4th at p. 538.) But here and again, there were no statements made by Varela and admitted that would be subject to examination and confrontation. Consequently, Montes's argument should be rejected.

C. SPECK'S TESTIMONY WAS NOT AN IMPROPER LAY OPINION

Montes separately argues that Speck provided an inadmissible lay opinion, because when she implied that co-defendant Varela told her Montes shot Walker, she believed that to be true. (AOB 283.) As this Court has noted,

> Lay opinion about the veracity of particular statements by another is inadmissible on that issue. ... 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, 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' ... , i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. ...

(*People v. Melton* (1988) 44 Cal.3d 713, 744.)

Further,

> *Melton* and similar cases involved lay opinion from those who had no personal knowledge of the facts. Such opinions are of little assistance in deciding the credibility of testimony by percipient witnesses who do have personal knowledge. There is a difference between asking a witness whether, in his opinion,

another is lying and asking that witness whether he knows of a reason why another would be motivated to lie.

(*People v. Chatman* (2006) 38 Cal.4th 344, 381.)

In this case, Speck did not suggest that she believed Montes actually killed Walker. Instead, her testimony merely put into proper context her own lack of a reaction to Montes's statements after he had read the article. Her statement thus helped to better convey her observations about Montes and her own reaction to her own personal observations, as well as placed into context her testimony and lack of reaction to Montes's statement or why he might have reason to lie. There was no other way to convey her observations and testimony absent the fact that she had spoken with co-defendant Varela, and, that she knew Montes's comments about his lack of involvement were in perceived to be in a joking manner, rather than considered credible and sincere.

D. SPECK'S TESTIMONY WAS RELEVANT

Montes alternatively claims that Speck's testimony - which implied she subjectively believed that Montes had shot someone - was irrelevant and prejudicial. (AOB 284.) Respondent disagrees.

"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, supra,* 8 Cal.4th at p. 189.) As to whether the statement is relevant, "[w]e review a trial court's relevance determination under the deferential abuse of discretion standard." (*People v. Jablonski, supra,* 37 Cal.4th at p. 821.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra, supra,* 37

Cal.4th at p. 1113.) It cannot be said the trial court abused its discretion when it ruled Speck's testimony admissible.

As discussed above, Speck's testimony in this regard was admitted for a nonhearsay purpose, to merely explain her further actions and place into proper context her reaction to Montes's statements. Thus it was relevant to the issue of whether Montes was involved in the crime, even though it was not offered in the form of statements made by Varela and presented to the jury. Simply put, there was nothing improper with Speck testifying about why she obtained the paper the next day and her reaction to Montes's statements.

Finally, it cannot be said that any prejudice resulted from this brief and isolated testimony such that it resulted in a miscarriage of justice. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113.) The jury did not find Montes killed Walker because Speck testified she believed that he did. The evidence established the involvement of all the defendants: Montes and the others had a gang-related relationship, co-defendant Hawkins knew Walker, the defendants were placed at the scene just before the victim's disappearance, co-defendant Gallegos supplied the murder weapon, the defendants arrived in Walker's car and subsequently returned with co-defendant Varela's assistance, co-defendant Hawkins earlier boasted about wanting to "smoke" a convenience clerk before he left the party, and Montes expressed a desire to earn his gang stripes. When coupled with Montes's own jovial and brazen actions after the murder and his subsequent confession to Speck and other persons, admission of evidence that suggested Speck believed Montes killed Walker was harmless. Consequently, Montes's claim lacks merit and his concomitant constitutional challenges must be rejected.

XVIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED IRRELEVANT EVIDENCE THAT CO-DEFENDANT GALLEGOS PLAYED FOOTBALL WITH AND KNEW WALKER

Montes sought to introduce evidence Walker knew and played football with co-defendant Gallegos, to establish that co-defendant Gallegos had a motive to kill Walker. Co-defendant Gallegos objected to introduction of this evidence because it was not true they played football together (and he represented that if the evidence were admitted, he would call witnesses to testify Walker did not know Gallegos). (33 RT 6061-6065.) The trial court excluded the evidence as irrelevant and pursuant to Evidence Code section 352, on the ground that it was more prejudicial than probative. (33 RT 6062, 6066.) Montes claims exclusion of this evidence violated his state and federal constitutional rights to a fair trial, to due process of law, compulsory process, confrontation, and a reliable penalty determination. (AOB 290; referring to U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. art. I, § 7, 15 & 16.)

A trial court's exercise of discretion under Evidence Code section 352 will not be reversed absent of showing a manifest miscarriage of justice. (*People v. Williams*, *supra*, 43 Cal.4th at pp. 584, 634-635.) Consequently, appellate courts rarely find an abuse of discretion in section 352 issues. (*People v. Ramos, supra,* 30 Cal.3d at p. 598, fn. 22.) In this case, the trial court expressly engaged in weighing the probative value of the evidence against the potential prejudicial impact. Further, this record fails to demonstrate an abuse of discretion when it ruled the evidence inadmissible.

Here, co-defendant Gallegos told Detective Anderson that he knew Walker and played football with him. (33 RT 6063-6064.) Montes offered this as evidence of a possible motive for co-defendant Gallegos being the actual killer (to prevent identification). (33 RT 6062, 6065.) Co-defendant Gallegos objected to introduction of this evidence. He maintained that he

did not know Walker. He also argued he would be placed into an untenable position of having to defend against the assertion by presenting witnesses, that the evidence was not relevant and did not go to motive, that the evidence was not reliable and did not qualify as a declaration against penal interest, and, that the evidence was inadmissible under Evidence Code section 352. (33 RT 6062, 6065.) The trial court agreed. It concluded the evidence was not relevant, did not bear on motive, and, was more prejudicial than probative under Evidence Code section 352. (33 RT 6062, 6066.) The trial court did not abuse its discretion when it excluded the evidence.

Montes maintains that the proffered statement was properly admissible pursuant to Evidence Code section 1220 as a statement against interest of a party. (AOB 286-287.)[36] Whether the evidence was admissible under section 1220 as an exception to the hearsay rule, however, is inconsequential. The trial court ruled the evidence inadmissible because it was not relevant, had no bearing on motive, and, was prejudicial under Evidence Code section 352. The trial court was entirely correct.

Any suggestion that the excluded evidence tended to establish a motive for co-defendant Gallegos to shoot Walker (to prevent him from identifying co-defendant Gallegos as one of his assailants) was a leap in logic and also untenable considering that it was unreliably made in the context of a police interview where co-defendant Gallegos tried to exculpate himself and gain release by falsely claiming that he knew

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[36] 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.

Walker. (See 33 RT 6062.) And in fact, the need to kill Walker in order to avoid potential detection equally applied to all the codefendants, not just co-defendant Gallegos. (See 37 RT 6561-6562 (People's closing statement).)

But even if the evidence was wrongly excluded, it did not result in prejudice. Montes implies that he lacked that ability to argue he did not kill Walker. But exclusion of this evidence did not preclude such an argument in any manner. Here, the jury learned that co-defendant Hawkins and Walker knew each other (12 RT 2045-2046; 13 RT 2030, 2043;17 RT 2805-2806), that co-defendant Gallegos obtained the murder weapon (24 RT 4329-4330; 26 RT 4832-4833; 28 RT 5132-5134; 29 RT 5203-5205, 5346; 32 RT 5885), and that co-defendant Gallegos allegedly said that "he" carjacked someone and "he" had used the gun (32 RT 5915)[37]. As a result, it cannot be said that when ruling inadmissible evidence that Walker may have known co-defendant Gallegos, that the trial court's actions represented a manifest miscarriage of justice.

Moreover, Montes and co-defendants Gallegos and Hawkins were tried before the same jury and equally charged under a felony-murder theory with counts of murder, kidnapping during a car-jacking and car-jacking, as well as special circumstance allegations, as well as allegations that a principal was armed with a firearm as to each count. Thus, whether co-defendant Gallegos knew Walker, both he and Montes were culpable for the murder and other charges, irrespective of which defendant actually fired

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[37] Garcia testified about co-defendant Gallegos's statement and later changed his statement to co-defendant Gallegos actually stating, "they" carjacked and "they" killed someone to get money. (32 RT 5857-5859, 5933.)

the gun. (See 37 RT 6657 (People's closing statement); 38 RT 6796-6797 (People's rebuttal).)

Montes nevertheless argues the evidence was still relevant for purpose of the penalty phase, because he emphasized a lingering doubt argument and suggested that perhaps another defendant actually killed Walker. (AOB 290, referring to 44 RT 7916-7921, 7949-7951, 7968-7967.)[38] Montes has forfeited the argument because he did not seek to introduce it in the penalty phase for that purpose. He thus cannot claim error in the guilt phase impacted his subsequent argument in the penalty phase.[39] (See *People v. Sanders* (1990) 51 Cal.3d 471, 527 (decision to not present mitigating evidence precludes raising claim of error on that basis.) And in any event, evidence that one of the other codefendants knew Walker and/or may have allegedly shot Walker was still presented in the guilt phase and as a result, Montes still could make his lingering doubt argument. Further, even if the jury had doubt that Montes was the person who shot Walker, and, that he even lacked the intent to kill, the death penalty could still be imposed for his major participation in this felony-murder. (*Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127]; *People v. Diaz* (1992) 3 Cal.4th 495, 568-569 (murder by poison).) Consequently, Montes fails to show that any prejudice resulted when the court ruled the

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[38] Montes incorrectly refers to 45 RT.

[39] Of course, the right to present mitigating evidence in the penalty phase does not override the rules of evidence and the trial court still retains discretion to exclude evidence when appropriate. (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Here, because the evidence was irrelevant and inadmissible in the guilt phase, it would have presumably been inadmissible at the penalty phase for the same reason. (*People v. Stitely* (2005) 35 Cal.4th 514, 566 (evidence that is not admissible to raise reasonable doubt at guilt phase is inadmissible to raise lingering doubt at penalty phase.)

evidence inadmissible and his constitutional arguments should also be rejected.

CLAIMS ABOUT THE DISMISSAL OF JURORS

XIX. MONTES HAS NOT PRESENTED A CLAIM OF ERROR IN ARGUMENT XIX

Montes's argument XIX is merely an introduction to his claims about the dismissal of Jury No. 7 (discharged near the conclusion of the guilt phase) and that juror's replacement, Juror No. 2 (discharged after guilt verdicts were rendered and before penalty phase commenced). Montes claims dismissal of a seated juror without good cause violated his right to a trial by jury and to due process of law. (AOB 294, referring to U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 16.)

XX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JUROR NO. 7 DURING THE GUILT PHASE, BECAUSE HIS NEED TO START A NEW JOB BY A CERTAIN DATE IMPAIRED HIS ABILITY TO BE FAIR, AND, BECAUSE HE ENGAGED IN DEMONSTRATED INSTANCES OF MISCONDUCT

The trial court found good cause to excuse Juror No. 7 because he was unable to perform as a juror when he had to start a new job before the trial concluded, and because he committed misconduct during trial. (36 RT 6457-6459.) Montes now claims dismissal of Juror No. 7 violated his right to a trial by jury and to due process of law. (AOB 294 and 312; referring to U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 16.) Respondent disagrees because these reasons demonstrate good cause for removal.

Penal Code section 1089 provides in pertinent part,

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

> though the alternate juror had been selected as one of the original jurors.

(Pen. Code, § 1089.)

> The court on appeal reviews
>
> for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror must "'appear in the record as a demonstrable reality.

(*People v. Samuels* (2005) 36 Cal.4th 96, 132, quoting *People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)[40]

In addition, a court may remove a juror "who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*People v. Samuels, supra,* 36 Cal.4th at p. 132, quoting *People v. Cleveland, supra,* 25 Cal.4th at p. 474.)

Whether to investigate the possibility of juror bias, incompetence, or misconduct, as well as the decision to retain or discharge a juror, rests within the sound discretion of the trial court. A hearing is required only where the court possesses information which, if proven true, would

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[40] Montes raises federal constitutional challenges to the removal of the juror. He further suggests that federal courts have promulgated a 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." (AOB 294, quoting *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.) This Court, however, is not bound by those decisions. (*People v. Avena, supra,* 13 Cal.4th at pp. 394, 431.) And regardless, the trial court's decision to dismiss Juror No. 7 did not stem from his views on the merits of the case. Instead, it was based on his being substantially impaired in his duties and his commission of misconduct.

constitute good cause to doubt a juror's ability to perform his duties. (*People v. Ramirez* (2006) 39 Cal.4th 398, 461.) The trial court retains discretion about what procedures to employ, including conducting a hearing or detailed inquiry, when determining whether to discharge a juror. (*People v. Guerra, supra,* 37 Cal.4th at pp. 1067, 1158-1159.)

In this case, the trial court properly discharged Juror No. 7 based on his in ability to perform as a juror based on the need to start a new job, as well as based on certain instances of misconduct that occurred during trial.

A. BACKGROUND CONCERNING JUROR No. 7

On September 30, 1996, Juror No. 7 advised the court he was denied unemployment benefits. (26 CT 7218.) He requested the court allow him some flexibility for job interviews. At the end of the discussion between the court and the parties, Juror No. 7 remained on the jury. (15 RT 2376-2379.) About a month later, on October 28, 1996, Juror No. 7 told the court that he had an upcoming job interview, and requested that he be off the early part of the morning of October 31st so he could attend the interview. 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 some other jurors observed Juror No. 7 looking at flash cards. (29 RT 5277.) The court then questioned Juror No. 7 about the incident. Juror No. 7 explained he had flash cards on medical terminology for a class he took and kept them near his trial notes. Juror No. 7 claimed that he paid attention to the trial testimony and only looked at the cards when a witness used the term "enzyme" during 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.)

The prosecutor raised concerns about how Juror No. 7's inattention would affect the other jurors and whether it would impact deliberations. (29 RT 5280-5281.) The court found this to be speculation and did not believe this would affect the other jurors. The court also determined that looking at a definition of "enzyme" was a "minor violation" that alone did not justify removal and would not result in prejudice. (29 RT 5281-5282.) The court also questioned Juror No. 8, the juror who complained about Juror No. 7 to the bailiff. (29 RT 5283-5284.) The court then denied the prosecution's request to disqualify Juror No. 7. (29 RT 5286.)

The following day (October 31, 1996) the prosecutor complained he overheard Juror No. 7 say something like, "thank you lady" to another juror. The prosecutor also complained that Juror No. 7 made loud noises and acted in a disruptive manner. (30 RT 5445.) The court stated that it had not observed any noises and asked the bailiff. The bailiff advised that Juror No. 7 appeared to be snorting with his nose and was always moving around. (30 RT 5445.) The court acknowledged that Juror No. 7 was a very animated person and had some idiosyncratic behavior, such as a tic. (30 RT 5446.) The court stated it would more carefully watch Juror No. 7. (30 RT 5446.)

B. INITIAL MOTION TO REMOVE JUROR No. 7

On November 4, 1996, the prosecution filed a written motion to remove Juror No. 7. (Exhibit D to Montes's Motion to Augment the Record, filed in this Court on June 14, 2007, and granted on August 15, 2007; 31 RT 5590.) The prosecutor argued that Juror No. 7's actions indicated he had possibly pre-judged the case. (32 RT 5754-5758.) Montes and his co-defendants opposed the motion . (32 RT 5758-5761.) Montes's counsel also disagreed with the prosecutor's factual representations concerning what had transpired. (32 RT 5759.) Co-defendant Hawkins's

attorney, Angeloff, stated that Juror No. 7 appeared to be paying attention. (32 RT 5760.)

The trial court denied the motion to remove Juror No. 7. The court stated that "[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 any other juror. (32 RT 5762-5763.)

The prosecutor again complained about Juror No. 7 the next day (November 5, 1996). (32 RT 5879.) The prosecutor observed that Juror No. 7 did not appear to pay attention when an audiotape was played and 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.

C. DISMISSAL OF JUROR No. 7 DUE TO EMPLOYMENT ISSUES AND MISCONDUCT

On November 13, 1996, the day closing arguments commenced, Juror No. 7 informed the court that he had received an offer of employment. The prospective employer wanted Juror No. 7 to report for work on November 18, 1996. (26 CT 7235; 36 RT 6412.)

The court questioned Juror No. 7 to determine whether he wanted to be excused and whether it would constitute a financial hardship to remain on the jury. Juror No. 7 told the court that he asked his employer about his participation as a juror and claimed the employer understood. Juror No. 7 requested that the court call his employer and ask he be delayed a few days before starting the job. But Juror No. 7 was not aware the case could go to a penalty phase, which would not likely conclude until December 6th. If it

could be worked out with his employer, Juror No. 7 told the court he would remain as long as needed. (36 RT 6414.)

The court then called the prospective employer. The employer agreed to keep the job open an additional week, or until November 25th, but would not extend the job any further. The court stated 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 there was no hardship to Juror No. 7 before that time. (36 RT 6424.)

Montes expressly requested Juror No. 7 remain on the jury through the guilt deliberations. The other defense attorneys concurred. (36 RT 6424.) The prosecutor argued Juror No. 7 should be excused. (36 RT 6424-6426.) The court took the matter under submission, and requested written authorities from the parties. (36 RT 6428.)

Later 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 to excuse him for juror misconduct as well. (36 RT 6430.) The prosecutor then renewed his earlier arguments to remove Juror No. 7. (36 RT 6432.) Montes 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.)

Co-defendant Gallegos argued there was no new evidence regarding Juror No. 7's behavior since the time the court previously rejected the prosecutor's efforts to have him removed from the case. (36 RT 6440.) Co-defendant Gallegos's attorney also referred to his own notes, where he characterized Juror No. 7 as "animated, committed and enthusiastic." (36 RT 6439.)

The court responded that it had been watching Juror No. 7 and that during the prosecutor's examination of Investigator Clark, Juror No. 7

looked around the room rather than at the witness, and also looked down. Furthermore, at some point Juror No. 7 seemed to be mouthing words. (36 RT 6440-6441.) The defense attorneys intimated this was due to boredom and that other jurors seemed in distress or fell asleep during the particular examination. (36 RT 6441, 6446-6447.) Montes's counsel Cotsirilos commented that the jury had been so relieved at the conclusion of the prosecutor's examination that they applauded. (36 RT 6446-6447.)

The court also stated that it did not notice Juror No. 7 taking notes recently. (36 RT 6442.) The court also observed that Juror No. 7 did not appear to speak with the juror seated next to him and there did not appear to be any "friendly exchanges." (36 RT 6442.)

At the defense request the court questioned Juror No. 7 about the new employment information. (36 RT 6448.) Juror No. 7 advised the court he would not have any problem serving from the 18th to the 25th even though he would not be paid, but, he could not serve beyond that date. (36 RT 6452.) The court declined Montes's request to ask Juror No. 7 if he would have problems concentrating on the trial because he would be starting the job by the 25th. (36 RT 6455.)

The court then ruled against all of Montes's constitutional objections and dismissed Juror No. 7. (36 RT 6458-6459.) In so doing, the court ruled there was good cause to excuse Juror No. 7: (1) because there would be an "atmosphere of time urgency" in that the November 25th starting date would "substantially impair" Juror No. 7's ability to fulfill his duties[41]; and (2) misconduct due to Juror No. 7's reading of the term "enzyme" several weeks earlier as well as his perceived "inattentiveness" and "questionable behavior." (36 RT 6457-6459.)

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[41] The jury ultimately rendered guilt phase verdicts on November 22, 1996, three days before Juror No. 7's employment began. (26 CT 7252.)

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JUROR NO. 7

Based on the record and evidence presented it cannot be said the trial court abused its discretion when it determined that good cause existed to dismiss Juror No. 7. (*People v. Ramirez, supra,* 39 Cal.4th at p. 461; *People v. Barnwel, supra,* 41 Cal.4th at p. 1052.)

First, the trial court reasonably believed that Juror. No. 7's duties would be substantially impaired by the urgent need to finish trial before his employment date, as well as the fact he would not be paid if he stayed after November 25th. Montes criticizes the court for speculating about Juror No. 7's anxieties when he appeared willing to serve, and likens the case to *People v. Turner, supra,* 8 Cal.4th at pp. 203-205, where a juror indicated that the lack of employment benefits would not affect his judgment. (AOB 305-306.) But the question here is whether the evidence demonstrably supported the court's concern and conclusion. It did. The trial court reasonably was concerned Juror No. 7 would want to complete deliberations quickly for his own personal interests in keeping his new job, which was not secured after a certain date.

Montes also relies on the appellate case of *People v. Delamora* (1996) 48 Cal.App.4th 1850. (AOB 306.) But that case offers no assistance. In *Delamora*, two prospective jurors indicated during voir dire that they had only a limited number of days during which their employers would pay them for jury service. The trial court refused to excuse them and after the jury began deliberations, the two jurors' paid time for jury service expired. The court then dismissed them and replaced them with alternate jurors, without inquiring whether the two jurors would be willing to remain another day even if their employers would not pay them. The Court of Appeal concluded the trial court abused discretion when it dismissed the two jurors without making that inquiry, and the record provided nothing to

suggest either juror was unwilling or unable to continue if they had to serve another day without pay. (*People v. Delamora*, *supra*, 48 Cal.App.4th at p. 1856.) But in this case, the failure to complete deliberations meant not only that Juror No. 7 would be unpaid for his time, but that he would lose his job because the case would be extended to a penalty phase and past the cut-off date set by the employer.

Second and for alternative reasons, the trial court concluded that Juror No. 7 was becoming inattentive and engaged in behavior to suggest he lacked interest in the trial, or, might not be able to deliberate well with other jurors. Further, while the court found initially that consulting outside sources to define words was a "minor violation" and not prejudicial (29 RT 5281-5282), this factor combined with the totality of other circumstances and suggested that sufficient misconduct occurred to warrant dismissal.

Montes nevertheless relies on *People v. Hamilton* (1960) 60 Cal.2d 105, 126, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, to suggest looking up the definition of enzyme was not sufficient misconduct to warrant dismissal. (AOB 308-309.) In *Hamilton*, this Court held that referencing the Penal Code, without more, did not justify removal of the juror. But as noted above, Juror No. 7 was not removed simply for looking up the definition of enzyme. Instead, this fact, when combined with other factors observed directly by the trial court, lead the court to believe Juror No. 7 was not and would not properly fulfill his duties. Consequently, the trial court did not abuse its discretion when it removed the juror, and Montes's constitutional challenges should be rejected. (See *People v. Samuels, supra,* 36 Cal.4th at p. 132.)

XXI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISCHARGED ALTERNATE JUROR NO. 2 BEFORE THE PENALTY PHASE BEGAN, DUE TO HER EMOTIONAL DISTRESS AND A PROFESSED INABILITY TO IMPOSE THE DEATH PENALTY

Alternate Juror No. 2 replaced discharged Juror No. 7 during the guilt phase. (36 RT 6460.) After the guilt verdict and before the penalty phase began, Alternate Juror No. 2 requested to be discharged because of the emotional stress of the trial and her expressed belief that she could not impose the death penalty. (See 41 RT 7229-7234.) Montes claims that Alternate Juror No. 2's inability to perform her duties did not appear as a demonstrable reality, and, that her removal violated his right to trial by jury and to due process of law (AOB 294 and 312; referring to U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 16) and also transgressed his right to a reliable penalty determination in violation of the Eighth Amendment (AOB 314). The trial court properly removed Alternate Juror No. 2.

As noted in the preceding argument, the decision to discharge a juror and order an alternate to serve is reviewed for abuse of discretion and will be upheld if supported by substantial evidence. A juror's inability to perform as a juror must appear in the record as a demonstrable reality. A court may remove a juror "who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*People v. Samuels, supra,* 36 Cal.4th at p. 132, quoting *People v. Cleveland, supra,* 25 Cal.4th at p. 474.)

It is appropriate to remove a juror during the penalty phase when that juror cannot follow his or her oath and instructions to consider imposition of the death penalty. (*People v. Samuels, supra*, 36 Cal.4th at pp. 132-133.) Montes nevertheless claims the record does not support the conclusion that there existed a demonstrable reality of Alternate Juror No. 2's inability to perform her duty. (AOB 314-321.) Respondent disagrees.

Alternate Juror No. 2 replaced Juror No. 7 at the beginning of closing arguments during the guilt phase. (36 RT 6460.) Following the guilt verdicts, but before commencement of the penalty phase, Alternate Juror No. 2 requested to be relieved as a juror. (41 RT 7229-7230.) Alternate Juror No. 2 advised the court she had been having nightmares from the beginning of the case, that she could not get the trial out of her head, and that she had been sick and depressed the previous week. (41 RT 7230.) Alternate Juror No. 2 also indicated she had "overwhelming guilt at first" despite believing she made the right decision at the guilt phase. (41 RT 7231.) When asked if she could enter penalty deliberations with an open mind and discuss the possible sentences with other jurors, Alternate Juror No. 2 replied she "mentally [felt] like [she] was unable to continue." Additionally, Alternate Juror No. 2 stated that she could not vote to sentence Montes to death. (41 RT 7231, 7233-7234.)

Montes's counsel objected to the removal of Alternate Juror No. 2 and argued it would be improper to excuse her based on feelings for the death penalty if it was the evidence at the guilt phase which had led her to that conclusion. (41 RT 7234-7235.) The trial court did not further inquire to ascertain why Alternate Juror No. 2 was reluctant to impose the death penalty against Montes. However, Montes observes that in her questionnaire, Alternate Juror No. 2 had rated herself an 8 out of a possible 10, in favor of the death penalty. (AOB 314, referring to 1 CT 18.)

Whether Alternate Juror No. 2 favored the death penalty is inconsequential. She clearly later stated an expressed inability to impose it in this case. Moreover, her statements evidenced a demonstrable reality that she was unable to properly perform as a juror. Consistent with *Samuels*, the trial court properly dismissed her. Consequently, the trial court did not abuse its discretion when it removed the juror, and Montes's

constitutional challenges should be rejected. " (See *People v. Samuels, supra,* 36 Cal.4th at p. 132.)

XXII. THE JURY COULD PROPERLY FIND TRUE THE KIDNAP FOR ROBBERY AND KIDNAP SPECIAL CIRCUMSTANCES BUT IF NOT, THE ERROR WAS HARMLESS

The jury found true the special circumstances of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); kidnapping for robbery (Pen. Code, § 190.2, subd. (a)(17)(ii)); and kidnapping (Pen. Code, § 190.2, subd. (a)(17)(ii)). (40 RT 7122-7136; 25 CT 7036-7040; 27 CT 7468-7469; 28 CT 7282-7291.) Because kidnapping is a lesser-included offense of kidnap for robbery, Montes claims the kidnap special circumstance finding and death judgment must be reversed. In other words, he asserts the jury wrongly considered three rather than two special circumstances, and this made the death determination more likely. (AOB 322, referring to *People v. Lewis, supra,* 43 Cal.4th at pp. 415, 518.) No error occurred but if it did, it was harmless.

This Court has acknowledged it is not proper for special circumstances to be presented in a way that artificially inflate their significance, such as when two or more special circumstances are alleged but describe virtually the same conduct. (*People v. Harris* (1984) 36 Cal.3d 36, 63 (special circumstances of burglary with intent to commit larceny and robbery involve conduct with the same underlying intent to steal the victim's property.)

But in *People v. Melton*, *supra*, 44 Cal.3d at pp. 713, 765-769, this Court found the reasoning of *Harris* unpersuasive insofar as it concluded that Penal Code section 654, governing multiple punishments for similar acts, was applicable in the special circumstance context. Instead, in *Melton* this Court observed the penalty jury is directed by Penal Code section 190.3, factor (a), to consider both the circumstances of the crime – such as

the related felonies committed by the defendant - and any special circumstances found by the jury to be true. Thus, regardless of being designated as "special circumstances," the robbery and burglary committed by the defendant during the murder were properly considered as independent aggravating factors. As a result, a defendant who commits both offenses in the course of a murder may properly be found more culpable than a defendant who committed only one of the offenses. (*People v. Melton, supra*, 44 Cal.3d at pp. 713, 767.)

Moreover, this Court has continued to disapprove or reject the general reasoning of *Harris,* as it applies to the multiple felony murder special circumstances. (*People v. Holt* (1997) 15 Cal.4th 619, 681-682 (multiple felony murder special circumstance findings under Pen. Code, § 190.2, subd. (a)(17) are proper where defendant was engaged in multiple felonies when murder occurred); *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 865, 970 (burglary murder and robbery murder); *People v. Andrews* (1989) 49 Cal.3d 200, 225 (defendant who entertains single principal objective during indivisible course of conduct may nevertheless be punished for multiple crimes of violence against different victims during course of that conduct.) Even if this Court applied *Harris* and further concluded that the jury wrongly considered the kidnap special circumstance as a lesser offense to kidnap for robbery, any error was harmless.

Although the United States Supreme Court held California is a "non-weighing state," it also held the test for determining constitutional error for an invalidated special circumstance or sentencing factor is the same for both "weighing" and "non-weighing" states, namely,

> [a]n 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.

(*Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723], fn. omitted.)

Here, the same facts and circumstances were given appropriate weight to an otherwise valid circumstance. Further, any failure to set aside the lesser kidnap circumstance does not mean the jury gave "significant independent weight" to it, rather than the "overall circumstances of the capital crime and the aggravating and mitigating evidence." (*Brown v. Sanders, supra,* 546 U.S. at pp. 222-223; *People v. Morgan* (2007) 42 Cal.4th 5693, 628.) And while courts must guard against multiple felony-murder special circumstances artificially inflating the weight given to the underlying offenses as aggravating factors if considered more than once for exactly the same purpose, "nothing in the record suggests that the jury in this case might have been led by the court's instructions to simply count the special circumstances and weigh them mechanically rather than consider the nature of the conduct underlying those special circumstances." (*People v. Bean* (1988) 46 Cal.3d 919, 955.)

Finally, even if the Court finds the kidnap special circumstance to be invalid, it does not affect the penalty determination. That is because Montes does not challenge the remaining special circumstances. Thus any consideration of an alleged invalid special circumstances was at best harmless. (*People v. Allen*, *supra*, 42 Cal.3d at pp. 1222, 1281-1283 (jury's consideration of eight excessive special-circumstance findings harmless given that three valid special-circumstance findings remained); *People v. Silva* (1988) 45 Cal.3d 604, 632 (affirming despite the jury's consideration of invalid special-circumstance findings). Consequently, any error was harmless because no prejudice resulted.

XXIII. THE TRIAL COURT'S FAILURE TO LIMIT CALJIC NO. 2.15 TO THEFT RELATED OFFENSES DOES NOT WARRANT REVERSAL OF THE MURDER CONVICTION AND SPECIAL CIRCUMSTANCE FINDING

Montes argues the trial court wrongly instructed the jury with CALJIC No. 2.15 to allow an inference of guilt to both theft and non-theft offenses from the possession of recently stolen property, and as a result, relieved the prosecution of its burden to prove Montes guilty of the non-theft charges beyond a reasonable doubt and violated his rights to due process of law and to a fair trial. (AOB 330-334; U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.) Any instructional error was harmless.

The trial court instructed the jury over objection,[42] with a modified version of CALJIC No. 2.15:

> If you find a defendant was in conscious possession of recently stolen property, the fact of such possession is not by 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.

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[42] The defendants objected to the instruction by noting this was not just a mere property crime case. (35 RT 6358-6361; see also 36 RT 6405-6406.) The court determined the instruction was proper based on the evidence presented. (36 RT 6405-6406.)

(27 CT 7342; 38 RT 6820, emphasis added by court.)

Montes complains the instruction permitted the jury to infer that if it found he was in possession of property stolen from Walker (ie., such as Walker's money or car), then only slight corroboration was needed to find him guilty of all offenses, including murder and the attendant special circumstances. (AOB 331.) Respondent believes the modified instruction was properly given, but if not, the error was harmless.

Almost 10 years after the trial occurred in this case, this Court held that application of CALJIC No. 2.15 to non-theft offenses like rape or murder is improper. (*People v. Prieto* (2003) 30 Cal.4th 226.) This Court further determined, however, the instructional error did not lower the prosecution's burden of proof and is harmless when there exists overwhelming evidence of the defendant's guilt on the non-theft offenses. (*Id.* at p. 259.) In this case, the error was also harmless. But before turning to that issue, respondent respectfully submits this Court should revisit its conclusion in *Prieto* that CALJIC No. 2.15 should be limited to just theft-related offenses.

In reaching the conclusion that CALJIC No. 2.15 should be limited to theft-related offenses, this Court adopted the reasoning of *People v. Barker* (2001) 91 Cal.App.4th 1166, indicating "[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed" a rape or murder. (*Id.* at p. 1176.) But the reasons expressed in *Barker* and *Prieto* – possession of recently stolen property lead to the logic inference the defendant stole it - equally apply to non-theft offenses when contemporaneously committed with theft-related offenses. Here, it was

equally logically to conclude the person who stole Walker's car[43] also killed him while he lay trapped inside the trunk.

Additionally, the modified CALJIC No. 2.15 was not given in a vacuum, but was one of a series of instructions that informed the jury of its responsibility to evaluate the burden of proof as to the charged crimes, both the theft and non-theft related offenses. Thus, when read in conjunction with the entire charge, CALJIC No. 2.15 did not alter or lessen the prosecution's burden of proof. (*People v. Prieto, supra,* 30 Cal.4th at p. 248.)

Nor can the modified CALJIC No. 2.15 instruction be said to have created an impermissible presumption on the non-theft related offenses. CALJIC No. 2.15 is merely a permissive *limiting, cautionary* instruction which, like the rule requiring corroboration of accomplice testimony (Pen. Code, § 1111), inures to a criminal defendant's benefit by warning a jury *not* to infer guilt merely from the defendant's conscious possession of recently stolen goods, without more. Hence, the modified CALJIC No. 2.15 did not invite or mandate an inference of guilt on theft - or non-theft offenses - if corroborating evidence was present. Instead, it discouraged an inference of guilt and told the jurors that unexplained possession of recently stolen property would *not* alone support a conviction of robbery. (*People v. Johnson* (1993) 6 Cal.4th 1, 37; *People v. Vann* (1974) 12 Cal.3d 220, 224-225; *People v. Gamble* (1994) 22 Cal.App.4th 446, 455; *People v. Anderson* (1989) 210 Cal.App.3d 414, 427-432; *People v. Clark* (1953) 122 Cal.App.2d 342, 346 (requiring that CALJIC No. 2.15 be given *sua sponte)*; cf. *People v. Katz* (1975) 47 Cal.App.3d 294, 301.)

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[43] In addition to the evidence presented that Montes participated in the murder, his fingerprint was discovered on the outside of the driver's window of Walker's car. (15 RT 2551-2553; 23 RT 4152-4153; 28 RT 5102-5104, 5110-5118.)

Moreover, although CALJIC No. 2.15 expressly *permits* an inference of guilt if the accused's conscious possession of recently stolen property is accompanied by other corroborating evidence, the function of the instruction is not to call attention to the circumstances under which such an inference of guilt may be made, but to make clear the circumstances under which such an inference may *not* be made, i.e., to ensure the jurors do *not* make that inference solely from the accused's conscious possession of recently stolen goods. (See *People v. McFarland* (1962)58 Cal.2d 748, 755-756.)

Even if the Court were not inclined to revisit *Prieto* and permit extension of CALJIC No. 2.15 to non-theft offenses, the error here was harmless. This is because it is not reasonably probable that a result more favorable to Montes would have occurred in the absence of the error. (*People v. Flood* (1998) 18 Cal.4th 470, 487, 490.) The instruction clearly applies to property crimes and the jury did not likely interpret it any other way. Additionally, the jury still had to separately consider and address the necessary element of intent for the murder and special circumstances. And as already noted, the instruction did not lessen the burden of proof for the other charged offenses.

Finally, even without CALJIC No. 2.15, there was enough direct or circumstantial evidence supporting Montes's participation in the crime. (*People v. Prieto, supra,* 30 Cal.4th at p. 249.) Montes killed Walker to earn his way into the gang and then bragged about the murder afterwards. Montes's own statements and actions subsequent to the murder served as substantial evidence not only the he participated in, but in fact, personally committed the murder. Consequently, Montes's claim against the modified jury instruction and his concomitant constitutional challenges, should be rejected. (See *People v. Prieto, supra,* 30 Cal.4th at pp. 248-249.)

PENALTY PHASE ARGUMENTS

XXIV. ARGUMENT XXIV DOES NOT RAISE ANY CLAIM OF ERROR

XXV. THE TRIAL COURT HAD NO OBLIGATION TO CONDUCT AN EVIDENCE CODE SECTION 402 HEARING IN ORDER TO PREVIEW THE VICTIM IMPACT TESTIMONY

Montes objected to victim impact evidence on the grounds that it would violate Evidence Code section 352 as well as his state and federal due process rights. (26 CT 7259-7281; 41 RT 7180, 7181-7182, 7192.) Montes objected to any testimony by Walker's family about the circumstances of the offense. (See, e.g., 41 RT 7186.) Montes also requested the court conduct an Evidence Code section 402 hearing where the prosecutor would be required to present the actual testimony of each proposed prosecution witnesses. (26 CT 7276-7278.) The court denied the Evidence Code section 352 objection and refused to conduct a hearing with live witnesses. (26 CT 7278; 41 RT 7182, 7189-7190.) The court also ruled family members could discuss the manner of the murder and how the nature of the crime affected them. (41 RT 7189-7190.) However, the court agreed that it would review letters that had been written and submitted to the prosecutor by the intended victim impact family members (Defense Exhibits P-1 through P-4), and also review an outline of questions prosecutor gave to Montes and which indicated his generally areas of inquiry for these family member. The court recognized the written statements provided might be different than the actual testimony from these witnesses. (41 RT 7191-7207.)

Montes now claims the trial court erred by not conducting the actual witness hearing and thereby violated his due process right to adequate notice (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15); his due process right to a fair trial (U.S. Const., 14th Amend.; Cal. Const., art. I, §§

7 & 15); and his Eighth Amendment right to a fair and reliable capital penalty trial. (AOB 356-364.) Respondent disagrees.

The Eighth Amendment erects no *per se* bar prohibiting a capital jury from considering victim-impact evidence relating to a victim's personal characteristics and the impact of the murder on the family, and does not preclude a prosecutor from arguing such evidence. (*Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597,115 L.Ed.2d 720].) Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee, supra,* 501 U.S. at pp. 825, 829.)

In California, Penal Code section 190.3, subdivision (a), specifically permits the prosecution to establish aggravation by the circumstances of the crime. "The statutory provision declares that evidence of the 'circumstances' of the offense are admissible at the penalty phase. In *People v. Edwards* (1991) 54 Cal.3d 787, 833 [1 Cal.Rptr.2d 696, 819 P.2d 436], this court held that the scope of the term extends beyond the 'immediate temporal and spatial' context of the crime to '"[t]hat which surrounds [it] materially, morally, or logically"'." (*People v. Fauber* (1992) 2 Cal.4th 792, 868.) Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v.* Edwards, *supra*, 54 Cal.3d at pp. 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 865, 959.)

For all his reasons why a trial court should conduct an Evidence Code section 402 hearing and actually preview victim impact testimony and evidence before it is presented to the jury (ie., obviating the danger of being unable to "unring the bell" if inadmissible evidence were presented, and that objecting to evidence in front of the jury may make a defendant seem unsympathetic), Montes offers no statutory or case authority that requires a trial court to do so. At best, Montes discusses other states that require detailed pretrial disclosure of proposed victim impact evidence. (AOB 358-360.) But the only obligation upon the prosecutor in this case was to provide notice under Penal Code section 190.3 of the aggravating evidence it intended to present. Montes makes no assertion that the prosecutor did not comply with that obligation. As a result, it cannot be said that the trial court abused its discretion when it declined to conduct the requested hearing, especially when it had no obligation to do so.

XXVI. ARGUMENT XXVI DOES NOT RAISE A CLAIM OF ERROR

Argument XXVI is merely a summary of the general principles surrounding admission of victim impact evidence under federal and state law. It does not raise any claims of error beyond asserting that inflammatory evidence and evidence that exceeds the permissible scope should not be admitted.

XXVII. THE TRIAL COURT PROPERLY RULED ADMISSIBLE THE VICTIM IMPACT EVIDENCE

As noted above, Montes views the victim impact evidence as excessive and in transgression of constitutional limits. (AOB 377.) The challenged evidence, however, was properly admitted.

As discussed in Argument XXV, it is entirely proper for the jury in a penalty phase to consider the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. As a result, "jurors may in

considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 369.)

While victim-impact evidence is generally admissible under California law as a circumstance of the crime under Penal Code section 190.2, factor (a),

> irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*People v. Harris*, *supra*, 37 Cal.4th at pp. 310, 351, internal citations & quotations omitted.)

Moreover, victim-impact evidence which is so inflammatory that it tends to encourage the jury toward irrationality and an emotional response untethered to the facts of the case will violate due process under *Payne*. (*People v. Boyette* (2002) 29 Cal.4th 381, 444.) The victim impact evidenced admitted in this case, however, comported with the above guidelines.[44]

A. VICTIM'S MOTHER JUDITH KOAHOU

Before the penalty phase began, Walker's mother Judith Koahou provided a written statement that would be used to supplement her trial testimony. The statement was reviewed by the trial court prior to her testimony and the court provided Montes an opportunity to object to

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[44] As the record indicates, Montes made specific objections about certain aspects of victim family members prior to their testimony and also raised specific objections after they testified and as part of his mistrial motion that followed the conclusion of the penalty phase. That Montes's counsel recognized the emotional state in the courtroom and chose tactically not to object during the actual testimony of victim family members is understood and not the basis for any forfeiture arguments herein.

specific portions of her letter as well as the tenor of her testimony before she actually testified.[45] (41 RT 7193-7201.) Montes objected to any discussion about a community memorial being placed at the cemetery because it valued Walker's life in the community. The court found, however, that the value of an individual to the community was proper and did not impermissibly invite the jury to compare the values of the defendant and the victim's lives. (41 RT 7199.) Montes also objected to her statement as to what would happen "[i]f these people are allowed back into society," and her belief that Montes would kill again if released. (41 RT 7199-7200.) The prosecutor indicated he would not discuss these areas, "to the extent it's written out." The court responded, "I can see your objection. If the People aren't going into it, then these won't come in in front of the jury." The court also stated, "[I] agree with you that this is — this is inflammatory in which you're asking to exclude. He's not going to go into it." (41 RT 7200.)

During Judith Koahou's penalty phase testimony, there was some discussion about the cemetery and vandalism to Walker's memorial:

> [MR. MITCHELL]: Do you all go to the cemetery just to be where he's at?
>
> [MS. KOAHOU]: It's very difficult for me to go to the cemetery. We had a problem with the cemetery being vandalized.
>
> [MR. MITCHELL]: That happened last year?
>
> [MS. KOAHOU]: Yes. We went — I went there and — the kids on the football team had put together a bench that had a marble plaque in the middle of it. And somebody had gone

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[45] Judith Koahou's statement appears as Exhibit "V" to Montes's Motion to Augment the Record filed in this Court on June 14, 2007, and granted on August 15, 2007.

there and broken the bench and spray-painted graffiti on his headstone.

[MITCHELL]: What did you do?

[MS. KOAHOU]: We cleaned it up. And they took the bench back to the monument maker. I haven't put the bench back there. We put a sealant over the headstone so that — it's an anti-graffiti sealant. But it's very difficult to go there. When I went there and saw that, it was a great shock to me.

My son had been taken from me, and all I wanted to do was visit his grave, and someone had come along and just vandalized it.

(42 RT 7423.)

Judith Koahou's testimony ended soon after. (42 RT 7427.) When the parties returned from the break, Montes moved for a mistrial based on the introduction of the victim impact testimony as a whole, and also specifically based on testimony concerning the grave vandalism on Evidence Code 352 grounds. Montes's counsel further stated he provided ineffective assistance because he failed to object to this testimony at the time it came in, although he provided the tactical basis that he did not object because of the highly charged emotional state in the courtroom. (42 RT 7429-7431.)

Although the focus of the discussion largely concerned the emotional state of the jury as a whole following the testimony, the parties did briefly discuss the admission of evidence of vandalism. The prosecutor explained that the victim's mother raised the issue on her own (after he asked her if the family visited the cemetery) and that,

> [i]t is not intended to reflect anything other than the suffering that is continuing and ongoing in her life based on the circumstances of this crime. It's not going to be argued that Mr. Montes vandalized this gravestone. There's no identification who vandalized this gravestone. The fact is, it was the vandalism that caused her pain and suffering to a certain degree. It exacerbated her and she brought it forth to the jury.

(42 RT 7432.)

After it addressed the overall affect of the victim impact testimony and what it observed in the courtroom, the trial court noted that the evidence of vandalism in no way was an inference that Montes had been responsible, and did not prejudice or deprive Montes of a fair trial. (42 RT 7435-7436.)

The trial court properly declined to grant as mistrial. First, although Montes suggests he did not waive the objection because he waited until after Walker's mother testified (AOB 381-384), he did forfeit any claim on appeal related to evidence of vandalism. Montes did not object to testimony about vandalism at the time he discussed the objectionable portions of her testimony. The comment by the prosecutor and court that he would not go into those areas "to the extent it's written out," did not concern the vandalism. Instead and as revealed by the record, the focus of the objection were statements concerning whether Montes and the others would kill again and the family member characterization of the crime. (41 RT 7200.)

The purpose of the rule requiring a specific and timely objection "is to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial." (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) Here, Montes did not specifically object or secure a timely final ruling on whether the victim's mother could discuss the vandalism of her son's grave. (Evid. Code, § 353, subd. (a).) Had he done so, the trial court could have taken ameliorative action to ensure the prosecutor did not ask any questions about the cemetery or caution Walker's mother not to discuss the vandalism that occurred.

Even if Montes did not forfeit the claim on appeal, it also fails on the merits. Evidence of the vandalism was relevant and its admission did not deprive Montes of a fair trial. In arguing the testimony was irrelevant and

prejudicial, Montes relies on *People v. Harris*, *supra*, 37 Cal.4th at p. 310 and *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356. (AOB 385-387.) In *Harris* this Court ruled the trial court should have excluded testimony about the lid on the victim's casket mistakenly being opened as it was being placed into the hearse. This Court explained the incident "was too remote from any act by defendant to be relevant to his moral culpability." (*People v. Harris, supra,* 37 Cal.4th at p. 352.) However, *Harris* concluded the evidence was not unduly prejudicial for reasons including the paucity of significant mitigating factors. (*Ibid.*) Similarly, in *Welch v. State*, the court held admission of evidence the victim's son put flowers on his mother's grave and brushed the dirt away "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative." (*Welch v. State, supra*, 2 P.3d at p. 373.)

According to Montes, like in *Harris* and *Welch*, this evidence about the vandalism to the grave was too remote from any act by Montes to have been relevant, was not a "circumstance of the offense" in any sense, and not something for which blame could be affixed on Montes. (AOB 386.) Montes, however, is mistaken. The fact that when the victim's family visited his grave they had to endure vandalism to the gravesite was not too remote to the crime as it affected the victims and had probative value as to the impact of the crime upon those victims. As Judith Koahou explained, she had great difficulty when she visited the grave; as of the date of her testimony she had not returned the memorial bench that had been sent to be cleaned by the monument maker. As she noted, "[m]y son had been taken from me, and all I wanted to do was visit his grave, and someone had come along and just vandalized it." (42 RT 7423.) In that sense, it is no different than in *People v. Harris, supra,* where this Court found appropriate testimony about what the victim's mother and grandmother saw at the mortuary, and, the admission of a photograph of the victim's gravesite.

Both served as further evidence relating to the victim's death and the effect upon the family. (*People v. Harris, supra,* 37 Cal.4th at pp. 351-352.)

Finally, even if improper, Montes fails to show prejudice resulted. He maintains prejudice was heightened because the jurors already saw photos and video of the memorial plaque and this testimony must have resonated with the jurors because it came toward the end of her testimony (the final penalty phase evidence presented by the prosecution). What more likely resonated with the jury was not the brief comment about the vandalism, but instead the aggravating circumstances surrounding the murder, Montes's statements and actions following the killing, the testimony from the victim's mother and other family members who detailed the horrible and devastating impact on their lives following Walker's murder, and, the very paucity of factors in mitigation.

B. THE CIRCUMSTANCES OF THE OFFENSE

As noted above, the court ruled testimony from Walker's family members about the manner of the murder and how the nature of the crime had affected them would be admissible. (41 RT 7189-7190.) Montes claims such testimony violated Montes's due process right to a fair trial under the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution, as well as his right to a fair and reliable penalty trial under the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution. (AOB 388-393, relying on *Booth v. Maryland, supra*, 482 U.S. at pp. 502-503, 508-509.)

In *Booth* the United States Supreme Court held that it was error to admit evidence of the opinions held by murder victim's relatives on three topics — the crime, the defendant, and the appropriate sentence. The admission of such opinions, the Court held, is clearly inconsistent with the reasoned decision-making required in capital cases. Montes maintains that

this portion of *Booth* was not overruled by *Payne* and remains good law today. (AOB 391, referring to *Payne supra*, 501 153 U.S. at p. 830, fn. 2; *People v. Smith* (2003) 30 Cal.4th 581, 622; *People v. Robinson*, *supra*, 37 Cal.4th at p. 656 (conc. opn. of Moreno, J.).)

But here, the challenged portions of testimony did not relate to victim opinion on the crime itself, the defendant, or the appropriate sentence. Instead, the victims discussed how the crime affected them – the loss was more difficult under the circumstances of the killing rather had Walker had died from cancer or an automobile accident – and how the family members continued to struggle with the death. The challenged testimony actually concerned very specific, brief, and isolated comments: Able Koahou (Walker's step-father), Judith Koahou (Walker's mother) and John - aka Jack - Walker (Walker's biological father) each testified that the manner Walker died was harder to deal with than if he had died from a sickness or accident (42 RT 7331, 7375-7376, 7424-7425), and Scott Walker (Walker's brother) testified that he did not think time would make it easier to deal with his brother's death (42 RT 7400-7401).

What Montes essentially seeks is a prophylactic rule where family members of a victim cannot discuss how they were affected by the circumstances of the killing because it would produce "negative reverberations." (AOB 392.) But "jurors may in considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.'" (*People v. Zamudio*, *supra*, 43 Cal.4th at pp. 327, 369.) Further, testimony by a victim's family regarding "personal difficulties" following the murder may be properly admitted as victim-impact evidence of the emotional trauma suffered by family and close friends of the victim as a result of their death. (*People v* Zamudio, *supra*, 43 Cal.4th at pp. 327, 368 (grandchildren.) That is exactly what happened in this case.

C. PASSAGE OF TIME AND FRUSTRATION WITH DELAY

Before presentation of victim impact testimony, Montes objected to references in the written statement prepared by Walker's father, where he expressed frustration with the justice system and the passage of time during the prosecution. (41 RT 7201.) The court ruled a victim could not discuss specific continuances and grounds, but could explain how the lengthy delay prolonged grief. (41 RT 7204.) In light of this ruling, when Walker's brother Scott testified, he also expressed frustration with the delays. He noted that he did not believe grief would get better with time and that,

> ... [t]he only thing that's going to get better – I don't think there will be a final resting point, too many things. ¶ I haven't had a rest for the last two years, because it feels, like every other month or every month, get a new court day, new prelim, something. Something that makes me relive it every day. It's just – after this is over, still got everything else down the road to.

(42 RT 7400-7401.)

In his subsequent mistrial motion after the penalty phase concluded, Montes addressed Scott Walker's testimony, because it referred to the outcome of the proceedings and further appellate review and implied the decision for death would rest elsewhere, such as with the Governor's commutation power or appellate courts. (42 RT 7429.) The trial court denied the motion, finding the testimony relevant and admissible. (42 RT 7435.)

Montes now argues the trial court erred because the evidence was improper. (AOB 394-397, referring to *People v. Ramos* (1984) 37 Cal.3d 136, 157 and *Caldwell v. Mississippi* (1985) 320 [105 S.Ct. 2633, 86 L.Ed.2d 231].) But the impropriety Montes discusses in the above cases, however, is distinguishable from this case. In *Ramos* and *Caldwell*, the prosecutor improperly informed the jury about subsequent proceedings in

which another body (whether the Governor or an appellate court) would ultimately bear responsibility for determining the appropriateness of a death sentence. That is significantly different than here, where a victim's family member expressed the fact that the delays in this case exacerbated his already existing grief. The statement in no way asked or allowed the jury to consider whether delay was a factor in its determination or otherwise diminished the jury's own sense of responsibility for the sentence imposed.

D. COMPARING WALKER'S LIFE TO OTHERS

The court ruled the victim impact witnesses could not testify as to Walker's value in comparison to Montes or other members of society. (41 RT 7186, 7188.) Walker's mother testified at the end of the prosecution's penalty phase case and in her closing remarks stated:

> [MS. KOAHOU]: Mark was a productive member of society. At 16 years of age he had a car, he had a job, he had a bank account, he paid taxes, which appalled him that he had social security taxes and Medicare taxes to pay. But he worked hard. He was loving and independent, a beautiful young man. It's not just our loss, it's the loss of — it's everyone's loss.
>
> And Mark walked down a road that wasn't an easy road. He came from a dysfunctional family. He went to a private school and had to go to a public school. He went through divorce. He went through poverty for the first several months after Jack and I broke up. We didn't have a lot of money. We never did really have what I would consider a lot of money. We were comfortable. But he make [sic] proper choices. When he came to that fork in the road that goes right or wrong, he chose right consistently.

(42 RT 7426.)

Montes based part of his mistrial motion on the above statement. The trial court, however, found the remarks were admissible and proper. (42 RT 7430, 7436.) On appeal, Montes claims the statement wrongly invited comparisons between the lives of Walker and Montes, and rendered the

penalty trial fundamentally unfair, denying Montes of his right to due process of law, and that the decision to impose a sentence of death on arbitrary and capricious factors. (AOB 397-403, referring to U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) Respondent disagrees.

To support his claim that the concluding remarks by Walker's mother were not relevant to the jury's sentencing determination and improperly invited the jury to draw side-by-side comparisons between Walker and Montes, Montes does not present this Court with any controlling or California authority. Instead, he offers a few cases from other states (and the Fourth Circuit) that hold testimony based on comparative human worth judgment is not proper. (See AOB 399-403.) But even if those courts imposed a rule contrary to that of California, a state may individually choose to admit evidence of specific harm caused by a defendant, to wit, the loss to society and the victim's family of a unique individual. Further, constitutional limits on victim impact evidence are not surpassed where various witnesses paint a portrait of the victim as "compassionate, loyal, and extroverted, and made clear that they mourned her loss." (*People v. Huggins, supra,* 38 Cal.4th at pp. 175, 238.)

Moreover, in this case comparative analysis between Walker and Montes, or any other person for that matter, did not occur. Montes insinuates that testimony from Walker's mother was "clearly orchestrated" and calculated to anticipate defense mitigation evidence about Montes's childhood problems and disruption caused him by his parent's divorce. (AOB 399.) Any implication that the prosecutor and the victim's family members colluded to impress on the jury that Montes should be executed because Walker did not become a murderer despite a similar childhood, is unfounded and inaccurate. Walker's mother merely observed that her son was a good boy who did not deserve to be killed. She in no way suggested

that her son's life had more value than Montes. That Walker's death represented a unique loss to society and his family is neither surprising nor improper evidence to be presented to the jury: The prosecution has a "legitimate interest" in rebutting defense mitigating evidence

> by introducing aggravating evidence of the harm caused by the crime, 'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'

(*People v. Prince*, *supra*, 40 Cal.4th at pp. 1179, 1286, quoting *Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

E. THE VICTIM-IMPACT VIDEOTAPE

The penalty phase case-in-chief included a ten-and-a-half minute long videotape with an instrumental soundtrack, prepared by Walker's father. The tape comprised approximately 115 different photographs that depicted Walker throughout life – from a baby or a child to the age he was killed. It concluded with an image of a snow covered road, followed by a photograph of Walker's memorial plaque. There was no narration, but it originally had a music track with popular songs chosen by Walker's family. Montes objected to admission of the videotape and specifically the musical soundtrack. (41 RT 7338-7348; 42 RT 7356.) The trial court watched the videotape, which was originally 17 minutes, and concluded that although it made an emotional impact the photographs were relevant and probative. However, the court expressed concern with the selected musical songs and ruled the background music inadmissible. (41 RT 7346.) The court observed that the audio portion could be removed and appropriate instrumental background music could be used if desired. (41 RT 7346-7347.) Following the court's comments, the prosecutor removed the musical soundtrack and used one instrumental loop that Montes conceded was not as emotional as the music with lyrics. Additionally, the

prosecution edited and shortened the videotape to the ten and a half minute length ultimately presented. (42 RT 7356.)

After the videotape was edited, the trial court viewed it again. The court concluded that the instrumental piano music did not add "materially to the emotional affect of the tape." The court also engaged in an Evidence Code section 352 balancing test and determined that the probative value of the tape outweighed any prejudicial effect and ruled it admissible. (42 RT 7359.)

Despite the above, Montes claims the videotape shown to the jurors fell outside the bounds countenanced by this Court, rendered the penalty trial fundamentally unfair, and created a significant risk that the decision to impose a sentence of death was based on arbitrary and capricious factors, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15 and 17 of the California Constitution. (AOB 404-412.) Respondent disagrees.

1. General Legal Principles

Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. This is particularly so if the presentation lasts beyond a few moments, emphasizes the childhood of an adult victim, or is accompanied by stirring music. The medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents. (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1179, 1289.)

In light of those principles, a victim-impact video that contains photos of adult victims as children and teenagers is nevertheless appropriate, if the video does not emphasize any particular period of their lives and instead reviewed all of their lives. (*People v. Zamudio*, *supra*, 43 Cal.4th at pp.

327, 367.) Further, still photographs or photographs in a video of victim's grave marker or grave site is properly admitted as circumstances of the crime. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 367, citing *People v. Kelly* (2007) 42 Cal.4th 763, 797 (videotape ending with view of victim's grave marker); *People v. Harris*, *supra*, 37 Cal.4th at pp. 310, 352 (photograph of victim's gravesite).) However, courts may also appropriately exclude the audio portion including music, and if there is narration, direct the narrator to be "'very objective as to what the scene shows'" and refrain from "inappropriate" comments that might arouse emotions. (*People v. Zamudi, supra,* 43 Cal.4th at p. 366.) Regardless, courts should monitor juror reactions to ensure the proceedings do not become injected with a legally impermissible level of emotion. (*People v. Zamudio, supra,* 43 Cal.4th at p. 367.) In this case, the trial court properly admitted the videotape.

2. Recent Caselaw Regarding Victim-Impact Videotape

In making his claim, Montes details three recent cases from this Court that upheld the use of a victim-impact videotape.[46] (AOB 406-409.) These cases do not support Montes's position on appeal.

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[46] Montes also relies on the Texas case of *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330. (AOB 404.) There, the entire victim impact testimony consisted of just two witnesses whose testimony merely comprised of five pages of transcript testimony. However, the prosecution also introduced a 17-minute video montage of approximately 140 still photographs prepared by the victim's father for his son's memorial service. The video covered the victim's entire life, from infancy to young adulthood. Almost half of the photographs depicted the victim's infancy and early childhood; there were also photographs of his entire extended family, and the visual portion of the video was accompanied by a musical soundtrack. (*Id.* at p. 333.)

In *People v. Prince*, *supra*, 40 Cal.4th at p. 1179, this Court approved admission of a 25-minute interview with the victim that had been taped at a local television station a few months before her death. This Court noted the videotape was not accompanied by music and was a "straightforward, dry interview." It was not an emotional tribute to the victim or something that "stir[red] strong emotions that might overcome the restraints of reason." The tape did not display the victim in her home or with her family, and there were no images of the victim as an infant or young child. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1290.) Further, the trial court in *Prince* closely monitored the reactions of both the jurors and the spectators during the presentation of the impact evidence, including the videotape. The court noted that a few of the jurors expressed emotion, but no one broke down and cried, or otherwise appeared overcome with emotion. (*Ibid.*)

In *People v. Kelly, supra*, 42 Cal.4th at p. 763, this Court considered a videotape that depicted a photographic chronology of the victim's life and was also set to music. (*Id.* at p. 797.) The videotape in *Kelly* was found to have "irrelevant" characteristics, such as the background music. But, this Court declined to decide whether it was error to admit the tape in its final form because it concluded that any error in admission of the tape could not reasonably have affected the outcome of the penalty determination in that case: For example, the videotape did not emphasize any particular period of the victim's life. And, rather than several witnesses providing repetitive impact testimony, only the victim's mother testified. Further, this Court reemphasized that such videotapes should not contain irrelevant background music or video techniques which enhance the emotion of the presentation. (*People v. Kelly*, *supra*, 42 Cal.4th. at pp. 797-799.)

Finally, in *People v. Zamudio*, *supra*, 43 Cal.4th at p. 327, this Court upheld admission of a 14-minute video montage of still photographs, narrated by the victims' children. In addition to the videotape, four family

members also testified about the effect of the murders on themselves and their families.

Montes seeks to distinguish this case from the above cases. For example, he notes that the videotape was set to music, portrayed Walker at home and with his family and had about half of the photographs depict him as an infant or as a child much younger than the age at which he was killed. And unlike *Prince*, many of the jurors in Montes' were observed to be crying. (42 RT 7428-7429.) One man was also seen to have his head down on his arms for some period of time. (42 RT 7434.) Further, he likens this case to the memorial video in *Salazar* which "[w]as very lengthy, highly emotional, and barely probative of the victim's life at the time of his death." (*Salazar v. State*, *supra*, 90 S.W.3d at p. 338.) Moreover, Walker's mother, father, step-father and brother all testified about him and his life, as well as described the impact his murder had on them. Finally, unlike the videotape in *Zamudio*, the tape in the present case was set to music and played straight through without interruption. (AOB 408-410.)

Despite Montes's criticisms, it cannot be said that admission of the victim-impact videotape rendered the penalty trial fundamentally unfair, or created a significant risk that the decision to impose a sentence of death was based on arbitrary and capricious factors.

First, Montes's reliance on *Prince* to show the juror in that case did not appear upset is untenable. *Prince* did not involve a victim-impact videotape at all. Instead, it was merely a dry interview with the victim taped at a local television station a few months before her death and without any emotional component.

As the most recent evolution of the law concerning victim-impact videotape evidence, *People v. Zamudio* detailed and discussed the *Kelly* case and is thus particularly instructive. There, this Court observed that a videotape may permissibly review a victim's life, and does not duplicate

but rather supplements testimony from family members. The relevant inquiry is whether the videotape is unduly emotional and present material relevant to the penalty determination. (*People v. Zamudio, supra,* 43 Cal.4th at p. 365.)

Here, the ten and one-half minute videotape was shorter than the tapes approved in *Zamudio* and in *Kelly*. Like those cases, the videotape reviewed Walker's life from young child through the time he was killed and did not duplicate victim testimony. As explained in *Zamudio*,

> [r]egarding relevance, we explained that the videotape 'humanized [the victim], as victim impact evidence is designed to do. It contained a factual chronology of [her] life, from her infancy to her death in early adulthood, which helped the jury to understand "the loss to the victim's family and to society which ha[d] resulted from the defendant's homicide." [Citation.]'

(*People v. Zamudio, supra,* 43 Cal.4th at p. 365, citing *Kelly, supra*, 42 Cal.4th at p. 797.)

Further and like in *Zamudio*, three family members testified in addition to the victim's mother. "However, the testimony of these three additional witnesses was relatively brief and, in view of the entire record, does not establish that the victim impact evidence here either rendered defendant's trial fundamentally unfair or invited a purely irrational response from the jury." (*Id.* at p. 367, fn. 22.)

Montes focuses much on the fact that the videotape here was set to music to evoke an emotional response. (See 41 RT 7340-7343.) In fact, he emphasizes the principle that background music should not "enhance the emotion of the presentation." (AOB 408, referring to *People v. Kelly, supra,* 42 Cal.4th at p. 798.) Montes makes it seem as if lyrical and emotional songs were played in the background. But as borne by the record, those songs were removed and replaced by a piano instrumental, one that the trial court specifically determined did not enhance or add to

any emotional impact and one that Montes himself conceded was more appropriate. (42 RT 7359.) Moreover, Montes fails to present any case law that suggests background instrumental music prophylactically renders a victim-impact videotape inadmissible. Admittedly, the trial court in 1996 did not have the benefit of *Zamudio*'s recent reasoning and preferred method to use narration and not any audio or music track. But inasmuch as in all other aspects the videotape in this case was admissible and proper, the fact it was set to instrumental music - observed by the court to not enhance any emotional impact - did not result in any prejudicial impact.

At most, the jurors observed a videotape that humanized the victim and serve to chronicle his life. It may have affected and moved the jurors or even upset them, but other than the fact some jurors were moved to tears, there is no evidence the videotape evoked an overly improper emotional response. Instead, it allowed them to better understand the loss to the victim's family and to society. Under the principles set forth by this Court, the videotape was properly admitted and did not render the penalty trial fundamentally unfair, or, create a significant risk that the decision to impose a sentence of death was based on arbitrary and capricious factors. Consequently, Montes's claim and his concomitant constitutional challenges should be rejected because admission of victim impact testimony comported with constitutional guidelines. (See *People v. Boyette, supra,* 29 Cal.4th at p. 444.)

F. EXCESSIVE NATURE OF THE VICTIM-IMPACT EVIDENCE

Montes requested the trial court limit the number of victim impact witnesses to a maximum of two. (26 CT 7259-7281; 41 RT 7182, 7192.) As noted above, four victim impact witnesses testified and the prosecution played a ten-and-a-half-minute video montage. Not only does Montes contend the victim impact evidence in this case was excessive, he goes so

far to argue that victim impact evidence must be limited to testimony from a single witness, or otherwise results in a fundamentally unfair penalty trial, and creates an unacceptable risk that the decision to impose a sentence of death was based on arbitrary and capricious factors, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15 and 17 of the California Constitution. (AOB 412-414.) To support this principle, he relies on the fact that only a single victim impact witness testified in *Payne v. Tennessee,* and that fact that New Jersey and Illinois have limited the number of victim impact witnesses that can testify.[47] (AOB 412.)

But as noted above, *Payne* does not impose a constitutional limitation based on the number of witnesses. Under *Payne*, the admission of victim impact evidence is limited by ensuring it is not cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee, supra,* 501 U.S. at pp. 825, 829.) And in California, Penal Code section 190.3, subdivision (a), specifically permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) thus allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 787, 833-836; see also *People v. Brown*, *supra*, 33 Cal.4th at pp. 382, 398;

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[47] The New Jersey limitation is by judicial decision (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180) and the Illinois limitation is by statute (*People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107, referring to Illinois Rights of Victims and Witnesses Act, 725 ILCS 120/3(a)(3)).

People v. Taylor, supra, 26 Cal.4th at pp. 1155, 1171; *People v. Mitcham, supra*, 1 Cal.4th at pp. 1027, 1063; *People v. Pinholster, supra*, 1 Cal.4th at pp. 865, 959.) There is no constitutional, statutory, judicial law, or even sound policy reasoning to limit such victim impact evidence to a single witness.

G. CUMULATIVE EFFECT OF VICTIM-IMPACT EVIDENCE

Lastly, Montes contends that the cumulative impact of the victim impact evidence affected the jury's ability to render a fair and reliable penalty verdict and thus abridged his right to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for reliability in the application of the death penalty mandated by the Eighth Amendment. (AOB 414-417.)

Contrary to Montes's allegation, this case did not have a "virtually unrestrained presentation of victim impact evidence." (AOB 416.) Four family members who had different relationships with Walker testified about how the murder uniquely affected them and a brief ten-and-a-half minute video montage of photographs was presented to the jury. In total, this compromised only about 100 pages worth of trial testimony. (41 RT 7326-7337; 42 RT 7360-7379, 7383-7436.) And in addition to the overwhelming evidence related to the circumstances of the crime[48], the prosecution also

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[48] Montes again makes his oft-repeated assertion that the jury never determined he shot Walker. (AOB 416.) But it is disingenuous to use this assertion to imply he did not shoot Walker. Each defendant was culpable for the murder regardless of who shot Walker. Thus, the jury was charged only with finding whether each principal was armed with a firearm; it was not asked to determine which defendant actually shot Walker. (See PRT 799 (prosecutor comments during severance motion.) In addition to finding each principal to be armed, respondent observes Montes's jury also found him to be an ex-felon in possession of a firearm at the time of the offense. It therefore at least found Montes had the firearm in his custody or under

(continued...)

presented other aggravation evidence, such as Montes's prior burglary conviction, his violent conduct such when he assaulted co-defendant Gallegos while in a secure holding cell, and his continued threat to do violence by the discovery – on two separate occasions – of deadly weapons on him or in his cell (a shank and a toothbrush with an attached razorblade). (41 RT 7270-7283, 7301-7306, 7312-7319.)

None of the specific objections discussed above have merit and the victim impact evidence admitted in this case comported with constitutional guidelines. Montes's cumulative error claim must, therefore, be rejected.

XXVIII. THE TRIAL COURT PROPERLY DECLINED TO GRANT A MISTRIAL BASED ON ADMISSION OF VICTIM-IMPACT EVIDENCE

Montes claims that the trial court should have granted his mistrial motion because incurable prejudicial victim impact evidence denied him a fundamentally fair penalty trial and thereby violated the Due Process Clause of the Fifth and Fourteenth Amendments, as well as transgressed his right to a reliable penalty determination, in contravention of the Sixth, Eighth and Fourteenth Amendments. (AOB 417-418.) But as shown in the preceding arguments, the victim impact evidence was properly admitted. Consequently, the trial court's denial of the motion for mistrial did not

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(...continued)
his control during the charged offenses. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401.)

Moreover, Montes's assertion overlooks evidence that demonstrated he in fact did shoot Walker: Montes had been seen with the gun at the party (see 16 RT 2706-2707; 22 RT 3898-3899; 23 RT 4070-4071); Montes admitted to George and Sylvia Varela and Blancarte that he shot and killed Walker; Montes essentially admitted the same to his father; and Montes bragged about the killing as a means to earn his stripes. (See e.g., 17 RT 2902-2903; 18 RT 2892-2903; 22 RT 3883-3884; 25 RT 4474, 4463-4475; 34 RT 6200-6204 and 6209-6210.)

constitute an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

XXIX. THE TRIAL COURT PROPERLY DECLINED MONTES'S REQUESTED INSTRUCTION ON HOW THE JURY SHOULD EVALUATE VICTIM IMPACT EVIDENCE

Montes claims that the trial court should have provided his requested jury instruction which cautioned the jury about how to evaluate and consider victim impact evidence.[49] The trial court refused because it found the concept behind the instruction was adequately addressed by other instructions, and, that it otherwise misstated the law and was argumentative. (45 RT 7808.) Montes now argues the failure to provide his requested instruction violated his state and federal constitutional guarantees to due process of law and violated his right to present a defense (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17), his right to the presumption of innocence, the requirement of proof beyond a reasonable doubt and his right to a fair trial. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) Montes also claims the error violated his right to trial by a properly instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and violated federal

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[49] The instruction read:

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

(28 CT 7608, Defense Special Instruction G-P.)

due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const., 14th Amend). (AOB 419-420.)

To the extent Montes did not raise any of these constitutional challenges in the trial court, they are forfeited on appeal. (*People v. Burgener*, *supra*, 29 Cal.4th at pp. 833, 871, fn. 6 (defendant waives federal claim by failing to object on that basis below) and p. 886 ("It is elementary that defendant waived these claims by failing to articulate an objection on federal constitutional grounds below"); *People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8; *People v. Earp* (1999) 20 Cal.4th 826, 893.) Regardless, Montes's argument should be rejected.

As explained in the previous arguments, the trial court properly admitted the victim impact evidence. Moreover and specific to the issue raised in this argument, this Court recently held a trial court has neither obligation nor need to provide such a cautionary instruction on how the jury should evaluate and consider victim impact evidence. (*People v. Harris* (2008) 43 Cal.4th 1269, 1318, citing *People v. Carey* (2007) 41 Cal.4th 109, 134.) Consequently, Montes's claim and his constitutional challenges should be rejected.

XXX. ARGUMENT XXX DOES NOT STATE A CLAIM OF ERROR

Argument XXX does not raise any specific claim of error but merely sets forth general principles about prosecutorial misconduct.

XXXI. DURING THE GUILT PHASE CLOSING ARGUMENT, ANY REFERENCE TO MATTERS NOT IN EVIDENCE OR VOUCHING FOR THE CREDIBILITY OF WITNESS KIM SPECK'S TRIAL TESTIMONY BY THE PROSECUTOR DID NOT RESULT IN PREJUDICIAL MISCONDUCT

During cross-examination of Kim Speck, the jury learned that prosecutor Mitchell went to court with her and helped Speck to reinstate drug diversion and dismiss a traffic ticket. (21 RT 3475-3477.) In his

closing guilt phase argument, the prosecutor asserted that Speck did not lie at trial and whatever deal she received in her own pending criminal matters would have occurred without his assistance.[50] The trial court sustained Montes's objection and agreed that it would admonish the jury - it then did so at the end of argument when it told jurors that arguments provided by the parties are not evidence. (38 RT 6758, 6801-6802.)

The standard to review claims of prosecutorial misconduct or error, is well established. Prosecutorial misconduct implies the use of deception or reprehensible methods to persuade the court or jury. (*People v. Jones* (1997) 15 Cal.4th 119, 187.) When as here, the contention is based on comment during argument, it must be remembered that prosecutor argument should not be given undue weight, inasmuch as jurors are warned in advance it is not evidence and jurors understand argument to be statements of advocates. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.)

> Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument . . . .

(*People v. Huggins, supra,* 38 Cal.4th at pp. 175, 207.)

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[50] The portion at issue is as follows:
It's contended that Kim Speck is lying because she got a deal. Well, look at her testimony. As to each point in her cross-examination where it was contended that she was lying about this now because she got this deal, on redirect, I contend to you, that it was gone over and proven that she made the same statements before she got the deal. You've got a transcript from the Court showing the deal she got. The same disposition she would have gotten actually had she gone back to court in front of Judge Flynn --. (38 RT 6758.)

Further, and in order to make out a federal constitutional violation based on conduct of the prosecutor, the defendant must establish conduct so egregious that it infected the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Padilla* (1995) 11 Cal.4th 891, 939.) In determining whether such prejudice existed, the "reasonable likelihood" standard of *Estelle v. McGuire* (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed.2d 385], is used in California to review claims of prosecutorial misconduct in argument. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663; see also *People v. Cain* (1995) 10 Cal.4th 1, 48; *People v.* Memro, *supra*, 11 Cal.4th at pp. 786, 874.) Montes cannot meet that threshold in this case.

Montes argues the misconduct improperly bolstered Speck's credibility with extrinsic facts and implied the prosecutor believed Speck had told the truth at trial that Montes was the actual shooter; as a result, the admonition later provided did not obviate the prejudicial impact upon the jury. (AOB 442-446.) Notwithstanding his protestation, Montes fails to establish this was conduct so egregious that it infected the trial with such unfairness as to make the resulting conviction a denial of due process.

In suggesting that Speck - who initially lied to police in order to protect her boyfriend co-defendant Valera (21 RT 3449) - provided credible testimony to the jury, the prosecutor argued that Speck testified truthfully despite being assisted in her own criminal matters and that she would have received the same deal even if he did not provide that assistance. To the extent this improperly referred to matters outside the record or vouched for the witness's credibility it was not prejudicial.[51]

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[51] Because the trial court found error and for purpose of the harmless-error argument respondent presumes that error occurred. However, the context of the remark referred jurors to the entirety of

(continued...)

First, the trial court sustained Montes's objection and admonished the jury to disregard the arguments of counsel. It is presumed the jury will follow the admonishment and any prejudice is avoided. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 702; *People v. Hinton* (2006) 37 Cal.4th 839, 864; *People v. Michaels* (2002) 28 Cal.4th 486, 528; *People v. Jones*, *supra*, 15 Cal.4th at pp. 119, 168.)

> Montes nevertheless suggests that prejudice occurred because, any error which increased the chance that the jury might be led to believe that ... Montes was the one who actually shot Walker, increased the chance that the jury would sentence him to death for the offense.

(AOB 445.)

That of course, is not the standard to review prejudice – it certainly did not infect the trial with such unfairness as to violate due process. The jury viewed Montes most culpable for the murder because evidence independent of Speck's belief corroborated that fact. This included, inter alia, that Montes had been seen with the gun (see 16 RT 2706-2707; 22 RT 3898-3899; 23 RT 4070-4071); that Montes was the only defendant who seemed jovial after the return to the party (see 17 RT 2883-2884; 18 RT 3071-3072; 20 RT 3306-3307; 21 RT 3587-3591; 22 RT 3691; 23 RT 4060-4065); that Montes used Walker's money to buy pizza (see 16 RT 2727; 20 RT 3394; 22 RT 3775, 3891-3892; 25 RT 4504); and that Montes described in detail how he had "jacked" the car and also bragged to Blancarte and Sylvia Varela about committing the murder and earning his stripes for the gang (see 17 RT 2902-2903; 18 RT 2892-2903, 2979; 22 RT

(...continued)
Speck's testimony and that she made consistent statements before the deal occurred. Thus, because it was based on facts in the trial record, the prosecutor did not improperly "vouch" to urge a witness's credibility. (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

3883-3884; 23 RT 3879-3882; 25 RT 4467-4469; 26 RT 4701; 34 RT 6209-6210).

> In light of the evidence presented, it cannot be said there was a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. In conducting this inquiry, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Guerra, supra,* 37 Cal.4th at pp. 1067, 1153, internal citations & quotations omitted.) Consequently, Montes's prosecutor misconduct claim must be rejected.

PENALTY PHASE MISCONDUCT

XXXII. THAT A PROSECUTION PENALTY PHASE WITNESS MENTIONED MONTES WAS HOUSED IN THE MAXIMUM SECURITY AREA OF THE JAIL DID NOT CONSTITUTE PREJUDICIAL MISCONDUCT

During penalty phase in limine motions, Montes obtained a court ruling prohibiting witnesses from mentioning that his cell was located in the maximum security area of the jail. (41 RT 7217). During the penalty phase, however, a deputy correctional officer that conducted a search of Montes's cell remarked the cell was located in the maximum security area.[52] (41 RT 7302.) Montes now argues this reference constituted

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[52] The testimony at issue consisted of the following:

> [MR. MITCHELL]: At that time did you have occasion to search a cell or cells in the 2-A section of the Robert Presley Detention Center?
>
> [DEP. COUCHMAN]: Yes, I did.
>
> [MR. MITCHELL]: At that time did you search Cell No. 14?
>
> [DEP. COUCHMAN]: Yes, I did.

(continued...)

prejudicial error that deprived him of the guarantee of fundamental fairness, and, thereby violated the due process clause of the Fifth and Fourteenth Amendments. (AOB 450.) Respondent disagrees.

First, there was no objection at the time of the testimony and the claim is forfeited. (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1370, 1405.) That Montes made an limine objection to any reference about his being housed in a maximum security area of the jail is inconsequential. At the time the witness made the objectionable reference, Montes never sought an admonishment or request curative action. "Prosecutorial misconduct is waived by failure to object *and ask for admonition below*, unless the misconduct could not have been cured by admonition. This is true in the penalty phase as well as the guilt phase." (*People v. Frye*, *supra*, 18 Cal.4th at pp. 894, 969-970 (emphasis added); see also, *People v. Coddington*, *supra*, 23 Cal.4th at pp. 529, 636; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 877, 914-915 (where defense counsel objected to prosecutor's comment about defendant's neat courtroom appearance and victim's absence, but did not request an admonition, the misconduct claim was not preserved on appeal).) There is no exception to the objection rule for capital cases. (*People v. Clair*, *supra*, 2 Cal.4th at pp. 629, 662.)

Regardless even if the claim were preserved, it lacks merit. Respondent agrees with Montes that a prosecutor must guard against and warn witnesses from deliberately injecting inadmissible evidence before the

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(...continued)

> [MR. MITCHELL]: Can you describe that cell, please?
>
> [DEP. COUCHMAN]: That's in the 2-A maximum security area, and it's in Day Room 1 and it's in the corner, single-man cell.

(41 RT 7302, emphasis added.)

jury. (See *People v. Leonard, supra,* 40 Cal.4th at p. 1406 (when he referred to referred to defendant as the Thrill Killer, the detective witness violated the stipulation entered by the parties.) But this was not any deliberate effort by the prosecutor to offer inadmissible evidence to prejudice the defendant. There is nothing in the record to suggest the prosecutor knew the witness would mention this to be a maximum security area, admonished the witness not to mention it, or that the witness ignored the prosecutor and deliberately made the reference. Thus it cannot be said that the prosecutor somehow violated his duty to guard against impermissible references.

Assuming the witness's reference was attributed to the prosecutor and found improper, no prejudice resulted. The determination of prejudice is based on deciding whether there is

> a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. In conducting this inquiry, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Guerra, supra,* 37 Cal.4th at pp. 1067, 1153, internal citations & quotations omitted.)

In this case it cannot be said that any prejudice resulted. This was a brief, isolated comment which was neither highlighted, nor of particular importance in the context of the testimony. The focus of the testimony before the jury was not the details surrounding the cell or Montes's housing environment. Instead, the purpose was to explain that Montes lived in a single-man cell and when the correctional officer searched cells in this section on September 11th, "[u]nder the TV set we found a shank, a sharpened instrument about seven and a half inches long made of mirrored plastic, two pieces broken and tied together." (41 RT 7303.) No other questions were asked about the area where Montes was housed or otherwise

highlighted it as being a maximum security area. (See 41 RT 7303-7306.) And, during closing argument, the prosecutor merely mentioned the incident as it relates to Montes's "future dangerous," and without detail of it occurring inside a maximum security section. (45 RT 7891.) Given that the jury had already convicted Montes of murder and became aware of his continued acts of violence while in jail, the fact a witness mentioned Montes was housed in a maximum security area was of little impact.

Although Montes wishes to portray it otherwise, the witness's reference was not the prosecutor acting with deliberate intent to inject inadmissible evidence before the jury. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1218.) Instead, it was merely a brief isolated comment with no reasonable likelihood that it "affected the judgment of the jury." (*In re Jackson* (1992) 3 Cal.4th 578, 594 (as to false or misleading testimony by prosecution witness).) Consequently, no prejudicial misconduct occurred.

XXXIII. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING THE PENALTY-PHASE CROSS-EXAMINATION

Montes alleges that three instances of misconduct occurred during the cross-examination of witnesses in the penalty-phase. (AOB 453.) No such misconduct occurred.

As noted above, the same standard is applied on appeal to evaluate a claim of prosecutorial misconduct in the penalty phase as in the guilt phase. When misconduct has been established, the determination of prejudice is based on deciding whether there is

> a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. In conducting this inquiry, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Guerra, supra,* 37 Cal.4th at pp. 1067, 1153, internal citations & quotations omitted.)

A. QUESTIONING DR. DELIS ABOUT TESTS PERFORMED

Montes allegation here is somewhat unclear. He alleges the prosecutor questioned defense mental health expert Dr. Delis about tests that he knew the expert had not administered. In other words, Montes alleges the prosecutor knew that no other tests had been performed yet nevertheless questioned the witness, knowing that the answered would be "no." (AOB 453-458.) But he also seems to suggest the prosecutor tried to imply other tests were administered that the defense did not present to the jury. (AOB 457.) Regardless, respondent is not sure how either could be construed as a claim of error. Both focus on the fact the prosecutor inquired whether additional tests were conducted. That question did not violate any court ordered limitation on the cross-examination. Instead and as shown below, the only limitation imposed on the prosecutor was to not ask questions which implied the expert discussed tests with Montes before Montes took them. The challenged portion of the cross-examination did not offend this limitation and as a result, no misconduct occurred.

Here, the trial court conducted an Evidence Code section 402 hearing in part to determine whether defense mental health expert Dr. Delis prepared Montes before he took an I.Q. test. (42 RT 7438-7443.) Dr. Delis explained Montes' I.Q. score was obtained by administration of the Wechsler Adult Intelligence Scale Test ("Wechsler"). (43 RT 7591-7592.) The only other test Dr. Delis administered was the Hiscock Memory Test ("Hiscock"), a test designed to detect malingering. (43 RT 7593.) During cross-examination, the prosecutor inquired whether Dr. Delis or any other mental health professional administered other tests to Montes. (43 RT

7597-7604.) Dr. Delis stated that he had not given Montes any tests other than Weschler and Hiscock. (43 RT 7597-7598, 7600.)

At the conclusion of the hearing, Montes expressed concern the prosecutor would wrongly imply to the jury that defense counsel acted improperly by discussing the tests with Montes before they were administered. Montes requested the court order the prosecutor to not ask questions that raised any implication the defense coached or prepped Montes for any tests. However, the prosecutor stated that he would not make any such implication, and that, it "[l]ooks like it was a valid test that he administered." (43 RT 7609.)

At trial, the prosecutor asked Dr. Delis numerous questions about whether Montes had been given other tests. These questions did not relate to whether the expert or Montes's attorneys prepped or discussed the tests with Montes beforehand. And as shown below, any defense objections related only to whether the questions exceeded the scope of the direct examination:

> [MR. MITCHELL]: Did you give Mr. Montes additional tests?
>
> [MR. COTSIRILOS]: Same objection [beyond the scope].
>
> [THE COURT]: Sustained.
>
> [MR. MITCHELL]: In arriving at an opinion that Mr. Montes is borderline —
>
> [THE COURT]: We're dealing with an I.Q. test. If you want to ask if he gave additional I.Q. tests.
>
> [MR. MITCHELL]: In forming the opinion that Mr. Montes had a borderline mental retardation intelligence level, did you give him any additional tests?
>
> [DR. DELIS]: I did not give him any other I.Q. tests.
>
> [MR. MITCHELL]: Did you take any other tests or information into consideration in forming your opinion?

[DR. DELIS]: Other than the Hiscock, no.

[MR. MITCHELL]: Were you asked not to consider certain other tests that you gave Mr. Montes?

[MR. COTSIRILOS]: Objection. Beyond the scope and relevancy, Your Honor.

[THE COURT]: Sustained.

(43 RT 7690-7691.)

The prosecutor also asked Dr. Delis whether any tests were conducted to determine whether Montes had brain damage. Montes objected and pointed out that questions about additional tests bordered on bad faith, because the prosecutor knew the court's prior ruling and his questions forced the defense team to object in front of the jury. The court directed the prosecutor to only inquire whether witness had evidence to suggest that Montes had brain damage. (43 RT 7692-7693.) The following colloquy then occurred:

[MR. MITCHELL]: Did you subject Mr. Montes to any additional tests to ascertain whether he suffered from any organic brain damage?

[MR. COTSIRILOS]: Same objection.

[THE COURT]: Sustained.

(43 RT 7694.)

Regardless of how Montes's claim is characterized, the above questions were not misconduct. They were merely designed to undermine the reliability of the tests and the expert's opinion. As the record clearly establishes, the prosecutor's questions had nothing to do with the objection and concerns that Montes had expressed at the earlier Evidence Code section 402 hearing. None of these questions related to implying the defense team had "prepped" Montes in order to provide misleading test results. And despite the argument made at trial, there was no bad faith

merely because the prosecutor knew the answer to questions he propounded. It was entirely permissible to inquire whether the mental health expert reviewed or administered additional tests that would support his opinion and ultimate conclusion. This is especially true where, for example, other tests may have been available to administer but were not utilized. The prosecutor's actions were neither a deceptive nor reprehensible method to persuade the jury. (*People v. Price* (1991) 1 Cal.4th 324, 448.)

Further, Montes does not even suggest the prosecutor wrongly focused on this exchange during the closing argument. At best, the prosecutor insinuated the expert's opinion was not credible because it was not complete. This was not misconduct and the prosecutor's questions here were entirely proper. Consequently, Montes's claim should be rejected.

B. QUESTIONS ABOUT GANGS

Montes limited his penalty phase evidence to his childhood up until the age of twelve when his parents separated. He did not present any testimony about his good character traits during that time. Montes wished to preclude the prosecution from eliciting evidence outside this narrow scope of direct evidence. (See *People v. Ramirez*(1990) 50 Cal.3d 1158, 1158, 1192-1194; 26 CT 7255-7258; 41 RT 7211-7214; 42 RT 7469-7470.) Montes now alleges that the prosecutor nevertheless improperly questioned several witnesses about his involvement with gangs or drugs during his childhood (up to the age of eighteen).[53] Montes argues that this not only exceeded the scope of direct examination but also placed inadmissible character evidence before the jury and was also not admissible as

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[53] Montes's heading suggests the prosecutor wrongly discussed gangs and drugs. (AOB 458.) However, the record Montes refers to and his argument on appeal focuses solely on involvement with gangs.

aggravating evidence under section 190.3, factor (k). (AOB 458-477.) Respondent disagrees.

First, Montes portrays the cross-examination as having infected the jury with improper evidence about gang activity and bad character. That is simply not true.

As to Montes's grandfather Manuel Limones and his uncle Gregory Limones, the prosecutor posed questions about whether Montes had become "involved with the wrong crowd." These were objected to as outside the scope of direct examination and were sustained by the trial court. (42 RT 7542-7545, 7555-7557.) Consequently, no such testimony was elicited and no misconduct can be attributed to this fact because no objectionable evidence was presented to the jury. (*People v. Doolin* (2009) 45 Cal.4th 390, 444.)

As to family friend Yolanda Mendoza, the prosecutor elicited one isolated statement about whether Montes's mother had spoken to Mendoza when Montes was younger about becoming involved with gangs – which she denied - and it was made without objection. (44 RT 7716-7719.) As to family friend John Garcia, the trial court sustained objections as beyond the scope to questions about whether Montes was known to be involved in gangs or had "any other problems with the law." The court did allow one statement that Garcia had spoken with Montes's mother about Montes, but Garcia did not recall any discussion with her about whether Montes had become involved with gangs. (44 RT 7732-7734.) Finally, the prosecutor asked Montes's wife, Diana Montes, without objection whether she knew if Montes had been involved with gangs, and she denied any such knowledge. (44 RT 7767-7770.) As a result, the court sustained defense objections to many questions of this nature. Moreover, many of the questions in this regard were asked without objection and thus any claim of error has been forfeited on appeal. (*People v. Frye, supra,* 18 Cal.4th at pp. 969-970.)

Regardless, even if the claim were preserved, there is no need to address the merits. Any assumed improper evidence about Montes's involvement with gangs was harmless.

In *Ramirez*, this Court observed that the prosecution's cross-examination during the penalty phase should relate directly to a particular incident or character trait defendant offers in his own behalf. There, the trial court wrongly permitted the prosecutor to go beyond specific aspects of the defendant's background elicited on direct and introduce a course of misconduct he had engaged and did not relate to the mitigating evidence offered on direct examination. (*People v. Frye, supra,* 18 Cal.4th at pp. 1193-1194.) However, this Court determined the error was harmless:

> Although we find that the trial court erred in this regard, for a number of reasons we also conclude that there is no reasonable possibility that the error could have affected the judgment in this case and thus that the error does not warrant reversal of the death penalty judgment. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604, 758 P.2d 1135].) First, although the trial court's error did permit the prosecution to bring to the jury's attention a number of incidents of criminal misconduct that should not properly have been admitted, the incidents in question were relatively innocuous in comparison with the additional incidents of prior criminal activity that were properly admitted in the prosecution's case-in-chief — i.e., the prior forcible rape and the possession of a concealed weapon in a California Youth Authority facility — and the defendant himself presented evidence at the penalty phase of his past use of drugs. Second, the trial court specifically instructed the jury that it could not consider any prior criminal activity, other than the three crimes that the prosecution had presented in its case-in-chief, as an aggravating circumstance; this instruction minimized the danger that the jury would have used the evidence which was brought out on cross-examination for an improper purpose. Finally, the prosecutor did not dwell on this evidence or attempt to inflate its importance in closing argument. Under these circumstances, we cannot find there is a reasonable possibility that the error affected the verdict. (See,

e.g., People v. *Heishman* (1988) 45 Cal.3d 147, 191 [246 Cal.Rptr. 673, 753 P.2d 629].)"

(*People v. Ramirez* (1990) 50 Cal.3d 1158, 1193-1194.)

For reasons similar to *Ramirez*, any assumed error was also harmless in this case. First, these were not detailed discussions about specific incidents. They were isolated and minimal questions that were relatively innocuous when compared to the additional incidents of prior criminal activity that were also presented to the jury, such as Montes's prior burglary conviction and his continued acts of violence against others while in jail and his possession of deadly weapons. Further, Montes's involvement with gang activity was already an established fact during the guilt phase and the prosecutor's questions were merely designed to show these witnesses lacked knowledge about Montes's gang and violent lifestyle (or deliberately refused to disclose their knowledge). Additionally, there is no argument here that the trial court wrongly instructed the jury about their ability to consider prior criminal activity or evidence in aggravation. Finally, Montes makes no argument that the prosecutor dwelled in closing argument on any statements made by these witnesses during cross-examination. Consequently, any presumed error was harmless and Montes's claim should be rejected.

C. QUESTIONS SUGGESTING MONTES ACTUALLY KILLED WALKER

The jury in this case was not asked to determine whether Montes or any other defendant actually shot Walker; they were charged only with finding whether each principal was armed with a firearm. The jury concluded that Montes and his fellow co-defendants committed the first degree murder of Walker, found three special circumstances true and determined that each principal was armed with a firearm. The jury also found that Montes possessed a firearm as an ex-felon. (See 5 CT 1268-

1268A, 1274-1291, 1302; 40 RT 7122-7136, 7159-7168.) Montes now argues the prosecutor portrayed him as more culpable than what the verdict suggested, because he improperly presented evidence outside the record or wrongly implied during cross-examination of defense witnesses that Montes actually killed Walker. (AOB 477-485.) The argument borders on frivolous.

Respondent recognizes it is improper for a prosecutor to make comments which refer to facts outside the record. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 95.) But here the prosecutor in no way referred to facts outside the record. Evidence that tended to demonstrate that Montes shot Walker included *inter alia*, that Montes had been seen with the gun at the party (see 16 RT 2706-2707; 22 RT 3898-3899; 23 RT 4070-4071); that Montes admitted to George and Sylvia Varela and Blancarte that he shot and killed Walker, that he essentially admitted it to his father, and, that he bragged about the killing as a means to earn his stripes. (See e.g., 17 RT 2902-2903; 18 RT 2892-2903; 22 RT 3883-3884; 25 RT 4474, 4463-4475; 34 RT 6200-6204 and 6209-6210.)

Moreover, whether Montes actually pulled the trigger or not, the jury had already found beyond a reasonable doubt that Montes committed murder. In other words, that he killed Walker and was convicted of that fact. Questions Montes now complains about and that indicated Montes killed Walker (e.g., 44 RT 7745-7746 ("The fact that he killed Mark Walker is devastating to your family, isn't it?") ("Do you know why he killed Mark Walker?"), 44 RT 7772 ("You can't tell us why your husband killed Mark Walker, can you?") were entirely proper.

XXXIV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN HE QUESTIONED MONTES'S WIFE ABOUT A LETTER THAT HAD NOT BEEN PREVIOUSLY DISCLOSED TO THE DEFENSE

During the cross-examination of Montes's wife Diana, the prosecutor produced a letter that she had written to Montes after his arrest. The letter evidenced her own bias and suggested that she and Montes intended to target and intimidate persons involved in the case. Montes now complains the failure to produce the letter violated discovery obligations and also transgressed his right to due process of law and a fair trial. (AOB 486-499, referring to U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7.) The complaint is untenable. The witness was not questioned about the letter and the letter was not introduced into evidence. But even assuming it was error to try and impeach Montes's wife with a letter that had not been previously disclosed to the defense, any such error was harmless.

A. EXAMINATION OF DIANA MONTES REGARDING THE LETTER

During cross-examination of Diana Montes, the following occurred:

[MR. MITCHELL]: Despite the jury's verdict in this case, you don't believe your —

[DIANA MONTES]: No, I don't .

[MR. MITCHELL]: — your husband has committed murder?

[DIANA MONTES]: I don't.

[MR. MITCHELL]: And you'll never believe that, will you?

[DIANA MONTES]: No.

[MR. MITCHELL]: In fact, you yourself are willing to commit violent acts to try and help him get off, aren't you?

[DIANA MONTES]: I'm sorry? What are you talking about?

[MR. MITCHELL]: Do you recall writing a letter to your husband in which you asked him to get you the names of the people involved in the prosecution so you could give them to somebody?

[MR. COTSIRILOS]: Objection. Beyond the scope.

[THE COURT]: Overruled.

[DIANA MONTES]: No, I don't.

[MR. MITCHELL]: May I approach?

[THE COURT]: You may.

[MR. MITCHELL]: Is this your handwriting?

[MR. COTSIRILOS]: Could counsel show counsel before he shows the witness.

[THE COURT]: Counsel.

[MR. COTSIRILOS]: May we approach, Your Honor?

[THE COURT]: Yes. On the record.

(44 RT 7756-7757.)

Out of the presence of the jury, the court and counsel discussed the letter and the fact it had not been disclosed to the defense. Montes argued the failure to provide the letter as discovery violated Penal Code section 1054, and claimed it impacted the ability to make informed, tactical, decisions about what witnesses the defense intended to call at the penalty phase. The prosecutor stated that he had no obligation to provide the letter because it was penalty-phase rebuttal evidence. (44 RT 7757-7762.) Montes moved for a mistrial and alternatively requested the court admonish the jury not to infer anything from the questions that had been posed. (44 RT 7761-7762.) The trial court stated that in order to address the issue it needed to adjourn the jury. The prosecutor then decided it would not use the letter at all. (44 RT 7764.) Montes renewed his request for a mistrial

because of the alleged impact already created by letter during cross-examination and argued that it represented intentional misconduct. The trial court concluded there was no intentional misconduct. The court found this was at best a disagreement over whether there existed any obligation to provide the letter in discovery when it constituted rebuttal evidence. (44 RT 7765.) The court then admonished the jury, but only to disregard the last question asked of the witness. (44 RT 7767.)

B. ANALYSIS

Penal Code section 190.3 provides that,

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

(Pen. Code, § 190.3.)

"The statute does not require production of the evidence, however, but notice of it." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) Further and at the time of trial, rebuttal evidence was not subject to the advance notice requirement of section 190.3. (*People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1027, 1072-1073.)

Respondent recognizes that in *People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, this Court determined that the discovery provisions of Penal Code section 1054 apply to the penalty phase of a capital trial. (*Id.* at pp. 1232-1233.) However, this Court did not address to what extent this rule impacted impeachment or rebuttal evidence.

But recently, this Court addressed the issue and determined that although penalty phase rebuttal evidence is not subject to the advance notice requirements of Penal Code section 190.3, it is still subject to the

discovery provisions of Penal Code section 1054. (*People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 932, 955-960.)

Montes seems to suggest the letter in this case was not admissible as impeachment or rebuttal evidence. (AOB 495.) But the argument on appeal is not really whether this subject matter was a proper scope of impeachment – the letter obviously related to the witnesses bias. Further, any cooperation between Montes and his wife to target and intimidate witnesses would have also been relevant and admissible during the case in chief as Penal Code section 190.3, subdivision (b) aggravating evidence, because it evidenced an attempt by Montes to commit acts of force or violence.

The real issue here is whether the failure to provide the letter in discovery when the prosecutor knew that Montes's wife would testify and intended to impeach her with it constituted misconduct. In that regard, the prosecutor should have provided the letter to the defense before she had been called to testify. (*People v. Gonzalez, supra,* 38 Cal.4th at pp. 957-958 ("[i]f the prosecutor had any rebuttal he intended to present in the event defendant actually presented the proffered evidence, he was obligated to provide discovery of it".)

It is hard to fathom, however, how the failure to produce the letter in discovery constituted intentional misconduct when there was no clear law governing whether rebuttal evidence in the penalty-phase had to comply with the discovery provisions of Penal Code section 1054. Regardless, in order to determine whether the failure to produce the letter resulted in prejudice,

> the test for state law error at the penalty phase of a capital trial is whether there is a reasonable possibility the error affected the verdict. (citations.) To the extent the denial of discovery implicated defendant's federal due process rights (citations), the

applicable test is whether the error is harmless beyond a reasonable doubt.

(*People v. Gonzalez, supra,* 38 Cal.4th at pp. 960-961.)

In this case, no such prejudice occurred. Fundamentally, the concept of prejudice presumes the defense was somehow harmed by the failure to produce the evidence used against it. This is because the concern expressed by this Court is that defense counsel needs to make an informed and intelligent decision about the mitigating evidence it intends to present and how it may or may not be impacted by rebuttal evidence then used by the prosecution. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 960.)

But here, no such rebuttal evidence was actually used. The prosecutor declined to produce the letter and did not question the witness about its contents. As the trial court observed, "If you're not going to use it, then we don't have an issue. I'll instruct the jury to disregard the last question, and then we'll go on." (44 RT 7765.) Defense counsel agreed. As a result, all the jury learned was the witness denied writing a letter that asked Montes to provide her names of the people involved in the prosecution. To the extent Montes now complains the trial court should have also admonished the jury to disregard this portion of the question and answer (AOB 498), the trial court did so. (44 RT 7766-7767.)

Moreover, there is no reasonable possibility that the error affected the verdict. Even if this Court somehow concluded there was a reasonable possibility the defense would not have called Montes's wife to testify, her direct testimony comprised three pages of transcript and focused on her continued love for her husband and the fact she brought their son to visit him. (44 RT 7749-7752.) Although it – along with testimony of several other family members - may have had emotional affect with the jurors, it did not play a predominant role in the mitigation case or as Montes believes, had a "profound impact on the penalty phase." (AOB 499.) But

Montes really offers no compelling reason why the error resulted in prejudice and does not even suggest he would have declined to present her testimony had he known about the letter. Finally, even if the effect of these questions suggested Montes still remained a violent individual, the jury knew that already given his assault on co-defendant Gallegos while in a holding cell with other inmates, and, with his possession of deadly weapons inside a secured jail cell on two separate occasions. Consequently, Montes's claim should be rejected.

XXXV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED A MISTRIAL MOTION BASED ON THE FACT THAT THE PROSECUTOR FAILED TO PROVIDE DISCOVERY OF A LETTER WRITTEN BY MONTES'S WIFE USED DURING PENALTY-PHASE CROSS-EXAMINATION

In Argument XXXIV, Montes alleged the prosecutor committed a discovery violation and engaged in prejudicial misconduct when he tried to introduce a letter that Montes's wife had written to him after his arrest; the letter suggested she and Montes wanted to target and intimidate witnesses in the case. (AOB 486-499.) In a related argument, Montes now alleges the trial court abused discretion when it denied his mistrial motion. (AOB 500-504.) Respondent disagrees.

A motion for a mistrial should be granted if prejudice occurs during a trial which cannot be cured by instruction or jury admonition. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985.) A trial court's denial of a motion for mistrial is reviewed under the abuse-of-discretion standard. (*People v. Cox*, *supra*, 30 Cal.4th at pp. 916, 953.)

Re-asserting the prejudice arguments he made when he challenged the prosecutor's failure to produce the letter, Montes claims the trial court should have granted his mistrial motion. (See AOB 503-504.) But for the reasons expressed in Argument XXXIV, no such prejudicial misconduct

occurred. Consequently, it cannot be said the trial court abused its discretion when it denied Montes's mistrial motion.

XXXVI. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING PENALTY PHASE CLOSING ARGUMENT

Montes alleges the prosecutor committed five separate instances of prejudicial misconduct during the penalty-phase closing argument, and, that each deprived him of the guarantee of fundamental fairness and violated his right to due process of law and a fair penalty trial and his Eighth Amendment rights to a reliable penalty determination. (AOB 505-536; U.S. Const., 5th, 6th 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 and 16.) None of these alleged instances constituted misconduct. Moreover, any assumed misconduct was not prejudicial.

A. STANDARD OF REVIEW

Respondent set forth the standard to review claims of prosecutorial misconduct, or error, during closing argument in Argument XXXI. Briefly, prosecutorial misconduct implies the use of deception or reprehensible methods to persuade the court or jury. (*People v. Jones, supra,* 15 Cal.4th at p. 187.) The same standard is applied on appeal to evaluate a claim of prosecutorial misconduct in the penalty phase. Wide latitude is given to prosecutors during closing argument at the penalty phase. (*People v. Schmeck* (2005) 37 Cal.4th 240, 298-299.) To that end, it must be remembered that prosecutor argument should not be given undue weight, inasmuch as jurors are warned in advance it is not evidence and jurors understand argument to be statements of advocates. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1224, fn. 21.)

> Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is

> not misconduct for a party to make explicit what is implicit in every closing argument . . . .

(*People v. Huggins, supra,* 38 Cal.4th at p. 207.)

Finally, in order to make out a federal constitutional violation based on conduct of the prosecutor, the defendant must establish conduct so egregious that it infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Padilla, supra,* 11 Cal.4th at p. 939.) In determining whether such prejudice existed, courts apply the "reasonable likelihood" standard. (*People v. Clair, supra, 2* Cal.4th at pp. 662-663; see also, *People v. Cain, supra,* 10 Cal.4th at p. 48; *People v. Memro, supra,* 11 Cal.4th at p. 874.)

B. MONTES'S FAILURE TO OBJECT HAS FORFEITED HIS CLAIM

"Prosecutorial misconduct is waived by failure to object *and ask for admonition below*, unless the misconduct could not have been cured by admonition. This is true in the penalty phase as well as the guilt phase." (*People v. Frye, supra,* 18 Cal.4th at pp. 969-970 (emphasis added); see also, *People v. Coddington, supra,* 23 Cal.4th at p. 636; *People v. Montiel, supra,* 5 Cal.4th at pp. 914-915 (where defense counsel objected to prosecutor's comment about defendant's neat courtroom appearance and victim's absence, but did not request an admonition, the misconduct claim was not preserved on appeal).)

Montes concedes that he did not object to three of the misconduct claims. (AOB 508-527 (subsections C-E). Consequently, these claims have been forfeited. Despite forfeiture, Montes argues the misconduct constituted "plain error" that should be addressed on the merits. (AOB 507, referring to *People v. Wash* (1993) 6 Cal.4th 215, 276-277 (Mosk, J., concurring and dissenting) and *People v Hill, supra*, 3 Cal.4th at p. 1017,

fn. 1.) Respondent disagrees that such "plain error" occurred because as shown below, no misconduct occurred.

C. THE PROSECUTOR DID NOT WRONGLY APPEAL TO PASSION AND PREJUDICE

"It is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice." (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.) Montes claims that the prosecutor committed this error in four instances. However, he concedes he did not object or request an admonition as to these comments. (AOB 507.) The claim is, therefore, forfeited on appeal. (*People v. Coddington, supra,* 23 Cal.4th at p. 636; *People v. Frye, supra,* 18 Cal.4th at pp. 969-970.) But even if the Court addresses the claim, Montes fails to show any prejudicial error occurred.

First, Montes alleges the prosecutor asked the jury to place themselves in the proverbial shoes of the victim by arguing, "[P]ut yourself in Mark Walker's place. Try to imagine his final hour..." (AOB 509-511; referring to 44 RT 7878-7883.) This Court has held, however, that during the penalty phase the prosecutor may "invite the jurors to put themselves in the place of the victims and imagine their suffering." (*People v. Rundle* (2008) 43 Cal.4th 76, 194, citing *People v. Slaughter* (2000) 27 Cal.4th 1187, 1212.) Consequently, Montes's allegation is without merit.

Second, Montes alleges that the prosecutor asked the jury to show Montes the same level of mercy he showed to the victim by arguing, "accord him the same mercy he showed Mark. Accord him the same mercy he showed Mark's family." (AOB 514, referring to 44 RT 7910.) But this Court has held that such comments are not misconduct. (*People v. Ochoa, supra*, 19 Cal.4th at p. 465.) Montes suggest that this Court should re-visit that holding in light of contrary decisions in the Third Circuit and in Tennessee. (AOB 516-517, referring to *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527 and *State v. Bigbee* (1994) 885 S.W.2d 797.) Neither of

those decisions are controlling law and in any event, both pre-date this decision in *Ochoa*. Further, Montes offers no convincing reason why this Court should abandon its prior decision. In fact, this Court recently re-affirmed the principle. (*People v. Benavides* (2005) 35 Cal.4th 69, 109.)

Third, Montes alleges the prosecutor conveyed to the jury that they were also victims in this case because the experience of this trial will haunt them, as well as blatantly appealed to their fears and emotions about crime and their own families' safety by arguing,

> [e]ven their memories of Mark when they look at these photographs will forever be defiled by the manner in which this monster mercilessly made Mark suffer and robbed him of his life. ¶ Our children are not supposed to be ripped off of our streets; are not supposed to be blown away for a night's recreation. And that is what you have heard about in this case.

(AOB 517-520, referring to 44 RT 7862-7863 and 7883-7884.)

To suggest these comments wrongly cast jurors as victims is simply inaccurate. Instead, the prosecutor properly made an emotional appeal based on the evidence. (See *People v. Sanders* (1995) 11 Cal.4th 475, 551; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1119, fn. 35.) For example, the prosecutor urged the jury to consider that Walker's murder was reflective of our society where predators like Montes have no respect for human life and are capable of killing our children. (44 RT 7883-7884.) Further, to the extent this Court construes the prosecutor's comments as focusing on "community outrage," such comments are not misconduct, because they did not form the principle basis for advocating death. (*People v. Davenport*, *supra*,11 Cal.4th at pp. 1171, 1222.) Instead, the jury was asked to commit Montes to death because of the circumstances of the crime and the weight of factors ion aggravation.

Finally, Montes alleges that the prosecutor denigrated the trial rights guaranteed to Montes and suggested the judicial system "coddles criminals

by providing them with more procedural projections than their victims" by arguing that a judge controls Montes's life and attorneys protect his rights when facing death, but that Walker did not have similar protections. (AOB 521-522, referring to *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1411.) Montes tries to portray these comments as the prosecutor asking the jury to punish him for exercising constitutionally provided rights. (AOB 521, referring to *Griffin v. California* (1965) 380 U.S. 609 [127, 85 S.Ct. 1229, 14 L.Ed.2d 106].) The comments in no way did that.

Moreover and notwithstanding Montes's reliance on the non-binding authority of *Brooks*, the real claim here is that the prosecutor urged Montes had the benefit of being protected by a judicial procedural system and yet "sat as Mark's judge, jury, and his executioner" (AOB 521, referring to 44 RT 7908-7909); and that he presumably calculated that if he did not kill Walker he would be caught and go to jail (AOB 521, referring to 44 RT 7883-7884). There was nothing improper about that. The prosecutor merely advocated that Montes deserved no sympathy for his actions and offered the jury an additional motive for why he killed Walker. (See *People v.* Edwards, *supra*, 54 Cal.3d at pp. 787, 840.)

D. THE PROSECUTOR DID NOT IMPROPERLY DEHUMANIZE MONTES

Montes alleges that the prosecutor's argument was designed to dehumanize him and improperly appealed to the emotions of the jury. (AOB 522-525.) Respondent disagrees.

Where warranted by the evidence, this Court has "condoned a wide range of epithets to describe the egregious nature of the defendant's conduct." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1172-1173 (defendant described as a liar and sociopath) and citing *People v. Farnam* (2002) 28 Cal.4th 107, 168 ("monstrous," "cold-blooded," "vicious," and a "predator"; evidence described as "more horrifying than your worst

nightmare"); *People v. Hawkins, supra,* 10 Cal.4th at pp. 920, 961 ("coiled snake" and a "rabid dog"); *People v. Thomas* (1992) 2 Cal.4th 489, 537 ("mass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer"); *People v. Sully* (1991) 53 Cal.3d 1195, 1249 ("human monster" and "mutation").)

In this case, Montes focuses on the following comments:

> We have to, we must, condemn this with every fiber of our beings. You have to condemn this deep down in your soul where you're scarred. Where you get what it means to be a human being. *When an individual like Joseph Montes crosses the line beyond that which separates us from animals, we're not animals, because animals don't kill for sport. Animals don't kill for fun. Animals don't kill for money. Animals don't kill for a ride to a party. Monsters do. Those who kill by their nature regardless of the consequences, and that is what you have sitting in front of you.*

(44 RT 7863-7864, emphasis added.)

> The person who crosses that line that separates us between humans and monsters he forfeits his right to be called a human being.

(44 RT 7865, emphasis added.)

> The circumstances of this crime, ladies and gentlemen, tell you one thing, that monster deserves the death penalty.

(44 RT 7881.)

The prosecutor also called Montes a "sociopath," a "reprehensible excuse for a human being" and an "urban terrorist." (44 RT 7881-7882.) And stated,

> This crime in the manner in which this animal, this monster, committed this crime stretches the concepts of what it means to be human. A person who commits, who can commit this type of a crime, *falls outside the definition of what it means to be a human being.* It is inhuman [sic], immoral act.

(44 RT 7882-7883, emphasis added.)

Contrary to Montes's suggestion that these comments were designed to "lessen the juror's sense of moral responsibility for imposition of a death sentence" (AOB 524), the prosecutor's argument was a fair and proper comment on the evidence. Montes and his co-defendants needed a ride to a birthday party so they car-jacked Walker, shoved him into the trunk of his own car and drove to the party. Afterwards, they drove to an isolated location and executed Walker while he laid trapped inside the trunk. They disposed of the body and the car then returned to celebrate at the party. Montes used Walker's money to buy pizza and bragged that he earned his gang "stripes" for the murder. Walker's murder was purely for "sport," "for money," and "for a ride to a party." As the prosecutor explained, Montes killed Walker "regardless of the consequences." The murder was nothing short of a calculated and brutal execution and the comments made by the prosecutor in that regard were entirely proper. Consequently, no misconduct occurred.

E. THE PROSECUTOR DID NOT COMMIT *BOYD* ERROR BY SUGGESTING THE JURY CONSIDER THE EFFECT OF MONTES'S CRIME UPON HIS OWN FAMILY

Montes alleges that the prosecutor wrongly argued the jury should consider the effect of his crime on his own family and that this constituted *Boyd* error because mitigating evidence about his character and background was wrongly used as aggravating evidence. (AOB 525-527, referring to *People v. Boyd* (1985) 38 Cal.3d 762.) But as this Court observed in *Avena*:

> Although the gist of the prosecutor's argument was that there was no evidence of defendant's good character, we need not parse the closing arguments this fine, for *Boyd* concerns the *admission* of aggravating and mitigating evidence, not the scope of permissible argument. The prosecutor was permitted to argue in closing argument any reasonable inference, from the evidence

admitted, that was relevant to any of the statutory factors in aggravation.

Moreover, to the extent defendant is claiming the prosecutor cannot comment in closing argument on a defendant's bad character or mental condition, even if such comments are drawn from properly admitted evidence, we note defendant failed to object to the argument on this ground. Accordingly, he waived that issue for appeal.

(*People v. Avena* (1996) 13 Cal.4th 394, 439-440.)

In this case, the defense mitigating evidence focused on Montes's childhood and his alleged developmental disabilities. The primary focus was not on Montes as a teenager or young adult, but rather the affect and impact on him that followed from his parent's divorce. (See, e.g., 42 RT 7485-7489, 7498-7501, 7512; 44 RT 7735-7736). During closing argument the prosecutor commented,

No evidence was presented as to little Joey as a teenager. No evidence was presented as to his young adult years. Obviously evidence that they don't want you to hear about. You never heard who he is from the defense. You heard what his background was. Keep it in perspective, ladies and gentlemen. Everyone has family members.

Well, not everyone, but almost everyone has family members who love them. As you consider this as a possible mitigating factor, what you heard from the relatives, consider this: Consider what he has done to those people. Consider that they have been victimized by his conduct, by his crime. And he has totally, regardless of the consequences, spat in their faces when he committed this murder.

He has put them through — he has rejected his upbringing. He came from a good American family.

(44 RT 7897.)

How does that mitigate in favor of a lesser sentence for him what he has done to them?

(44 RT 7899.)

Montes concedes that the prosecutor did not expressly contend the jury should use the harm to Montes's family as a factor in aggravation. Instead, he suggests the prosecutor sought to transpose mitigating evidence into an aggravating factor. (AOB 526-527.) Respondent disagrees.

First, since *Boyd* prohibits admission of evidence and not argument about lack of remorse, no *Boyd* error occurred in this case. In any event, the prosecutor was entitled to point out the absence of evidence of remorse and to argue remorse as a mitigating factor is not present in the present case. (See *People v. Thompson* (1988) 45 Cal.3d 86, 124; *People v. Dyer* (1988) 45 Cal.3d 26, 81-82.) Further, the prosecutor neither presented nor sought to transpose evidence of Montes's character and background into an aggravating factor. In fact, the prosecutor's comments did not even discuss the mitigating aspect of their testimony. Instead, the prosecutor showed that Montes had a total lack of remorse for how his actions affected the family members who loved him and only served to negate mitigating evidence that Montes presented about his alleged troubled childhood. Thus, the prosecutor discussed defense evidence only to the extent it should not carry any extenuating weight when evaluated in the broader factual context of the circumstances of the offense and other factors in aggravation. (*People v. Young* (2005) 34 Cal.4th 1149, 1219-1220.) The comments were entirely proper.

F. URGING JURORS TO CONSIDER COMMUNITY VALUES AND TO ACT AS THE "CONSCIENCE OF THE COMMUNITY" DID NOT CONSTITUTE MISCONDUCT

Montes alleges that the prosecutor wrongly urged the jury to be the "conscience of the community," because that has no role in the jury's individualized sentencing decision. (AOB 527-529.) Respondent disagrees.

Montes challenges the following comments:

> [MR. MITCHELL]: If a death verdict is determined by you to be appropriate based upon this evidence, you are affirming what we stand for as a community, as a group of people who live by our laws and want to continue living by our laws and to be protected by our laws.
>
> In a sense you are affirming life with a death verdict, because it is our lives that you are affirming and the way we want to live them, and what we want to be free from in our society.

(44 RT 7869.)

> You sit as individuals, but also as representatives of our community. Our laws provide that persons who commit crimes like this are eligible for the death penalty.
>
> The evidence in aggravation of this crime, the victim impact on his family prove that this defendant deserves the death penalty. Decide for yourselves, but decide also as representatives of our community what response needs to be made to a monster like this.
>
> [MS. SANDRIN]: I'll object, improper argument.
>
> [THE COURT]: Objection is overruled.

(44 RT 7886-7887.)

> [MR. MITCHELL]: That is because you have a conscience and you sit as the conscience in this community.

(44 RT 7910.)

Montes recognizes that this Court has ruled to the contrary in similar situations where a prosecutor has made remarks urging a jury to act as the "conscience of the community." (See, e.g., *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1177-1178 and cases cited therein.) He nevertheless asks this Court to find the above remarks improper. (AOB 529.) But Montes offers no persuasive reason why these comments were not permissible under *Zambrano* and his claim should be rejected.

G. COMMENTS ABOUT MONTES'S FUTURE DANGEROUSNESS DID NOT CONSTITUTE MISCONDUCT

Montes alleges that the prosecutor repeatedly argued the jury should impose a death sentence to protect others from Montes's "future dangerousness." (AOB 530-536.) The comments were not misconduct.

While the prosecutor may not present expert testimony on future dangerousness as evidence in aggravation, the "prosecutor may argue from the defendant's past conduct, as indicated in the record, that the defendant will be a danger in prison." (*People v. Zambrano, supra,* 41 Cal.4th at p. 1179; see also *People v. Michaels, supra,* 28 Cal.4th at pp. 540-541; *People v. Davenport* (1985) 41 Cal.3d347, 288.)

When supported by the evidence, a prosecutor may argue in the penalty phase that if the defendant is not executed he or she will remain a danger to others. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 32-33.)

In this case, the following comments were made:

> [MR. MITCHELL]: We don't know why. We don't have to know why. All we know is that he is a dangerous human being. He is dangerous to other inmates. He is dangerous for anybody that is in contact with him. We know he is housed in the jail, no contact with other inmates, and what do they catch him with in his cell? What is he manufacturing in his free time alone in his cell late at night, one in the morning? He is manufacturing his little toy, a little toothbrush with a razor blade attached to the end of it.
>
> It can only have one purpose, inflicting injury. On who? Well, obviously not on himself. On other people. Whether it be guards, correctional staff, other inmates, we know how he thinks. Strike when they're vulnerable. We know what his attitude is. He wants to do something, he'll do it regardless of the consequences.
>
> And he is caught with that. Does he stop? No. Does he desist? No. What does he do? What was the date of this? This is while this trial was ongoing 9/11/96. 9/11/96. They can be pretty

crafty. They can be pretty ingenious in the weapons they make. Look at the deadly nature of this thing. It is filed down to a point. Two pieces together for strength.

Be careful as you examine this. It is sharp. Got a handle on it for a grip, so he won't cut himself. One intent and purpose to an instrument like this, inflicting mortal injury on another human being. He doesn't care about the consequences. Doesn't care if he gets caught, and this is while he is on trial for a capital murder case, ladies and gentlemen.

Think about it. The possession of weapons like this in the jail tell you a lot as to what your appropriate verdict should be. Perhaps they will argue that jail is a dangerous place and he needed these for protection from other inmates because he got stabbed.

Well, he got stabbed in between one of these weapons or sharpened instruments. And how did he get stabbed? Look at that. While he is on the phone, taken by surprise. That's how violence in jail occurs, taken by surprise. When you're vulnerable, you're struck whether you're a guard or whether you're another inmate like Mr. Montes was stabbed.

Inmates do not get the opportunity to act in self-defense. These weapons that he fashioned are for first strike or retaliation and for no other purpose. So he can take somebody by surprise like he did Ashley Gallegos, Ashley chained up by his hands. There is no fight. Strike when they're vulnerable. That is the purpose of these weapons.

And this is while he knows that this trial is ongoing. The death penalty is morally appropriate because we as a community have the right to defend ourselves against this. The right to live secure against people like the defendant. Life without parole is not going to protect other inmates. Not going to protect guards.

[MS. SANDRIN]: Improper argument, objection.

[THE COURT]: Objection is overruled.

[MR. MITCHELL]: Life without parole will not protect guards, nurses, or other employees.

[MS. SANDRIN]: Same objection.

[THE COURT]: Same objection is overruled.

[MR. MITCHELL]: Look at these weapons he fashioned, ladies and gentlemen. Not spending his time bettering himself. He is arming himself. What is to stop him if not you? You give him a life without parole sentence, what else has he got to lose? He has demonstrated by his conduct, and past conduct is the best predictor of future conduct, that he is a deadly and dangerous, caged man.

He was deadly and dangerous on the street and he is deadly and dangerous in jail. And he has demonstrated to you through his actions how he is going to behave for the rest of his life. It's his nature. He is a scorpion. What would he have to lose should you give him that life without parole sentence? His ingenuity and mechanical aptitude, he has found his forte. He gets his three squares and he fashions his instruments, and he waits for that moment to strike. As to whoever comes into his reach when he has got opportunity to do it, and the desire. And when is that desire going to come up? We don't know.

Who is going to piss him off? Who is going to have something he wants? Who is going to say the wrong thing? Who is going to be in the wrong place at the wrong time? You know his nature. Should other inmates be sentenced to be next to him? Should prison guards be subjected to the danger of having to house or be next to him? They don't deserve such a sentence, they have done nothing wrong.

[¶] . . . [¶]

You got that evidence in aggravation. You got the horrendous circumstances of this crime. The tremendous impact it has had on Mark Walker and the community. You've got his future dangerousness to consider in your determination of the penalty that is appropriate in this case.

[MS. SANDRIN]: Objection, improper argument.

[THE COURT]: Sustained.

[MR. SANDRIN]: I would ask for an admonition.

> [THE COURT]: Sustained. And the Court will instruct the jury to disregard the last comment as to future dangerousness. Continue.
>
> [MR. MITCHELL]: The best predictor of future conduct is past conduct. Will Joseph Montes be violent again based upon the past conduct you've seen? You've had evidence in this case. The answer has to be unavoidably, undeniably, yes, he will strike again.

(44 RT 7890-7895.)

The above comments made by the prosecutor were based on the evidence presented. (See e.g., *People v. Davenport, supra,* 11 Cal.4th at p. 1223 (future dangerousness may be an inference drawn from the underlying crime and evidence of other violent conduct).) As such, the comments properly advised the jury that based upon his conduct – specifically his assault against co-defendant Gallegos and possession of deadly weapons in jail while awaiting trial - Montes would remain be a danger to others.

None of Montes's claims about the prosecutor's comments during closing argument have merit. Consequently, no prejudicial misconduct resulted.

XXXVII. THE PROSECUTOR DID NOT IMPROPERLY CLAIM DURING PENALTY PHASE CLOSING ARGUMENT THAT LACK OF REMORSE WAS A FACTOR IN AGGRAVATION TO SUPPORT IMPOSITION OF A DEATH SENTENCE

In Argument XXXVI, Montes argued the prosecutor wrongly committed *Boyd* error when he urged the jury to consider the effect of his crime on his own family, because mitigating evidence about his character and background was used to aggravate the gravity of his crime. (Arg. XXXVI(E) at AOB 525-527, referring to *People v. Boyd, supra,* 38 Cal.3d at p. 762.) In this argument, Montes makes several broader constitutional arguments and alleges that other references to lack of remorse wrongly

served as a factor in aggravation. (AOB 537-556.) These arguments also lack merit.

Post-crime lack of remorse is not a statutory factor and should not be urged as factor in aggravation. (*People v. Cain*, *supra*, 10 Cal.4th at pp. 1, 77-78; *People v. Gonzalez, supra*, 51 Cal.3d at pp. 1179, 1231-1232.) But comments about lack of remorse are not misconduct

> when the prosecution calls to the jury's attention that the mitigating factor of remorse is not present, so long as the prosecution does not comment on defendant's failure to testify at the penalty phase.

(*People v. Vieira* (2005) 35 Cal.4th 264, 295-296, referring to *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 147-148.)

Such comments are also not misconduct unless they are designed to argue that lack of mitigation is an aggravating factor. (*People v. Davenport*, *supra*, 41 Cal.3d at pp. 247, 288-290.) For the reasons expressed in Argument XXXVI(E) and below, the claim lacks merit.

A. THE PROSECUTOR'S COMMENTS

Montes alleges that during closing argument, the prosecutor wrongly argued Montes had shown no evidence of remorse after the crime and that this lack of remorse was a factor in aggravation. (AOB 537.) The challenged comments are below:

> [MR. MITCHELL]: Look at his behavior and his conduct after this crime. During the crime and immediately thereafter no evidence of any remorse whatsoever. Laughing, drinking. Look what he has just done ordering pizza, drinking beer, playing pool, having a party.
>
> Can a human being do this? Fire five shots into the face of a 16-year old boy and then go and eat pizza. Can a human being be

repulsed by that conduct? What do we condemn if not this crime? What do we condemn if not this remorse, this conduct?[54]

(44 RT 7865.)

[¶] . . . [¶]

[MR. MITCHELL]: The defendant's words and acts in the commission of this crime immediately thereafter show complete and utter lack of remorse for what he did.

His attitude was demonstrated not only by the cold-blooded manner in which he gunned down this young boy in a dark roadway after locking him in a trunk, but his attitude and total lack of remorse was clearly shown by his statements following the killing. He was proud of it. Damn it he had earned his stripes.

His mind, the way his mind works, he can kill a defenseless 16-year old boy, total vulnerable victim, and think that now he deserves some praise. Some commendation. He has earned his stripes. Mark was earning his stripes as a human being. Joseph Montes earned his as a monster. Defendant's moral depravity, complete moral depravity, are grossly disclosed by his attempt to rationalize his actions.

Getting rid of a witness to a crime. He did it for himself and his buddies. This is an aggravating factor, ladies and gentlemen. His complete and utter overt lack of remorse. The way he committed this crime and his attitude toward it. Complete indifference. Complete utter indifference.

He has killed that boy and it meant nothing to him. And it means nothing to him.

(44 RT 7884-7885.)

[¶] . . . [¶]

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[54] As Montes observes (AOB 537, fn. 103), the context of the argument establishes that either the transcript is in error or the prosecutor misspoke. Respondent presumes that what was either said or intended to be said was, "What do we condemn if not this lack of remorse, this conduct?"

> [MR. MITCHELL]: All of these witnesses they put on not a bit of evidence, not a bit of testimony the defendant has expressed remorse, sorrow, sympathy or pity. And you've seen them here throughout this trial. The only time he cried when his mother talked about his parents splitting up. You saw the video of Mark Walker's family. You saw the testimony, you heard the testimony of Mark Walker's family. No tear was shed except when you bring up something that is a bad memory for him.

(44 RT 7899.)

> [¶] . . . [¶]
>
> [MR. MITCHELL]: Other aggravating factors, though, such as his overt lack of remorse. . . .

(44 RT 7890.)

B. MONTES HAS FORFEITED THE ISSUE BY FAILURE TO OBJECT

Montes concedes that he did not object to the above argument. (AOB 540.) The claim is, therefore, forfeited on appeal.

> Prosecutorial misconduct is waived by failure to object *and ask for admonition below*, unless the misconduct could not have been cured by admonition. This is true in the penalty phase as well as the guilt phase.

(*People v. Frye, supra,* 18 Cal.4th at pp. 969-970 (emphasis added);); see also, *People v. Coddington, supra,* 23 Cal.4th at p. 636; *People v. Montiel, supra,* 5 Cal.4th at pp. 914-915 (where defense counsel objected to prosecutor's comment about defendant's neat courtroom appearance and victim's absence, but did not request an admonition, the misconduct claim was not preserved on appeal); *People v. Clair, supra,* 2 Cal.4th at p. 662.) This rule specifically applies to comments about lack of remorse:

> Generally, we have concluded that, because a timely objection and admonition would cure any harm flowing from a prosecutor's improper remarks or argument to the jury, a claim the prosecutor improperly referred to a defendant's lack of remorse is waived if an objection is not made during the trial on the specific ground raised on appeal.

(*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 83, 146.)

To the extent Montes suggests this Court should address the merits because the misconduct advanced an erroneous legal theory (AOB 540), Respondent disagrees that the prosecutor advanced an erroneous theory. In any event, assuming the Court addresses the merits of the claim, it should be rejected.

C. THE ARGUMENT DID NOT CONSTITUTE *BOYD* ERROR

Montes alleges that the prosecutor wrongly told the jury that lack of remorse was a factor in aggravation and committed *Boyd* error. (AOB 541.) But as this Court observed in *Avena*:

> Although the gist of the prosecutor's argument was that there was no evidence of defendant's good character, we need not parse the closing arguments this fine, for *Boyd* concerns the *admission* of aggravating and mitigating evidence, not the scope of permissible argument. The prosecutor was permitted to argue in closing argument any reasonable inference, from the evidence admitted, that was relevant to any of the statutory factors in aggravation.
>
> Moreover, to the extent defendant is claiming the prosecutor cannot comment in closing argument on a defendant's bad character or mental condition, even if such comments are drawn from properly admitted evidence, we note defendant failed to object to the argument on this ground. Accordingly, he waived that issue for appeal.

(*People v. Avena, supra,* 13 Cal.4th at pp. 394, 439-440.)

Since *Boyd* prohibits admission of evidence and not argument about lack of remorse, no *Boyd* error occurred in this case. Montes nevertheless maintains that the comments here could not have been intended to counter evidence of good character or a claim of remorse as a mitigating factor, because the defense made no such claim and instead focused on Montes's childhood and his alleged developmental disabilities and the affect and

impact on him that followed from his parent's divorce.[55] (AOB 542, see also e.g., 42 RT 7485-7489, 7498-7501, 7512; 44 RT 7735-7736). But in making his challenge, Montes overlooks other salient comments by the prosecutor that place into proper context the discussion about lack of remorse:

> No evidence was presented as to little Joey as a teenager. No evidence was presented as to his young adult years. Obviously evidence that they don't want you to hear about. You never heard who he is from the defense. You heard what his background was. Keep it in perspective, ladies and gentlemen. Everyone has family members.
>
> Well, not everyone, but almost everyone has family members who love them. As you consider this as a possible mitigating factor, what you heard from the relatives, consider this: Consider what he has done to those people. Consider that they have been victimized by his conduct, by his crime. And he has totally, regardless of the consequences, spat in their faces when he committed this murder.
>
> He has put them through — he has rejected his upbringing. He came from a good American family.

(44 RT 7897.)

> How does that mitigate in favor of a lesser sentence for him what he has done to them?

(44 RT 7899.)

Regardless, the challenged comments by the prosecutor did not violate *Boyd.* The prosecutor was entitled to point out the absence of evidence of remorse and argue that therefore this mitigating factor is not present in the present case. In other words, the prosecutor simply

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[55] Montes also alleges that the prosecutor made comments about his failure to express remorse after his arrest and also referred to his demeanor during the trial. References to Montes's in-court demeanor are separately addressed in Argument XXXVIII.

underscored the lack of evidence of remorse as a factor in mitigation. (*People v. Crittenden, supra*, 9 Cal.4th at p. 148; see also *People v. Thompson*, *supra*, 45 Cal.3d at pp. 86, 124; *People v. Dyer*, *supra*, 45 Cal.3d at pp. 26, 81-82.)

Further, respondent acknowledges that post-crime lack of remorse is not a statutory factor and should not be urged as factor in aggravation. (*People v. Cain, supra,* 10 Cal.4th at pp. 77-78; *People v. Gonzalez, supra,* 51 Cal.3d at pp. 1231-1232.) But to the extent the comments focused on lack of remorse as an aggravating factor, the prosecutor could permissibly do so as long as the comments were directed to the "circumstance of the offense" under Penal Code section 190.3, factor (a). (*People v. Pollack* (2004) 32 Cal.4th 1153, 1185.)

The comments here were not so much directed at lack of remorse in general; instead, they focused both on the specific actions by the cold-blooded manner in which Montes executed Walker after locking him in the trunk of the car and his cavalier attitude about the murder afterwards when he bragged about the murder and with proud bravado that he had earned his gang stripes, as well as the fact that he declined to present any evidence to demonstrate a lack of remorse at the time of his actions.

As a result, the comments at issue were no different than in *Crew*, where the prosecutor discussed the defendant's callous actions at the time of the murder and that he gave the victim's property to his girlfriend within hours of the murder. There the prosecutor commented, "[t]he callousness and lack of remorse during the commission of this offense that the defendant exhibited is an aggravating factor." (*People v. Crew* (2004) 31 Cal.4th 822, 856-857.) This Court found these comments proper: "[t]he prosecutor's comments focused on the callousness of defendant's acts and lack of remorse near the time of the murder. Such lack of remorse is a circumstance of the murder that may be argued as an aggravating factor.

(*Ibid,* referring to *People v. Ochoa* (2001) 26 Cal.4th 398, 449.) The same result applies here. As the prosecutor observed,

> Look at his behavior and his conduct after this crime. During the crime and immediately thereafter no evidence of any remorse whatsoever. Laughing, drinking. Look what he has just done ordering pizza, drinking beer, playing pool, having a party.

(44 RT 7865.)

These comments were proper and did not constitute *Boyd* error.

D. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY REFERRING TO MONTES'S POST-*MIRANDA* EXERCISE OF HIS RIGHT TO REMAIN SILENT OR COMMIT *DOYLE* ERROR

Montes alleges that in the above comments, the prosecutor commented on the lack of evidence from defense penalty witnesses that Montes had expressed remorse, sorrow or pity to them for his actions. (AOB 546, referring to 45 RT 7855, 7899.) Montes thus contends the prosecutor sought to penalize Montes for exercising his right to remain silent, and thus violated *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91]. (AOB 544-548.) No such *Doyle* error occurred.

It is fundamentally unfair and a deprivation of due process to use an arrested person's silence to impeach any explanation that is subsequently offered by them at trial. (*Doyle v. Ohio, supra,* 426 U.S. at p. 618.) That, however, is not what occurred in this case.

Here, the prosecutor commented that Montes failed to express remorse for the killings and that the defense did not present evidence to establish he had any remorse for what he had done. (45 RT 7885, 7889.) This did not constitute *Doyle* error. (*People v. Crittenden, supra,* 9 Cal.4th at p. 147.)

As in *Crittenden*, "the prosecutor's generalized references to defendant's lack of remorse contained no allusion to the circumstance that

defendant had not confessed after receiving *Miranda* warnings prior to questioning." (*Ibid.*) These comments had nothing to do with Montes's confession or lack thereof. Instead, they focused on the actions of, and statements by, Montes following the killing, as well as the fact that none of the defense witnesses testified about Montes expressing any remorse or sorrow after the murder.

E. THE PROSECUTOR'S COMMENTS ABOUT LACK OF REMORSE DID NOT VIOLATE MONTES'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT OR CONSTITUTE *GRIFFIN* ERROR

Montes did not testify at either the guilt or the penalty phase. Montes next alleges that the prosecutor's comments regarding lack of remorse improperly drew adverse attention to the assertion of his Fifth Amendment right to remain silent. (AOB 548-551, referring to *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229].) Respondent disagrees.

As noted above, a prosecutor may comment upon a defendant's lack of remorse, but in so doing may not refer to the defendant's failure to testify. (*People v. Crittenden, supra,* 9 Cal.4th at p. 147.) But as this Court observed in *Zambrano*,

> [t]he prosecutor did not comment that defendant had failed to *take the stand* to express remorse; he simply said there was no *evidence* that defendant had *ever* expressed remorse. We have consistently found such penalty phase argument permissible under *Griffin*, even where it faults the defendant for failing to confess guilt and express remorse *during his guilt phase testimony*.

(*People v. Zambrano, supra*, 41 Cal.4th at pp. 1082, 1174.)

The same result applies here. The prosecutor did not comment that Montes failed to testify. The comments had nothing to do with whether Montes testified. Instead, the comments focused on the actions of, and

statements by, Montes following the killing, as well as the fact that no defense witnesses testified about any remorse or sorrow expressed by Montes after the murder. As this Court observed in *Crittenden*,

> The prosecutor's comment during closing argument simply referred to defendant's callous behavior after the killings and occurred during the prosecutor's review of the circumstances and nature of these crimes and of defendant's activities after their commission. [ ] The prosecutor's reference to defendant's lack of remorse was not a comment upon his failure to testify during the trial or to take the stand and confess his guilt following the guilt phase, but was a legitimate reference to the circumstance that, in communications with numerous individuals, defendant never expressed regret concerning the murders. [ ].

(*People v. Crittenden, supra,* 9 Cal.4th at p. 147.)

For the reasons expressed in *Zambrano* and *Crittenden*, the comments here did not constitute *Griffin* error. Consequently, the allegation should be rejected.

F. THE ARGUMENT DID NOT VIOLATE MONTES'S RIGHT TO A RELIABLE PENALTY DETERMINATION

Montes alleges the prosecutor's comments also violated his Eighth Amendment right to a reliable penalty determination. (AOB 552-553.) The allegation implies unreliability in the penalty determination because comments about lack of remorse "interjected an irrelevant factor into the sentencing process which must have had a substantial effect upon the jury's sentence determination." (AOB 553.) This statement is fundamentally flawed. As shown above, the comments were entirely proper. (*People v. Crittenden, supra,* 9 Cal.4th at p. 148.) Consequently, the allegation lacks merit.

G. THE PROSECUTOR'S COMMENTS ABOUT LACK OF REMORSE DID NOT VIOLATE FEDERAL DUE PROCESS BY INJECTING AN IMPERMISSIBLE FACTOR INTO THE PENALTY DETERMINATION

Finally, Montes alleges the prosecutor violated his right to federal due process of law because when he argued lack of remorse as an aggravating factor, he violated state procedural rules which create a liberty interest and infringed on notions of due process. (AOB 554.) This statement is also fundamentally flawed because as shown above, the prosecutor's comments were entirely proper. Consequently, this allegation should be rejected.

H. THE PROSECUTOR PROPERLY COMMENTED ON MONTES'S IN-COURT DEMEANOR DURING THE PENALTY PHASE AND ANY ASSUMED ERROR DID NOT RESULT IN PREJUDICE TO WARRANT REVERSAL OF THE PENALTY JUDGMENT

Montes argues the prosecutor improperly urged the jury to consider his courtroom demeanor as evidence of his lack of remorse, which violated Montes's state and federal rights to a fair trial, due process, confrontation and against self-incrimination. (AOB 557-566, referring to Cal. Const., art. I, § 15 and U.S. Const., 5th, 6th and 14th Amends.) The prosecutor's brief comments in this respect were proper. But assuming they were not, the comments did not constitute prejudicial error that requires reversal of the penalty phase.

Here, the prosecutor commented as follows:

> [MR. MITCHELL]: All of these witnesses they put on not a bit of evidence, not a bit of testimony the defendant has expressed remorse, sorrow, sympathy or pity. And you've seen them here throughout this trial. The only time he cried when his mother talked about his parents splitting up. You saw the video of Mark Walker's family. You saw the testimony, you heard the testimony of Mark Walker's family. No tear was shed except when you bring up something that is a bad memory for him.

(44 RT 7899.)

Montes concedes he did not object to the comments and he therefore forfeited the claim on appeal. (AOB 558; see *People v. Osband* (1996) 13 Cal.4th 622, 696.) However, Montes argues that this constituted "plain error" misconduct and a miscarriage of justice and that this Court must address the merits. (AOB 559, referring to *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1.) Respondent disagrees that it constituted plain error. But assuming the Court addresses the allegation, it is devoid of merit.

Fundamentally, Montes's argument here is flawed because he wrongly assumes a prosecutor may not refer to a *non-testifying* defendant's courtroom demeanor. (AOB 560-562, referring to e.g., *People v. Heishman* (1988) 45 Cal.3d 147.) That may be true as related to the guilt phase of a trial, but not the penalty phase.

In *Boyette*, this Court observed that

> comment during the *guilt phase* of a capital trial on a defendant's courtroom demeanor is improper... unless such comment is simply that the jury should ignore a defendant's demeanor.

(*People v. Boyette* (2002) 29 Cal.4th 381, 434, emphasis added and referring to *People v. Heishman, supra,* 45 Cal.3d at p. 197 and *People v. Stansbury* (1993) 4 Cal.4th 1017, 1058.)

But, a prosecutor may comment during the penalty phase on a defendant's demeanor. (*People v. Valencia* (2008) 43 Cal.4th 268, 307.) This Court has not limited the principle of commenting on a defendant's courtroom demeanor to instances only when the defendant actually testifies. Instead, this Court has set forth the general principle that comment about a defendant's demeanor is proper. (See *People v. Valencia, supra*, 43 Cal.4th at p. 307, referring to *People v. Navarette* (2003) 30 Cal.4th 458, 516 ("'a prosecutor may comment during closing argument on a defendant's demeanor'") and *People v. Beardslee* (1991) 53 Cal.3d 68, 114 (prosecutor

may "comment on defendant's facial demeanor as he sat in the courtroom").)

Comments about demeanor during the penalty phase must be treated different than the guilt phase.

> [A] defendant's demeanor may reflect remorse, or otherwise arouse sympathy in either jury or judge. Because the jury, and the judge in deciding whether to modify a verdict of death, must be permitted to consider any evidence that is relevant and potentially mitigating [citation], this is relevant to appropriate consideration.

(*People v. Valencia, supra*, 43 Cal.4th at p. 308, quoting *People v. Williams* (1988) 44 Cal.3d 883, 971-972.)

There is no reason why such a rule should be limited just to the defense. Instead, it should equally apply to the presentation of relevant evidence and argument by the prosecution in the penalty phase. Just as a defendant is entitled to ask the fact-finder to consider any relevant evidence in determining the appropriate penalty, so should the prosecution.

Montes nevertheless suggests that this Court found improper penalty phase comment on in-court demeanor in *Heishman*, but found it not error only because the defendant had placed his own character in issue as a mitigating factor. (AOB 564, referring to *Heishman, supra,* 45 Cal.3d at p, 197.) That is not entirely accurate.

In *Heishman*, this Court observed it was permissible to comment on demeanor in the penalty phase and in so doing relied on the fact the defendant placed his own character in issue as a mitigating factor. But *Heishman* did not address whether it is only proper to make such comments when a defendant places his own character in issue as a mitigating factor. In fact, that would be contrary to the other decisions of this Court on this issue.

Based on the above, the prosecutor properly commented on Montes's in-court demeanor during the penalty phase. But even assuming comment during the penalty phase on the in-court demeanor of a *non-testifying defendant* is error, it is hard to fathom that it reached the level of misconduct, which implies a deceptive or reprehensible method of persuading the court or jury. (*People v. Price, supra*, 1 Cal.4th at pp. 324, 448.) Indeed, even improper comments about a non-testifying defendant's in-court demeanor during the guilt phase are not necessarily prejudicial. "In light of the ample evidence both of defendant's lack of credibility and of his guilt, we conclude that, even assuming counsel were remiss in failing to object, no prejudice ensued." (*People v. Boyette, supra,* 29 Cal.4th at p. 435.)

The same result applies here. The comments were brief and related only to the fact that Montes seemed upset when his mother spoke about the divorce. In addition and as Montes concedes, the record does not indicate whether the jurors even watched Montes during the trial. (AOB 559, fn. 106.) Moreover, any error was harmless in light of the "ample evidence" that showed Montes to lack credibility and that established not only the vicious nature of the execution but also Montes's general depravity and callousness as related to the crime, Montes's cavalier attitude after the murder based on his statements and actions, and, his continued demonstrated propensity to engage in violent acts after the crime and while in prison. In fact, there is no reasonable possibility the verdict would have been different had this isolated comment not been made. Thus, it cannot be said that the comments deprived Montes of a fair trial or resulted in a miscarriage of justice. (*People v. Hinton, supra*, 37 Cal.4th at pp. 839, 865.) Consequently, Montes's claim and his concomitant constitutional challenges must be rejected because the comments were proper and not the result of any misconduct

I. THIS COURT SHOULD REJECT MONTES'S CLAIM THAT CUMULATIVE PROSECUTORIAL ERROR OCCURRED

Montes claims the cumulative effect of the alleged instances of prosecutorial misconduct violated his rights to due process of law, a fair jury trial and a reliable and non-arbitrary penalty determination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (AOB 567.) Because as discussed above no single instance of misconduct occurred, it cannot be said that any cumulative error resulted.

PENALTY PHASE INSTRUCTION ISSUES

XL. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSIDERATION OF FACTORS IN AGGRAVATION AND WAS NOT REQUIRED TO PROVIDE THE PROPOSED INSTRUCTION THAT THE JURY COULD CONSIDER ONLY THE LISTED STATUTORY FACTORS AS CIRCUMSTANCES IN AGGRAVATION

The trial court declined to provide Montes's proposed instruction "P-T" entitled: "Supplement to CALJIC No. 8.85. Aggravation Limited to Enumerated Factors." (28 CT 7594; 44 RT 7824-7825.)[56] Montes alleges that the trial court had a duty to provide the instruction. (AOB 571, referring to *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14 ("on

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[56] The proposed instruction read as follows:

The factors in the above list [referring to CALJIC No. 8.85] which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

(28 CT 7594.)

Montes also notes that the trial court refused to give another instruction defense requested ("L-P"), which provided, "[t]he factors set forth in subparagraphs (a), (b) and (c) above [in CALJIC No. 8.85] are the only factors that can be considered by you as aggravating factors." (AOB 570, fn. 108, referring to 28 CT 7602; 44 RT 7816-7817.)

request a court must give an instruction stating that the jury may consider only penalty factors (a) through (j), and evidence relating thereto, in determining aggravation.").

Montes maintains this Court determined the instruction is required to be given based on *Gordon*, *People v. Williams* (1988) 45 Cal.3d 1268, 1324 and *People v. Sully*, *supra*, 53 Cal.3d at pp. 1195, 1242. (AOB 571.) While those cases acknowledge that only factors specified in the statute can be considered in aggravation, they note there can be no prejudice in failing to provide the instruction when the prosecutor does not present extraneous, non-statutory factors.

This Court more recently addressed the issue in *Berryman*. There, the same instruction was requested and rejected because it duplicated other instructions that specified applicable factors to be considered in determining penalty. This Court observed,

> What was express in this "special" instruction was implicit in the instruction actually given. Reasonable jurors would have understood and employed the latter to "allow [them] to consider [for purposes of aggravation] the listed penalty factors, 'if applicable,' and to prohibit [them] from considering others." (*People v. Gordon, supra*, 50 Cal.3d at p. 1275 [arriving at a similar conclusion as to a similar instruction on a similar record].) There is no reasonable likelihood that the jury would have construed or applied the standard instruction otherwise.

(*People v. Berryman* (1993) 6 Cal.4th 1048, 1100.)

In this case, the prosecutor did not present extraneous, non-statutory factors. Nor can it be said that the prosecutor misled the jurors as to their consideration of factors in aggravation. Montes only points to the prosecutor's comments that the jury can consider "all" evidence about the crime presented in the guilt phase of the trial. (AOB 572, referring to 41 RT 7251 (opening penalty statement); 45 RT 7870 (closing penalty argument).) But like *Berryman*, the prosecutor's comments merely

reflected the fact that the jury could properly consider any evidence presented as applied to those factors in aggravation, and as already listed in CALJIC No. 8.85, CALJIC No. 8.84.1 (determination of penalty) and CALJIC No. 8.88 (weighing of factors). (28 CT 7569-7570, 7586-7587, 7590; see also CALJIC Nos. 8.86 and 8.87 as related to consideration of other crimes (25 CT 7578- 7579.)

To the extent Montes contends this allowed the jury to wrongly consider prejudicial "gang" evidence (AOB 572-573), Montes did not make any argument that the instruction was required in this regard. (44 RT 7824-7825.) Further, in these comments the prosecutor did not specifically point out that evidence as being aggravating in nature. But even if he did, that evidence most certainly related to factor (a), the circumstances of the crime: Montes killed Walker primarily to earn respect and entry into the gang.

Based on the above, the trial court properly declined to provide Montes's proposed instruction. In any event, any assumed error was harmless given that the prosecutor's comments did not mislead the jury to consider non-statutory factors and in light of the other properly provided instructions. Consequently, the claim must fail.

XLI. THE TRIAL COURT HAD NO OBLIGATION TO INSTRUCT THE JURY THAT POST-CRIME LACK OF REMORSE IS NOT AN AGGRAVATING FACTOR

Montes alleges that the trial court should have sua sponte instructed the jury that contrary to the argument of the prosecutor, lack of remorse was not an independent factor in aggravation. (AOB 574-576.) Montes's argument wrongly assumes the prosecutor's comments inaccurately explained how the jury could evaluate lack of remorse.

As this Court recently affirmed,

> There is no statutory bar to a logical comment on a defendant's lack of remorse. [Citation.] To the contrary, we have recognized that consideration of lack of remorse is proper. 'A

> defendant's remorse or lack thereof is a proper subject for the jury's consideration at the penalty phase [citation], and the prosecutor's comment thereon, which lacked any suggestion that the absence of remorse should be deemed a factor in aggravation of the offense, was proper.' [Citation.] The argument did not, as defendant asserts, focus the jury's attention on defendant's failure to testify at the penalty phase. It was clearly directed to the opportunities defendant had to express remorse in his statement to the police and guilt phase testimony." (*Holt, supra*, 15 Cal.4th at p. 691, 63 Cal.Rptr.2d 782, 937 P.2d 213; *People v. Hughes, supra*, 27 Cal.4th at pp. 393-394, 116 Cal.Rptr.2d 401, 39 P.3d 432.)

(*People v. Salcido, supra*, 44 Cal.4th at pp. 93, 114-115.)

In this case, Montes contends the prosecutor went too far, because he specifically argued to the jury that lack of remorse constituted a factor in aggravation.[57] (RT 7890; see also AOB (Arg. XXXVII) at pp. 537-538, referring to 45 RT 7890.) But Montes concedes he never objected to these comments and cannot now challenge them on appeal. (*See supra*, at Arg. XXXVII(B); *People v. Crittenden, supra,* 9 Cal.4th at p. 146.) Further, other than his proposed instruction that the jury consider only enumerated factors in aggravation (see *supra*, at Arg. XL) Montes did not request any

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[57] The comments at issue were:

> The defendant's words and acts in the commission of this crime immediately thereafter show complete and utter lack of remorse for what he did...
>
> ¶
>
> Getting rid of a witness to a crime. He did it for himself and his buddies. This is an aggravating factor, ladies and gentlemen. His complete and utter overt lack of remorse. The way he committed this crime and his attitude toward it. Complete indifference. Complete utter indifference.

(44 RT 7884-7885.)

instruction governing lack of remorse, and presents no compelling authority that one is required absent a request.

More importantly, any such instruction was unnecessary because the prosecution did not argue that lack of remorse - not related to the crime - is an aggravating factor. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 310, 361.) Instead, the prosecutor discussed Montes's lack of remorse as a circumstance of the crime under Penal Code section 190.3, subdivision (a). As discussed in Argument XXXVII(A), the entirety of the prosecutor's comments focused on Montes's actions during commission of the crime and immediately thereafter. (45 RT 7865, 7884-7885.) This was entirely proper. (*People v. Lucero* (2000) 23 Cal.4th 692, 722-723 (the manner in which defendant disposed of the victims' bodies was a circumstance of the crime which was properly argued by the prosecutor as aggravating; the argument was not an improper reference to defendant's lack of remorse or failure to testify).)

Admittedly, the prosecutor also addressed the fact that defense penalty phase witnesses did not present evidence of remorse and that Montes only appeared remorseful when he cried as his mother discussed her divorce. (AOB 538, referring to 44 RT 7899.)[58] Arguably, these brief comments when considered in proper context were designed merely to point out the lack of remorse in arguing there was no reason to extend mercy. (*People v. Stansbury, supra*, 4 Cal.4th at pp. 1017, 1067-1068.) Regardless, because the comments were proper, there was no need to provide any ameliorative instruction governing lack of remorse as a factor in aggravation. Instead, the standard instructions provided to the jury

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[58] To the extent this was an improper comment on Montes's courtroom demeanor Respondent separately addressed it in Argument XXXVIII.

concerning factors in aggravation and mitigation was sufficient. (*People v. Harris, supra*, 37 Cal.4th at p. 361.) Consequently, Montes's claim that the trial court erred when it did not provide the requested instruction should be rejected.

XLII. FAILURE TO INSTRUCT THE JURY NOT TO "DOUBLE COUNT" THE CRIMES AND SPECIAL CIRCUMSTANCES CONSTITUTED HARMLESS ERROR

Montes requested that the trial court instruct the jury with a special instruction (Defense K-P) against "double counting" of the crimes and special circumstances.[59] The trial court initially stated that it was inclined to provide it, but then refused to give the instruction, indicating that it might revisit the issue depending on the prosecutor's closing argument. (38 RT 7815-7817.) Montes again requested the instruction after the prosecutor's closing argument. The court declined. (38 RT 7912.)

This Court has repeatedly held that the trial court has no duty to sua sponte instruct the jury against double counting. (*People v. Ramirez* (2006)

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[59] The instruction read,

> You must not consider as an aggravating factor the existence of any special circumstances if you have already considered the facts of the special circumstances as a circumstance or circumstances of the crime for which Joseph Montes has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.
>
> You may not double-count any "circumstances of the offense" which are also "special circumstances." That is, you may not weigh the special circumstances more than once in your sentencing determination.
>
> Multiple special circumstances which encompass one single course of conduct should be considered by you only once.

(28 CT 7603.)

39 Cal.4th 398, 476.) But when as here, the instruction is requested, a trial court should instruct the jury against "double-counting" multiple felony-murder special circumstances (*i.e.*, that the jury should not double-count the underlying felony - *e.g.*, robbery or burglary - both as a circumstance of the murder and again as a special circumstance) . (*People v. Monterroso* (2004) 34 Cal.4th 743, 789.) However, absent misleading argument by the prosecutor any failure to provide the instruction is harmless. (*People v. Ayala* (2000) 24 Cal.4th 243, 289.) This is because in the absence of prosecutorial argument to the contrary, it is unlikely the jury would give undue weight under factor (a) to evidence which proved the circumstances of the offense and also proved the special circumstance. (*People v. Medina, supra*, 11 Cal.4th at pp. 694, 779.)

Here, the failure to provide the requested instruction was harmless because no misleading comments were made by the prosecutor. And in any event, the trial court also instructed the jury with CALJIC No. 8.84.1, which stated in relevant part:

> 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 of this case. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> A. The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(44 RT 7977.)

This Court has determined that CALJIC No. 8.84.1 is not erroneous or misleading, and does not imply the jury may "double count" evidence under factors (a) and (c). (*People v. Mayfield, supra*, 14 Cal.4th at pp. 668, 805 (as to 1986 rev.).) Consequently, Montes's claim should be rejected.

XLIII. THE TRIAL COURT HAD NO OBLIGATION TO INSTRUCT THE PENALTY PHASE JURY THAT MONTES WAS ENTITLED TO THE INDIVIDUAL JUDGMENT OF EACH JUROR

At the end of the guilt phase of Montes's trial, the trial court provided CALJIC No. 17.40, which instructed, "[b]oth the People and the defendant are entitled to the individual opinion of each juror," that "[e]ach of you must decide the case for yourself," and that "you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." (28 CT 7380.) The trial court declined to provide Montes's requested penalty phase instruction (Defense No. P-X) that essentially said the same thing.[60] (28 CT 7591; 44 RT 7836.) Montes now claims this denied him the right to a fair and reliable jury determination of penalty in violation article I, sections 15, 16, and 17 of the California Constitution and his federal constitutional right to due process of law. (AOB 584-5891.) Respondent disagrees.

The instruction is duplicative of the duty to evaluate the evidence as instructed in CALJIC Nos. 8.84.1 and 8.88. Regardless, the failure to enumerate various guilt-phase instructions at penalty phase or repeat CALJIC No. 17.40 does not constitute error and the constitutional

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[60] The instruction read,

> The People and the defendant are entitled to the individual opinion of each juror. You must individually decide each question involved in the penalty decision.
>
> An individual juror may consider evidence as a mitigating factor even if none of the other jurors consider that evidence to be mitigating. There is no need for you as jurors to unanimously agree on the presence of a mitigating factor before considering it.

(28 CT 7591.)

challenge should be rejected. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 75.)

XLIV. PREJUDICIAL MISCONDUCT DID NOT RESULT WHEN AN ALTERNATE JUROR CONSULTED SCRIPTURES THAT ADVISED THE JUROR TO FOLLOW THE LAW ON WHETHER TO IMPOSE THE DEATH PENALTY

Alternate Juror No. 3 substituted as a juror during trial. Before trial began he consulted an elder in his church about the church's views on capital punishment and read (but could not recall the specific) passages from The Book of Mormon to which the elder had referred him. Montes claims this misconduct, which specifically concerned the penalty to be imposed, diminished the juror's sense of responsibility for the decision whether or not Montes should be sentenced to death; violated Montes's right to a reliable penalty determination; and deprived Montes of his right to an impartial jury, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and California Constitution, article I, §16 and § 17. (AOB 590-616.)

A. PROCEDURAL BACKGROUND

Montes filed a new trial motion alleging that Alternate Juror No. 3, who had substituted in as a juror, consulted an elder in his church about the Church's views on capital punishment and read specific passages from The Book of Mormon to which the elder had referred him. The motion contained transcripts of interviews with Alternate Juror No. 3 and a declaration of the defense investigator who conducted one of the two interviews after the trial. (45 RT 8001-8002; 28 CT 7645-7687, 7689-7700, 7721-7726.) The prosecutor did not contest the facts or admissibility of the documents, and, the trial court considered the transcripts and interview statements on the merits for purpose of the new trial motion. (45 RT 8002, 8005.)

In his interviews, Alternate Juror No. 3 explained that during voir dire in this case he consulted a supervisor at work who was both a friend and an elder in his church (Church of the Latter Day Saints) and asked how the church stood on the death penalty and on sentencing and prisons. The elder advised Alternate Juror No. 3 to read certain scriptures in the Book of Mormon, which essentially stated that church members were to follow the laws of the land, even if they did not believe in them and that he would not be held accountable for his decisions if it turned out the law was wrong. (28 CT 7649-7650, 7693-7698.)

B. THE TRIAL COURT PROPERLY DENIED THE NEW TRIAL MOTION

Prior to sentencing Montes sought a new trial on the ground that Alternate Juror No. 3 had received extrinsic evidence. (Pen. Code, § 1181, subd. (2); 28 CT 7640-7644; 28 CT 7689-7714; 28 CT 7715-7719; 45 RT 8001-8007.) The court denied the new trial motion. The court found that juror misconduct had not occurred. And even assuming that misconduct had occurred, the court found no prejudice resulted. (45 RT 8007.) The trial court correctly ruled.

A new trial may be granted pursuant to Penal Code section 1181, subdivision (2) "[w]hen the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property." When ruling on a request for a new trial based on juror misconduct, the trial court must undertake a three-step inquiry. First, the court must determine whether the affidavits or declarations supporting the motion are admissible. (Evid. Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. Finally, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.)

On appeal from the denial of a new trial motion, the trial court's findings on questions of historical fact and credibility will be upheld if supported by substantial evidence. (*People v. Tafoya*, *supra*, 42 Cal.4th at pp. 147, 192, citing *People v. Danks* (2004) 32 Cal.4th 269, 303; *People v. Nesler* (1997) 16 Cal.4th 561, 582; *People v. Murphy* (1973) 35 Cal.App.3d 905, 932.) Whether a juror's uncontested actions constituted misconduct is a legal decision subject to independent review. (*People v. Mickey* (1991) 54 Cal.3d 612, 649.)

In this case, the only issues are whether the uncontested facts establish misconduct and if so, whether it resulted in prejudice. The trial court admonished all potential jurors "not to converse with any of the other jurors or anyone else on any subject concerning this trial." (1 RT 18, 51, 96, 139, 173, 205.) Because Alternate Juror No. 3 sought and obtained guidance on the law from a non-juror, Montes argues that Alternate Juror No. 3 improperly received extrinsic input about the propriety of the death penalty from an outside source. (AOB 599; see also *People v. Karis* (1988) 46 Cal.3d 612, 642 ["Jurors are not allowed to obtain information from outside sources either as to factual matters or for guidance on the law"].) Respondent submits, however, that no prejudicial misconduct occurred.

When misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found non-prejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Juror bias may be demonstrated in two ways: (1) if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror (likely bias), or (2) looking at the nature of the misconduct and the surrounding circumstances, it is substantially likely the juror was actually biased against the defendant (actual bias). The judgment must be set aside

if the court finds prejudice under either test. (*In re Carpenter* (1995) 9 Cal.4th 634, 653; *In re Lucas* (2004) 33 Cal.4th 682, 696-697.)

Here, it cannot be said the information obtained by Alternate Juror No. 3 substantially influenced his verdict or demonstrated a bias against Montes. As the prosecutor explained, Alternate Juror No. 3 was not in possession of information related to Montes or the case itself. Instead, he obtained information about the teachings of his church during the voir dire period. He did not refuse to disclose the information and during voir dire expressed his belief that regardless of, or based upon, his religion he would follow the law. Further, even if it constituted misconduct to inquire about his church's teachings, Montes has failed to demonstrate that any prejudice resulted. In fact, as the prosecutor observed,

> any interpretation of that conduct inures to the defendant's benefit. His strongly religious tenants that he holds dear to himself, it holds something so dear to him that he sought the guidance of his church prior to coming back here saying he could and would fulfill his duties as as [sic] juror, that he did not have any reservations about sitting in judgment of Mr. Montes or determination of penalty.

(45 RT 8006-8007.)

Admittedly, reading aloud and circulating Bible passages during voir dire is misconduct. (*People v. Danks*, *supra*, 32 Cal.4th pp. 304, 333.) However, any presumption of prejudice

> may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . .

(*People v. Williams* (2006) 40 Cal.4th 287, 333, citing *In re Carpenter, supra,* 9 Cal.4th at p. 653.)

In *Danks*, this Court concluded sharing of biblical verses did not result in actual bias or result in prejudice because the juror merely shared a

personal view and did not purport to validate it as truth or impose the view on others, and that the passages were not even discussed. (*People v. Danks, supra*, 32 Cal.4th at p. 308.) In *Carpenter,* the discussed passages did not propound a standard as to when the death penalty should be imposed but instead "counseled deference to governmental authority and affirmed the validity of sitting in judgment of one's fellow human beings according to the law." (*People v. Williams, supra,* 40 Cal.4th at p. 336, referring to *In re Carpenter, supra*, 9 Cal.4th at p. 653.)

If the above circumstances do not constitute prejudicial misconduct, then the lesser actions of Alternate Juror No. 3 certainly do not. Alternate Juror No. 3 did not bring the Bible passages in to discuss with fellow jurors or seek to impose his personal religious views upon the others. Instead, he merely sought private guidance from a church elder and the scriptures on whether imposition of the death penalty would comport with his religious views. Moreover and if anything, Alternate Juror No. 3 resolved to merely follow the law, independent of outside religious views or extrinsic pressures to the contrary.

> We have adopted a higher 'reasonably probable' prejudice standard for jury misconduct, including misconduct at the penalty phase of a capital trial, whereby the extraneous material to which jurors are exposed must be inherently likely to prejudice a juror, or there must be facts from which it can be concluded that there was substantial likelihood of actual bias. (citation omitted.) As discussed above, on the record before us defendant does not meet that standard.

(*People v. Williams, supra,* 40 Cal.4th at p. 336.)

As in *Williams*, the record fails to establish any prejudicial misconduct occurred. The trial court properly denied the new trial motion because prejudicial misconduct did not occur. Consequently Montes's claim and his concomitant constitutional challenges should be rejected

because substantial evidence supports the trial court's ruling in denying the new trial motion. (See *People v. Tafoya, supra,* 42 Cal.4th at p. 192.)

XLV. MONTES'S CUMULATIVE ERROR CLAIM MUST BE REJECTED

Montes claims the cumulative effect of the alleged errors during the penalty phase violated his right to federal and state due process of law. (AOB 617.) Respondent has already discussed the lack of error and/or prejudice in each of the arguments. Because Montes failed to establish any errors at all, he has certainly not established a basis for cumulative error. Moreover, for the reasons previously discussed, any single or collective errors were inconsequential. (See *People v. Price, supra*, 1 Cal.4th at pp. 324, 491.) Montes was entitled to a fair trial, not a perfect one. (*People v. Marshall* (1990) 50 Cal.3d 907, 945.) The record here shows he received a fair trial and his sentence and death judgment should be affirmed.

SENTENCING ERRORS

XLVI. THE DEATH SENTENCE IMPOSED ON MONTES IS NOT DISPROPORTIONATE AND DOES NOT CONTRAVENE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

Montes requests this Court undertake an intracase proportionality review in his case, maintaining his sentence is disproportionate to his personal culpability, and therefore constitutes cruel and unusual punishment under both the Eighth Amendment and article I, section 17 of the California Constitution. (AOB 619-626.) Montes sentence was not disproportionate.

This Court has determined it has no authority to independently evaluate whether the evidence shows the defendant's sentence of death is appropriate. (*People v. Hines* (1997) 15 Cal.4th 997, 1080.) Further, intercase proportionality review is not required by the federal Constitution

and this Court has consistently declined to undertake it. (*Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Hoyos* (2007) 41 Cal.4th 872, 927; *People v. Cook* (2007) 40 Cal.4th 1334, 1368; *People v. Lewis* (2001) 25 Cal.4th 610, 677; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Mincey*, *supra*, 2 Cal.4th at pp. 408, 476; *People v. Bell* (1989) 49 Cal.3d 502, 553.)

This Court does, however, engage in "intracase" review to determine if the penalty is disproportionate to the defendant's individual culpability. (*People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Wright* (1990) 52 Cal.3d 367, 449.) Upon request, the California Supreme Court reviews the facts of a case to determine whether a death sentence is so disproportionate to a defendant's culpability so as to violate the California Constitution's prohibition against cruel or unusual punishment. (*People v. Howard* (2008) 42 Cal.4th 1000, 1032.)

In evaluating whether a sentence is cruel or unusual punishment as applied to a particular defendant (intracase proportionality review), the reviewing court examines the circumstances of the offense, including the defendant's motive, the extent to which the defendant was involved in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must consider the defendant's personal characteristics, *e.g.*, age, prior criminality and mental capabilities. (*People v. Tafoya*, *supra*, 42 Cal.4th at pp. 147, 198.)

In this case, Montes's entire argument focuses on the nature of the offense and the offender. Montes suggests that he had very low culpability, having only participated in a carjacking, robbery and kidnapping while acting with a simple reckless disregard for life. He also maintains that he was merely 20-years-old at the time of the offense, with only one prior burglary conviction and in possession of limited mental abilities. (AOB 624-626.)

As to the circumstances of the offense, Montes certainly has a skewered version of what occurred. He was not a lesser culpable participant in a carjacking and kidnapping with mere disregard for life. Montes committed this heinous crime so he could become a member of the gang. Walker, a 16-year-old, was stuffed into the trunk of his own car and driven to an isolated location where Montes executed him while Walker tried to get out of the trunk and defend his own life. Montes shot Walker five times at close range and within a few seconds of each other: He was shot on the top of his head, the right side of his mouth, and the left side of his face. (30 RT 5422-5425, 5427-5428, 5435, 5438, 5449, 5452-5453, 5458-5459.) Montes then returned to the birthday party in a very jovial mood (while Gallegos and Varela seemed very subdued) and used Walker's money to buy pizza. (E.g. 16 RT 2727; 17 RT 2883-2884; 18 RT 3071-3072; 20 RT 3306-3307, 3394; 21 RT 3587-3591; 22 RT 3691, 3775, 3891-3892; 23 RT 4060-4065; 25 RT 4504.) Montes then bragged that he committed the killing and described how he had shot the victim, pulling his sleeve down to cover his hand and protect him from blood spatter, and even showed George Varela a blood spot on his sleeve. Montes also explained that after firing one or two shots, he turned away as he continued to fire because he was "grossed out" by the sight. Montes also told George Varela he had "jacked" the car. (25 RT 4467-4469; 26 RT 4701.)

Even assuming this Court were to view Montes as being young and with a lack of extensive prior criminal conduct[61], as well as lower levels of

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[61] Montes had a prior burglary conviction. Additionally, while in a holding cell awaiting trial he assaulted Gallegos by striking him with waist chains on September 8, 1996 (41 RT 7270-7283); and was found in possession of a toothbrush with a razorblade on its end on July 23, 1996, and in possession of a shank inside his jail cell on September 11, 1996. (41 RT 7301-7306, 7312-7319.)

intelligence and affected mental capabilities, Montes's motive, the extent to which he was involved in the crime, the manner in which the crime was committed, his brazen attitude that followed, the consequences of Montes's acts, the violent behavior that continued while in jail awaiting trial, and the very paucity of mitigating factors justified imposition of the death penalty. It cannot be said that the penalty was disproportionately imposed or resulted in a constitutional violation. (See *People v. Howard, supra,* 42 Cal.4th at p. 1032.)

XLVII. SHOULD THIS COURT CONCLUDE THE DEATH SENTENCE MUST BE REVERSED, THE MATTER SHOULD BE REMANDED FOR A NEW TRIAL RATHER THAN MODIFY THE SENTENCE TO LIFE WITHOUT PAROLE

Montes requests that if this Court determines the death sentence should be vacated, this Court should modify the sentence to be life without possibility of parole, rather than remand the case for a new penalty trial. (AOB 627-629.) The request should be denied. Reversible error at the penalty phase does not entitle a defendant to a life without-parole term; the remedy is a new penalty trial. (*People v. Robertson* (1982) 33 Cal.3d 21, 55-56; *People v. Haskett* (1982) 30 Cal.3d 841, 861.)

XLVIII. COUNT III MUST BE REVERSED BECAUSE CARJACKING IS A NECESSARILY LESSER-INCLUDED OFFENSE OF KIDNAP FOR CARJACKING

Montes was convicted in count II with kidnap during a carjacking (Pen. Code, § 209.5) and in count III with carjacking (Pen. Code, § 215). (24 CT 7036-7040; 40 RT 7124-7126.) For count III, the court imposed the upper term of nine years (principal term) with one year concurrent for the Penal Code section 12022, subdivision (a) enhancement. For count II, Montes was sentenced to a concurrent sentence of life with the possibility of parole, with one year concurrent for the Penal Code section 12022(a)(1) enhancement.

Montes correctly notes that carjacking is a necessarily lesser-included offense of kidnap for carjacking. (AOB 646, referring to *People v. Duran* (2001) 88 Cal.App.4th 1371, 1379; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415; see also *People v. Medina, supra*, 11 Cal.4th at pp. 685, 688-689 (as to attempted offenses).) Accordingly, Montes's conviction for count III and the attendant enhancement must be reversed. (*Ibid.*; *People v. Contreras, supra*, 55 Cal.App.4th at p., 765; *People v. Ortiz, supra*, 101 Cal.App.4th at p. 415.)

XLIX. SENTENCE ON COUNT II, KIDNAPPING DURING A CARJACKING, SHOULD BE STAYED BECAUSE IT SERVED AS A PREDICATE FELONY FOR THE FIRST DEGREE MURDER CONVICTION

Montes was prosecuted solely under a felony-murder theory. (See 35 RT 6259.) Following his conviction, the trial court imposed concurrent terms on all four counts of Montes's convictions. (28 CT 7727-7728; 45 RT 8018-8020.) Montes correctly argues the sentence on count II should be stayed. (AOB 631-632.)

Since counts II (kidnap during a car-jacking) and III (car-jacking) were the predicate felonies for the finding of first degree murder on the theory of felony-murder, Penal Code section 654 precluded imposition of a separate term for those crimes. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576 (Penal Code section 654 precludes imposition of separate term for robbery count because robbery was the predicate felony for conviction of first degree murder on the theory of felony-murder); *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709 (as to enhancements attached to the counts).)

RECURRING CHALLENGES TO CALIFORNIA'S DEATH PENALTY

L. MONTES'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY SHOULD BE REJECTED

Montes makes five separate constitutional challenges to California's death penalty scheme which he recognizes are recurring challenges rejected by this Court. (AOB 633.) To the extent Montes did not raise any of these constitutional challenges in the trial court, they are forfeited on appeal. (*People v. Burgener*, *supra*, 29 Cal.4th at pp. 833, 871, fn. 6 (defendant waives federal claim by failing to object on that basis below) and p. 886 ("It is elementary that defendant waived these claims by failing to articulate an objection on federal constitutional grounds below"); *People v. Waidla*, *supra*, 22 Cal.4th at pp. 690, 726, fn. 8; *People v. Earp*, *supra*, 20 Cal.4th 826, 893.) Regardless, each claim can be summarily rejected.

LI. PENAL CODE SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Montes claims that Penal Code section 190.2 is overbroad because the special circumstances in Penal Code section 190.2 that render a defendant eligible for the death penalty does not adequately narrow the category of death-eligible defendants in conformity with the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 636-638.) The argument has been rejected repeatedly by this Court. (See, e.g. *People v. Hoyos, supra*, 41 Cal.4th at pp. 872, 926; *People v. Beames*, *supra*, 40 Cal.4th at pp. 907, 933; *People v. Demetrulias, supra,* 39 Cal.4th at pp. 1, 43; *People v. Elliot* (2005) 37 Cal.4th 453, 487.) In short, the statute is not overbroad based on the number of special circumstances, or because it permits execution for an unintentional felony-murder, or because of the interpretation of the lying-in-wait special circumstance. (*People v. Cornwell* (2005) 37 Cal.4th 50, 102.)

LII. PENAL CODE SECTION 190.3, SUBDIVISION (A) IS NOT ARBITRARY OR CAPRICIOUS

Montes claims that Penal Code section 190.3, subdivision (a), which allows the jury to consider the "circumstances of the crime" as an aggravating factor, is arbitrary and capricious under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 639.) The claim has been rejected by this Court. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 1, 41-42; *People v. Kipp* (1998) 18 Cal.4th 349, 381; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 979 [114 S.Ct. 2630, 129 L.Ed.2d 750] ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision").)

More specifically, because they do not perform a narrowing function, the aggravating factors in Penal Code section 190.3 are not subject to the Eighth Amendment standard used to define death eligibility criteria. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 477.) Factors in Penal Code section 190.3 violate the Eighth Amendment only if they are insufficiently specific or if they direct the jury to facts not relevant to the penalty evaluation. To that end, both factors (a) (circumstances of the crime) and (b) (criminal activity) meet Eighth Amendment requirements. (*People v. Cain, supra,* 10 Cal.4th at pp. 1, 68-69; *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 478-479.)

LIII. THE DEATH PENALTY CONTAINS ADEQUATE SAFEGUARDS

Similar to the above argument, Montes claims there are not adequate instructions provided to the jury to ensure how and in what manner to consider acceptable aggravating and mitigating circumstances, and as a result, Penal Code section 190.3(a) violates the Sixth, Eighth and Fourteenth Amendments. (AOB 642.) Respondent disagrees.

A jury's consideration of the circumstances of the crime under factor (a) is an individualized function, not a comparative function. (*People v.*

Jenkins, *supra*, 22 Cal.4th at pp. 900, 1052.) Further, a trial court is not required to give an instruction clarifying what is meant by circumstances of the crime as a factor in deciding whether to impose the death penalty under Penal Code section 190.3, subdivision (a). (*People v. Wader* (1993) 5 Cal.4th 610, 663-664 [1978 Law]; *People v. Phillips* (1985) 41 Cal.3d 29, 63 [1977 Law].)

More specifically, there is no need for a jury unanimity or beyond-a-reasonable-doubt instruction (AOB 643) (*People v. Hoyos, supra*, 41 Cal.4th at pp. 872, 926; *People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Alcala* (1992) 4 Cal.4th 742, 809); there is no need for written findings on aggravating factors (AOB 661) (*People v. Moon*, *supra*, 37 Cal.4th at pp. 1, 43); inter-case proportionality review is not required (AOB 664) (*People v. Hoyos, supra*, 41 Cal.4th at pp. 872, 927; see also *Pulley v. Harris, supra,* 465 U.S. at p. 37); un-adjudicated criminal activity can be considered (AOB 666) (*People v. Elliot*, *supra*, 37 Cal.4th at pp.453, 488; *People v. Brown*, *supra*, 33 Cal.4th at pp. 382, 402; *People v. Lewis* (2001) 26 Cal.4th 334, 395); there are no restrictive adjectives in listing of potential mitigating factors (AOB 668) (*People v.* Moon, *supra*, 37 Cal.4th at pp. 1, 42, citing *People v. Weaver* (2001) 26 Cal.4th 876, 993; *People v. Perry* (2006) 38 Cal.4th 302, 319); and there is no requirement to instruct the jury that mitigating factors can only be mitigating. (AOB 668) (*Ibid.*; *People v. Farnam* (2002) 28 Cal.4th 107, 191.)

LIV. THE DEATH PENALTY DOES NOT VIOLATE EQUAL PROTECTION

Similar to the above, Montes claims the lack of procedural protections for death penalty cases in comparison to non-death penalty cases means the death penalty violates equal protection. (AOB 673.) This Court has repeatedly rejected the notion that the death-penalty law denies equal protection because of a different method of determining penalty than is

used in non-capital cases. (*People v. Williams* (2008) 43 Cal.4th 584, 650; *People v. Elliot*, *supra*, 37 Cal.4th at pp 453, 488; *People v. Smith* (2005) 35 Cal.4th 334, 374.)

LV. THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

Montes claims California's death-penalty law violates international law and thereby the Eighth and Fourteenth Amendment. (AOB 677.) This argument has been repeatedly rejected by this Court. (*People v.* Mendoza, supra, 42 Cal.4th at pp. 686, 708; *People v. Beames*, *supra*, 40 Cal.4th at 907, 935; *People v. Perry*, *supra*, 38 Cal.4th at pp. 302, 322.)

CONCLUSION

Sentence on count three should be reversed and imposition of punishment on count two should be stayed. The conviction and judgment of death should otherwise be affirmed.

Dated: June 18, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **67,323** words.

Dated: June 18, 2009

EDMUND G. BROWN JR.
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Joseph M. Montes** Case No.: **S059912**

I declare:

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

On June 19, 2009, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Sharon Fleming Attorney at Law P.O. Box 157 Ben Lomond, CA 95005 *Attorney for Appellant* *Joseph Manuel Montes* (two copies)	Hon. Robert J. McIntyre Riverside County Superior Court 9991 County Farm Road Riverside, CA 92501-3526
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 19, 2009, at San Diego, California.

G. Nolan
Declarant

Signature

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