In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MANUEL BRACAMONTES,

Defendant and Appellant.

CAPITAL CASE

Case No. S139702

San Diego County Superior Court Case No. SCD 178329
The Honorable John M. Thompson, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

Statement of the Case 18

Statement of Facts 19

I. Guilt Phase 19

A. Laura's Home and Neighborhood 20

B. The Night Laura Was Taken 21

C. The Discovery and Autopsy of Laura's Body 23

D. The 1991 Investigation Led Police to Suspect that Bracamontes Had Murdered Laura 24

E. New DNA Testing in 2003 Reveals Bracamontes's Sperm on Laura's Pajama Top and Mouth Swabs 27

F. Bracamontes Flees—Twice—When Police Attempt to Arrest Him 29

G. Defense 31

H. Prosecution's Rebuttal 32

II. Penalty Phase 32

A. Prosecution's Case in Aggravation 32

1. Impact of Laura's murder on her family and the community 32

2. Prior conviction for traumatically injuring Maggie Porter 34

B. Defense's Case in Mitigation 35

Argument 37

I. The Trial Court Acted Within Its Discretion in Requiring Bracamontes to Wear Ankle Restraints and Any Error Was Harmless as the Record Shows, at Most, a Glimpse of the Restraints by a Few Prospective Jurors 37

A. Background 37

TABLE OF CONTENTS
(continued)

Page

B. The Trial Court Acted Within Its Discretion in Determining that Physical Restraints Were Appropriate at Trial 40

C. The Trial Court Had No Sua Sponte Duty to Instruct the Jury to Disregard the Restraints 43

D. Any Error Was Harmless 43

II. The Trial Court Properly Declined to Instruct the Jury On Absence of Flight 47

III. To the Extent the Trial Court Excluded Evidence of Third-Party Culpability, It Did Not Abuse Its Discretion as There Was No Evidence Linking Any Third Party to the Actual Crimes Committed Against Laura 53

A. The Defense Did Not Seek to Present a Third-Party Culpability Defense Based on the Evidence Bracamontes Claims Was Improperly Excluded 54

B. By Failing to Seek Admission at Trial of Evidence He Now Claims Constituted Third-Party Culpability Evidence, Bracamontes Has Forfeited His Claim that the Trial Court Erred in Excluding It 57

C. To the Extent the Trial Court Excluded the Evidence as to Third-Party Culpability, Bracamontes Fails to Demonstrate an Abuse of Discretion in Doing So 58

D. Any Error Was Harmless Under the Controlling Review Standard of *Watson* 62

IV. Bracamontes's Rights Under the State and Federal Constitutions Were Not Violated as the Result of the Filing of the Complaint 12 Years After Laura's Murder but Only One Day After DNA Tests Provided Sufficient Evidence to Charge Him 63

TABLE OF CONTENTS
(continued)

Page

A. After A Full Hearing on Bracamontes's Motion to Dismiss for Prosecutorial Delay, the Trial Court Found No Meaningful Prejudice Had Been Shown and Denied the Motion 63

B. Bracamontes Fails to Show a Due Process Violation Stemming from the 12-Year Prearrest Delay in Prosecution 69

V. The Trial Court Properly Admitted the Victim-Impact Testimony of Laura's Third-Grade School Teacher as It Was Relevant to the Impact of the Murder On the Community 73

A. The Trial Court's Ruling 73

B. Bracamontes Forfeited His Claim by Failing to Properly Object at Trial 74

C. The Trial Court Properly Admitted the Victim-Impact Testimony of Laura's Teacher; Any Error Was Harmless as No Prejudice Ensued 75

VI. As There Are No Errors to Cumulate, Bracamontes's Cumulative-Error Claim Fails 80

VII. Aggravating Circumstances Are Not Constitutionally Required to Be Proved Beyond a Reasonable Doubt 80

VIII. California's Death Penalty Scheme Is Constitutional 82

A. California's Death Penalty Scheme Appropriately Narrows the Class of Death-Eligible Offenders 82

B. The "Circumstances of the Crime" Factor Under Penal Code Section 193, Subdivision (a), Provides a Constitutionally Relevant and Clear Consideration in Determining the Appropriate Penalty 83

C. The Death Penalty Statute and Accompanying Jury Instructions Are Constitutionally Clear and Complete 83

TABLE OF CONTENTS
(continued)

Page

1. Appropriateness of death need not be found beyond a reasonable doubt 83
2. The prosecution bears no burden of persuasion in the penalty phase..... 83
3. Unanimity as to aggravating factors is not required 84
4. The "so substantial" language in the penalty phase jury instructions is not impermissibly vague 85
5. CALJIC NO. 8.88 properly guides the jury in determining whether death is the appropriate penalty..... 85
6. The court need not expressly instruct the jury to return a life sentence if it finds mitigating factors outweigh those in aggravation..... 86
7. The jury was properly instructed on penalty phase evaluation of mitigating circumstances 86
8. No presumption of life instruction is constitutionally required 87

D. The Jury Need Not Prepare Written Findings Identifying the Aggravating Factors On Which It Relied..... 87

E. The Jury Instructions on Mitigation and Aggravating Factors Were Constitutionally Sound..... 87

1. Restrictive adjectives do not restrict the consideration of mitigation 87
2. It is unnecessary to delete inapplicable sentencing factors..... 88

TABLE OF CONTENTS
(continued)

Page

3. The statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not invite the jury to aggravate the sentence based on the absence of mitigating factors 88

F. Intercase Proportionality Review Is Not Constitutionally Required 88

G. California's Capital Sentencing Scheme Does Not Run Afoul of the Equal Protection Clause 89

H. California's Death Penalty Scheme Does Not Violate International Law 89

Conclusion 90

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey
(2000) 530 U.S. 466 81

Blakely v. Washington
(2004) 542 U.S. 296 81

Boyde v. California
(1990) 494 U.S. 370 87

Brown v. Sanders
(2006) 546 U.S. 212 82

California v. Trombetta
(1984) 467 U.S. 479 60

Chapman v. California
(1967) 386 U.S. 18 ..... 43, 62

Cool v. United States
(1972) 409 U.S. 100 ..... 50, 51

Cunningham v. California
(2007) 549 U.S. 270 80

Deck v. Missouri
(2005) 544 U.S. 622 ..... 40, 46

Holmes v. South Carolina
(2006) 547 U.S. 319 61

Hurst v. Florida
(2016) 577 U.S.__ 136 S.Ct. 616 81

Kansas v. Carr
(2016) 577 U.S. __ 136 S.Ct. 633 ..... 86, 87

Karis v. Calderon
(9th Cir. 2002) 283 F.3d 1117 82

TABLE OF AUTHORITIES
(continued)

Page

Loux v. U.S.
(9th Cir. 1968) 389 F.2d 911 42

Mayfield v. Woodford
(9th Cir. 2001) 270 F.3d 915 82

Payne v. Tennessee
(1991) 501 U.S. 808 .....75, 76, 78

People v. Abilez
(2007) 41 Cal.4th 472. 523 80

People v. Alfaro
(2007) 41 Cal.4th 1277 80

People v. Anderson
(2001) 25 Cal.4th 543 81

People v. Arias
(1996) 13 Cal.4th 92 87

People v. Arias
(1996) 13 Cal.4th 92 82

People v. Blair
(2005) 36 Cal.4th 686 .....83, 84

People v. Bolin
(1998) 19 Cal.4th 297 84

People v. Brady
(2010) 50 Cal.4th 547 78

People v. Brown
(2003) 31 Cal.4th 518 61

People v. Brown
(2004) 33 Cal.4th 382 83

People v. Cannady
(1972) 8 Cal.3d 379 52

TABLE OF AUTHORITIES
(continued)

Page

People v. Carpenter
(1997) 15 Cal.4th 312 88

People v. Catlin
(2001) 26 Cal.4th 81 .....69, 71

People v. Clark
(1993) 5 Cal.4th 950 89

People v. Cleveland
(2004) 32 Cal.4th 704 44

People v. Combs
(2004) 34 Cal.4th 821 46

People v. Cook
(2006) 39 Cal.4th 566 88

People v. Cook
(2007) 40 Cal.4th 1334 89

People v. Cowan
(2010) 50 Cal.4th 401 .....70, 72

People v. Cox
(1991) 53 Cal.3d 618 38

People v. Cudjo
(1993) 6 Cal. 4th 585 61

People v. Cunningham
(2001) 25 Cal.4th 926 42

People v. Doolin
(2009) 45 Cal.4th 390 89

People v. Dunkle
(2005) 36 Cal.4th 861 84

People v. Duran
(1976) 16 Cal.3d 282 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

People v. Dykes
(2009) 46 Cal.4th 731 .....76, 77, 78

People v. Edwards
(1991) 54 Cal.3d 787 76

People v. Elliott
(2012) 53 Cal.4th 535 58

People v. Ervine
(2009) 47 Cal.4th 745 .....44, 45, 46, 57

People v. Farley
(2009) 46 Cal.4th 1053 82

People v. Foster
(2010) 50 Cal.4th 1301 .....44, 89

People v. Frye
(1998) 18 Cal.4th 894 88

People v. Fuiava
(2012) 53 Cal.4th 622 86

People v. Gamache
(2010) 48 Cal.4th 347 41

People v. Gonzales
(2006) 38 Cal.4th 932 79

People v. Gonzales
(2011) 51 Cal.4th 894 89

People v. Green
(1980) 27 Cal.3d 1 .....49, 50, 51, 52

People v. Gutierrez
(2002) 28 Cal.4th 1083 60

People v. Hall
(1986) 41 Cal.3d 826 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

People v. Hawkins
(1995) 10 Cal.4th 920 43

People v. Hayes
(1990) 52 Cal.3d 577 84

People v. Henriquez
(2017) 4 Cal.5th 1 81

People v. Hillhouse
(2002) 27 Cal.4th 469 88

People v. Homick
(2012) 55 Cal.4th 816 .....80, 82

People v. Hoyos
(2007) 41 Cal.4th 872 .....84, 87, 89

People v. Huggins
(2006) 38 Cal.4th 175 .....74, 77

People v. Jackson
(1993) 14 Cal.App.4th 1818 43

People v. Jackson
(1996) 13 Cal.4th 1164 51

People v. Jackson
(2009) 45 Cal.4th 662 84

People v. Johnson
(1992) 3 Cal.4th 1183 79

People v. Johnson
(2016) 62 Cal.4th 600 89

People v. Jones
(2011) 51 Cal.4th 346 88

People v. Kaurish
(1990) 52 Cal.3d 648 .....59, 60

TABLE OF AUTHORITIES
(continued)

Page

People v. Lenart
(2004) 32 Cal.4th 1107 84

People v. Letner and Tobin
(2010) 50 Cal.4th 99 44

People v. Lewis
(2008) 43 Cal.4th 415 .....80, 90

People v. Lewis
(2009) 46 Cal.4th 1255 80

People v. Lindberg
(2008) 45 Cal.4th 1 89

People v. Linton
(2013) 56 Cal.4th 1146 .....76, 78

People v. Lynch
(2010) 50 Cal.4th 693 80

People v. Marks
(2003) 31 Cal.4th 197 .....74, 76

People v. Mayfield
(1993) 5 Cal.4th 142 75

People v. McDaniel
(2008) 159 Cal.App.4th 736 .....41, 42

People v. McDowell
(2012) 54 Cal.4th 395 .....80, 85, 87, 89

People v. McWhorter
(2009) 47 Cal.4th 318 .....58, 60

People v. Mendoza
(2000) 24 Cal.4th 130 51

People v. Montgomery
(1879) 53 Cal. 576 50

TABLE OF AUTHORITIES
(continued)

Page

People v. Morrison
(2004) 34 Cal.4th 698 88

People v. Murtishaw
(2011) 51 Cal.4th 574 89

People v. Nelson
(2008) 43 Cal.4th 1242 .....69, 70, 71, 72

People v. Nelson
(2011) 51 Cal.4th 198 90

People v. Parson
(2008) 44 Cal.4th 332 87

People v. Pearson
(2013) 56 Cal.4th 393 .....76, 77

People v. Pride
(1992) 3 Cal.4th 195 44

People v. Prieto
(2003) 30 Cal.4th 226 84

People v. Prince
(2007) 40 Cal.4th 1179 .....61, 90

People v. Partida
(2005) 37 Cal.4th 428 57

People v. Rangel
(2016) 62 Cal.4th 1192 81

People v. Rich
(1988) 45 Cal.3d 1036 45

People v. Schmeck
(2005) 37 Cal.4th 240 82

People v. Sheldon
(1989) 48 Cal.3d 935 45

TABLE OF AUTHORITIES
(continued)

Page

People v. Simon
(2016) 1 Cal.5th 98 .....74, 75

People v. Slaughter
(2002) 27 Cal.4th 1187 45

People v. Smith
(2005) 35 Cal.4th 334 77

People v. Smith
(2007) 40 Cal.4th 483 81

People v. Stankewitz
(1990) 51 Cal.3d 72 41

People v. Stanley
(2006) 39 Cal.4th 913 84

People v. Staten
(2000) 24 Cal.4th 434 .....49, 50

People v. Stevens
(2009) 47 Cal.4th 625 40

People v. Taylor
(2010) 48 Cal.4th 574 86

People v. Thomas
(2011) 51 Cal.4th 449 .....79, 81

People v. Tuilaepa
(1992) 4 Cal.4th 569 .....44, 45

People v. Verdugo
(2010) 50 Cal.4th 263 .....79, 82

People v. Virgil
(2011) 51 Cal.4th 1210 .....82, 84

People v. Wall
(2017) 3 Cal.5th 1048 41

TABLE OF AUTHORITIES
(continued)

Page

People v. Watson
(1956) 46 Cal.2d 818 .....43, 52, 53, 62

People v. Williams
(1997) 55 Cal.App.4th 648 .....49, 50, 52

People v. Williams
(2015) 61 Cal.4th 1244 86

People v. Winbush
(2017) 2 Cal.5th 402 86

Pully v. Harris
(1984) 465 U.S. 37.....82, 89

Ring v. Arizona
(2002) 536 U.S. 584.....81, 84

Scherling v. Superior Court
(1978) 22 Cal.3d 493 .....63, 69

Tuilaepa v. California,
(1994) 512 U.S. 967.....87

United States v. Marion
(1971) 404 U.S. 307.....71

Wardius v. Oregon
(1973) 412 U.S. 470.....48, 50

Wong Sun v. United States
(1963) 371 U.S. 471.....51

Zant v. Stephens
(1983) 462 U.S. 862.....87

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Evidence Code
§ 352.....58, 60, 73, 75
§ 353.....75
§ 354.....57
§ 520.....83, 84

Florida Statutes
§ 775.082(1).....81

Health and Safety Code
§ 11377 (a).....18

Pen. Code § 12022, subd. (b).....18

Penal Code
§ 187, subd. (a).....18
§ 190.2 subd. (a)(17)(b).....18
§ 190.2 subd. (a)(17)(e).....18
§ 190.2, subd. (a)(17)(f).....18
§ 190.3.....81
§ 190.3 subd. (a).....76, 83, 87, 88
§ 190.4.....81
§ 193, subd. (a).....83
§ 245, subd. (c).....18
§ 273.5.....35
§ 1127c.....49, 50, 51, 52

Vehicle Code
§ 2800.2, subd. (a).....18

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment.....80, 81, 86
Eighth Amendment.....*passim*
Fourteenth Amendment.....86, 89

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

CALCRIM
No. 2.52.....52

CALJIC
No. 2.52.....47, 48, 50
No. 8.84.1.....79
No. 8.88.....79, 85, 86

STATEMENT OF THE CASE

On March 2, 2004, the San Diego County District Attorney filed an information charging appellant Manuel Bracamontes with the 1991 murder of nine-year-old Laura Arroyo (count 1; Pen. Code, § 187, subd. (a)) and alleging the special circumstances that Bracamontes was engaged in the commission and attempted commission of kidnapping (Pen. Code, § 190.2, subd. (a)(17)(b)), oral copulation (Pen. Code, § 190.2, subd. (a)(17)(f)), and performing a lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 190.2, subd. (a)(17)(e)). The information further alleged that Bracamontes personally used a deadly and dangerous weapon—a "pick axe like tool"—to kill Laura. (Pen. Code, § 12022, subd. (b).) For actions taken by Bracamontes during his arrest in 2003, Bracamontes was also charged with assault with a deadly weapon on two peace officers (counts 2 & 4; Pen. Code, § 245, subd. (c)), recklessly attempting to evade a pursuing officer (count 3; Veh. Code, § 2800.2, subd. (a)), and unlawfully possessing methamphetamine (count 5; Health & Saf. Code § 11377(a)). (1 CT 8-10.)

On March 15, 2004, Bracamontes pleaded not guilty and denied the allegations. (10 CT 2009.)

On February 14, 2005, Bracamontes demurred to counts 3 and 5 on grounds the counts had been improperly joined. (5 CT 1116-1125.) The trial court sustained the demurrer and dismissed counts 3 and 5; count 4 was renumbered as count 3 in a second amended information. (10 CT 2034-2035; see 2 CT 310-313.)

Jury selection began on August 5, 2005. (10 CT 2066.) A jury was sworn on August 11, 2005, and testimony began four days later. (10 CT 2074, 2078.) The jury began guilt-phase deliberations on the morning of August 31, 2005. (10 CT 2104.)

At 10:38 a.m. on September 2, 2005, the jury found Bracamontes guilty of murder and found the special circumstance and personal-use-of-a-deadly-weapon allegations to be true. The jury also found Bracamontes guilty of the count 2 assault, but not guilty as to the count 3 assault. (10 CT 2104-2117.)

The penalty phase began on September 14, 2005. (10 CT 2118.) On September 23, 2005, the jury determined the appropriate penalty to be death. (10 CT 2132, 2134.)

On December 14, 2005, after independently determining the penalty was appropriate, the trial court sentenced Bracamontes to death for the special-circumstance murder of Laura Arroyo. (10 CT 2138-2144.)

STATEMENT OF FACTS

I. GUILT PHASE

On the night of June 19, 1991, nine-year-old Laura Arroyo ran downstairs to answer a knock at the front door of her family's home. Laura's mother had heard her daughter say, "Who's there," and came downstairs ten minutes later to discover that Laura was gone. Laura's pajama-clad body was discovered less than four miles away in a business park early the next morning. She had been slain with a pick-axe.

Bracamontes was Laura's neighbor and was considered a suspect during the ensuing police investigation. The investigation stalled, however, when DNA testing failed to reveal any useful evidence. Swabs had been taken from various areas of Laura's body—including her mouth—and smeared onto slides for microscopic review by the county medical examiner. But the smears failed to identify any sperm present on the oral swabs. This apparent absence of sperm—in connection with the fully-clothed nature of Laura's body and lack of injury to her anal and vaginal areas—led the medical examiner to conclude that no sexual assault had

occurred, a conclusion that the police relied upon in determining how to proceed in their investigation.

In 2003, the swabs and other items were freshly examined using different DNA-testing techniques. Bracamontes's sperm was discovered on the oral swabs, as well as on the pink pajama top Laura had been wearing the night she was killed.

The facts and circumstances surrounding Bracamontes's kidnapping, sexual assault, and murder of nine-year-old Laura Arroyo are detailed below.

A. Laura's Home and Neighborhood

In June 1991, Luis and Laura Arroyo (Mr. and Mrs. Arroyo) lived in the Monterey Park condominium complex on Monterey Court in the San Diego County neighborhood of San Ysidro with their three children—Augustine (age 11), Jose (age 10), and Laura (age 9). (25 RT 1975-1976, 1998-1999.) Mr. Arroyo worked as an auto body painter and Mrs. Arroyo as a homemaker. (25 RT 1976.) Laura was finishing third grade at Nicoloff Elementary. (25 RT 1999; see 42 RT 3745, 3769.)

Margarita (Maggie) Porter lived in the same condominium complex with her three children—Daniel, Jessica, and Manuel Jr. (31 RT 2718-2719.) By June, Porter and her children had lived there for five or six months. (31 RT 2717-2718.) Until recently, Bracamontes, who was baby Manuel's father, had lived there too; most neighbors seemed to think he still did. (25 RT 1990, 2008-2009, 2026; 30 RT 2604; 31 RT 2719.) According to Laura's mother and some of the older girls in the complex, Laura regularly played with four-year-old Jessica and Bracamontes was often present when they did. (25 RT 2006-2009; 30 RT 2602; see also 25 RT 1987-1988 [Laura's father saw Jessica a lot because she and Laura played together nearly everyday, including at each other's homes]; 33 RT 3216 [Laura and Jessica were "best friends"].) Bracamontes liked Laura "a

lot," according to Leonor Gomez, and often hugged Laura and patted her on the head. (30 RT 2602-2603.) But Porter, who married Bracamontes less than a month before trial, would later testify that she barely knew Laura and that Bracamontes was "never" around when Jessica played with Laura. (31 RT 2717, 2734-2735.)

B. The Night Laura Was Taken

On June 19, 1991, Laura spent the entire afternoon into the evening playing outside with neighborhood friends after school. (25 RT 2001-2002, 2025.) By sunset, her brothers had gone inside and she was sitting near the bottom of some stairs with 12-year-old Elizabeth Alcarez and 13-year-old Leonor. (25 RT 2002, 2021-2025; 30 RT 2594-95, 2597.) Around 8:30 p.m., Mr. Arroyo returned from work and stopped to give Laura a hug. Laura asked her father if she could play outside a little longer; he said "yes," and continued home. (25 RT 1976-1977; 26 RT 2080; 30 RT 2599.)

During the time the girls were sitting on the stairs, Bracamontes walked back and forth past them several times. (25 RT 2028-2029; 30 RT 2597, 2601-2602; 33 RT 3216.) He seemed to be going between Porter's condominium and his car or a neighbor's balcony. (25 RT 2028-2029; 26 RT 2082; 30 RT 2597-2600.) One of the times, he greeted the girls by saying "Hi," and Laura said, "Hi Manny." (26 RT 2083; 30 RT 2598; 33 RT 3216.) Later, after Mr. Arroyo had gone inside, Bracamontes walked up and told Elizabeth that her mother was looking for her. But when Elizabeth went (with Laura and Leonor) to ask her mother about this, her mother made clear that she was not looking for Elizabeth and let Elizabeth stay outside. (25 RT 2028-2030; 26 RT 2084, 2088; 30 RT 2600-2601.) The girls returned to the stairs until Leonor was called home and Elizabeth walked Laura home. (25 RT 2030-2031; 30 RT 2594-2595.) Elizabeth waited until Laura was inside her condominium with the heavy metal screen door closed and locked, and the main door closed, before returning

home by 9:00 p.m. (25 RT 2031 [Elizabeth knew Laura was home before 9:00 p.m., because Elizabeth was required to be home by that time]; see also 26 RT 2080 [Mrs. Arroyo recalled Laura coming home around 8:50 p.m.]; 26 RT 2075 [Mr. Arroyo finished taking a shower by 9:00 p.m.].)

Inside her apartment, Laura briefly went upstairs to her mother, who was watching television; Laura's father and brothers were taking showers. The doorbell rang moments later and Laura ran downstairs to answer it. (25 RT 2003-2004.) Laura knew not to open the door to strangers. (25 RT 2019-2020.) Mrs. Arroyo heard Laura say "Who is it?" and nothing more. (25 RT 2003-2004.) Mrs. Arroyo went downstairs five to ten minutes later and found both the main door and the security screen door ajar. (25 RT 2004-2005, 2020; 26 RT 2085.) She initially went to the kitchen and started cooking. (25 RT 2004.)

Mrs. Arroyo started to worry when she realized Laura's shoes were sitting by the front door as the kids normally wore their shoes outside. (25 RT 1979, 1981, 2005.) After her husband and two sons came downstairs, Mrs. Arroyo sent one of her sons outside to look for Laura. (25 RT 2005; 26 RT 2085; see 25 RT 2031-2032; 30 RT 2594.) The son returned a few minutes later without Laura and the whole family began searching the complex and knocking on doors. (25 RT 1980, 2005-2006; 26 RT 2085.) By 9:31 p.m., Mr. Arroyo called the police to report that Laura was missing. (25 RT 1980, 2006; 26 RT 2090-2093.)

Bracamontes "always" parked in the cul-de-sac in front of the apartments, while Porter used their assigned carport space behind the buildings for her car. (25 RT 2009-2010; 31 RT 2735-2736.) On this night, witnesses had seen Bracamontes's car parked in the back carport area. (30 RT 2604, 2627; 33 RT 3217, 3142.) At around 9:00 p.m., at least one witness had seen Bracamontes's car leaving the carport area; the

witness could not see who was in the car. (30 RT 2625-2627; see 25 RT 2048; 26 RT 2070, 2082; 33 RT 3142.)

The police pulled up to the complex at around 9:46 p.m. (26 RT 2093.) Officers went door to door in search of Laura, at some point knocking on Porter's door. (25 RT 2045; 31 RT 2730-2731.) Porter would later tell police that after the police knocked on her door, she called Bracamontes at his mother's house around 10:00 p.m. to 10:15 p.m. and asked him to come over and watch the kids so Porter could help search for Laura. (31 RT 2731-2732.) Mrs. Arroyo recalled being outside with Porter and police when Bracamontes arrived and walked directly to Porter's condominium without stopping. (25 RT 2012-2013; see 25 RT 1989-1990.) The search for Laura continued throughout the night. (25 RT 1982.)

C. The Discovery and Autopsy of Laura's Body

Around 6:30 a.m. the next morning—about three and a half miles away—Hilda Topete arrived for her shift at Aqua Alarm on Bay Boulevard in Chula Vista and saw Laura's feet protruding from behind some nearby bushes. (26 RT 2095-2097; 33 RT 3127-3128 [drive from Monterey Pine complex to Aqua Alarm takes about six minutes].) Police were dispatched to the location and found Laura—dressed in pink pajamas—lying dead in a pool of blood. (26 RT 2099-2101, 2117; 28 RT 2381; 30 RT 2638.)

An autopsy conducted by the medical examiner[1] the next day revealed that Laura had been stabbed ten times about the head and torso. (28 RT 2377-2383.) The stab wounds—most of which completely penetrated

[1] Chief Medical Examiner Brian Blackbourne conducted the 1991 autopsy. (28 RT 2379-2380.) Dr. Mark Super, Chief Forensic Pathologist for the Sacramento County Coroner's Office at the time of trial and a deputy medical examiner in 1991 who participated in Laura's autopsy, testified on the results of the autopsy at trial. (28 RT 2377-2378.)

Laura's body and impacted the concrete beneath her—were consistent with a pick axe and would have required a "tremendous amount of force." (26 RT 2128-2130; 27 RT 2259-2264; 28 RT 2384, 2389-2390, 2424; 29 RT 2540.)

The medical examiner concluded that a struggle had occurred after finding Laura had suffered facial abrasions, a broken nose, several chipped teeth, injury to her ear, and bruising on her neck and shoulder area, including three heart-shaped bruises that corresponded to three little heart buttons on Laura's pajama top. (28 RT 2391-2400.) And based on petechial hemorrhages found on Laura's eyelids, the medical examiner concluded that Laura had likely been strangled. (28 RT 2402-2405.) The medical examiner explained that strangulation cases often involve other severe injuries because the perpetrator thinks the victim is dead after strangulation, but discovers otherwise and finds an alternative way—like a knife or bludgeon—to cause death. (28 RT 2405-2406.) An examination of Laura's genitalia revealed no evidence of tearing, bruising, or disruption that might indicate sexual assault. Finally, evidence was collected from Laura's body, including fingernail trimmings, portions of bone, and two swabs each of her neck, anus, mouth, and vagina. (26 RT 2149-2158; 28 RT 2410-2412.) The medical examiner smeared a swab from each area onto slides and viewed the slides through a microscope to look for sperm, but found no sperm on the prepared slides. (28 RT 2410-2412.)

D. The 1991 Investigation Led Police to Suspect that Bracamontes Had Murdered Laura

In the course of their investigation into Laura's death, Chula Vista police detectives explored various leads, including at least two other men besides Bracamontes, whether people involved in the Arroyo's sale of their taco shop might have held a grudge, and witness reports of a brown car with four occupants parked in the cul de sac on the evening Laura was

abducted. (See, e.g., 25 RT 2051-2052, 2073; 26 RT 2086-2089; 30 RT 2625-2626, 2651-2652; 31 RT 2802, 2807.)

On July 12, 1991, detectives interviewed Porter at work. (30 RT 2639; 31 RT 2777-2779, 2810.) Porter said that she had arrived home around 4:00 p.m., gone to bed around 8:00 p.m., and called Bracamontes to come over around 10:00 or 10:15 p.m. after learning Laura was missing. Porter did not mention Bracamontes being at the Monterey Pine complex before Porter called him to come over late at night. (31 RT 2777-2779.) When detectives interviewed Porter for a second time a few days later, Porter added that Bracamontes had come to Porter's condominium for about a half hour around 5:00 p.m. to drop off baby Manuel. (31 RT 2779-2780.)

Detectives interviewed Bracamontes on three separate occasions. During the first interview on July 14, 1991, Bracamontes said he knew Laura had disappeared because Porter had told him when she telephoned him around 9:45 p.m. asking him to come over. He said he had been at work until around 3:30 p.m., then at home until he received Porter's call. (30 RT 2639-2642.) Bracamontes claimed he had not been at the Monterey Pine complex for a week prior to that. (30 RT 2544, 2657.) He also said he did not know Laura well enough to have an opinion of her. (30 RT 2645.)

Bracamontes was interviewed again two days later and added that he had gone to the complex to pick up baby Manuel in the morning and to drop him off in the afternoon. (30 RT 2646, 2661.) During a third interview on August 1, 2018, after being told that witnesses had seen him at the complex on the evening Laura disappeared, Bracamontes said he had been there because he was dropping off baby Manuel. (30 RT 2662, 2667.) At no time during any of the three interviews did Bracamontes admit to being at the complex between 7:00 and 9:00 p.m. on the day of Laura's

disappearance.[2] He also never admitted walking past, or speaking to, Laura or any of the other girls that evening. (30 RT 2672-2673.) At the end of the third interview, Bracamontes provided hair, blood, and saliva samples, but refused to answer any further questions. (30 RT 2671.) No sperm or semen samples were collected from Bracamontes. (26 RT 2205; 30 RT 2673; 31 RT 2861.)

Following the August 1, 1991, interview, detectives obtained search warrants for Bracamontes's homes and car. (26 RT 2162; 30 RT 2651; 31 RT 2788.) The searches revealed blue-green textile fibers inside the car and on a shirt and sweater found in Bracamontes's residence that had the same microscopic characteristics as a single blue-green textile fiber found on Laura's pajama pants. (31 RT 2749-2752, 2784, 2788.) Detectives had sent Laura's clothing to the FBI to have it examined for trace evidence, but the protocol used at the time did not reveal further evidence beyond the textile fiber. (29 RT 2487; 31 RT 2782-2785; 34 RT 3229-3246; see 29 RT 2486-2489 [DNA testing was in its infancy in the early 1990s, and standard lab practices reflected this].) And because the medical examiner had found no sperm on his prepared slide, the detectives proceeded on the theory that no sexual assault had taken place, which meant the various swabs taken from Laura's neck and body cavities were not examined for further evidence. (26 RT 2205; 31 RT 2840, 2848-2849.) Detectives were thus unsuccessful in finding physical evidence beyond the blue-green fiber at the time and the investigation stalled. (31 RT 2794-2798; see 26 RT 2161-2165; 30 RT 2573-2576, 2581, 2584-2590; 31 RT 2781-2789, 2793-2794; 33 RT 3172-3185 [further efforts made in 1991, and again in 1999, to discover evidence of Laura's killer].)

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[2] During a fourth interview a year later, Bracamontes continued to deny being at the complex in the hours just prior to Laura's disappearance. (30 RT 2678-2679; 8 CT 1721-1723.)

E. New DNA Testing in 2003 Reveals Bracamontes's Sperm on Laura's Pajama Top and Mouth Swabs

Around the year 2000, the San Diego Police Department (SDPD) received a grant to analyze unsolved sexual assault cases. After clearing out its own backlog of 550 sexual assault kits, the department used the remaining money to analyze the evidence in similar cases for other departments. (28 RT 2286; 31 RT 2835-2836.) Accordingly, the evidence in this case was reevaluated in 2003. (32 RT 2960-2961.) Supervising Criminalist Patrick O'Donnell recommended first retesting the cavity swabs and fingernail clippings taken from Laura during the autopsy given advancements in DNA testing and his experience that the presence of sperm was sometimes missed by microscopic testing alone. (31 RT 2833-2835, 2850; 32 RT 2961; see 31 RT 2848-2850 [reasonable for investigators to rely on medical examiner's findings in 1991, but later learned not to rely on those findings alone as better testing methods were developed].)

On October 14, 2003, SDPD Criminalist Ian Fitch analyzed the neck and cavity swabs, as well as the fingernail clippings. He found sperm on the neck and oral swabs, as well as on some of the fingernail clippings, and successfully generated a DNA profile. (28 RT 2285-2287, 2292-2294, 2300-2301; 32 RT 2925-2926.) Fitch utilized a detergent-based extraction method that was not in use in 1991, which enabled him to detect sperm on retesting. (28 RT 2925-2926; 31 RT 2848, 2851.) Fitch conservatively estimated that the neck, oral, and fingernail swabs contained a total of 31,760 sperm. (36 RT 3389-3393.) A week later, Fitch received hair and blood reference samples for Bracamontes and for Benny Silva, another individual who had been investigated for Laura's murder in 1991. (28 RT 2301-2302, 2351-2352; 32 RT 2963, 2973.) Fitch determined that Bracamontes was "very likely" the source of the sperm on the swabs and fingernail clippings; the probability that a person chosen at random would

possess the DNA profile generated by the samples was 1 in at least 2.7 trillion. (28 RT 2307-2314, 2318-2320.) Fitch's findings were independently verified through retesting by a private laboratory.[3] (28 RT 2323-2324, 2328, 2358-2369; 32 RT 2913.)

In February 2004, Shelley Webster, a criminalist at the San Diego County Sheriff's crime laboratory, reexamined Laura's clothing using a blue light and observed what appeared to be semen stains on several sections of Laura's pajama top—including the neck, shoulder, and mid-chest areas. (28 RT 2428-2429.) By cutting those sections of the garment, placing them in a test tube with water, and sonicating them for a half hour, Webster was able to release sperm cells and develop a full-DNA profile for the mid-chest portion, and a partial-DNA profile for the shoulder portion; the neck area contained insufficient DNA to develop a profile. (28 RT 2436-2440, 2446.) Webster compared her profiles to a reference sample from Bracamontes and found that Bracamontes's DNA matched both the sperm and non-sperm fractions of the full-DNA profile, and was consistent with the partial-DNA profile. (28 RT 2442-2444, 2464-2465.) She estimated the likelihood of someone chosen at random matching the full-DNA profile to be one in 30 quadrillion. (29 RT 2465-2466.)

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[3] Incidentally, the original slides prepared by Dr. Blackbourne were reexamined by his successor at the medical examiner's office in 2003 and still showed no sperm. (32 RT 2930.) He had previously seen cases where sperm cells did not appear on a smear, but had been present on the swab. (32 RT 3932-2933.) An analyst at the San Diego County Sheriff's lab, who also viewed the slides and observed no sperm, explained this outcome by testifying that sperm cells are "sticky" and do not always transfer to a slide through the simple smearing process utilized by medical personnel. (28 RT 2430-2432; see 31 RT 2848 [O'Donnell explaining that sperm adheres tightly to swab]; 32 RT 2925-2926 [Fitch had to chemically purify the sperm cells to be able to see them].)

F. Bracamontes Flees—Twice—When Police Attempt to Arrest Him

On October 24, 2003, after Fitch discovered Bracamontes's sperm on Laura's oral swabs, police obtained an arrest warrant for Bracamontes. (32 RT 2963-2964, 2981.) Around 6:00 p.m., two investigators for the district attorney, Robert Marquez and Michael Howard, went to Maggie Porter's home attempting to obtain a current address for Bracamontes. (32 RT 2983, 3015-3016.) Marquez recognized a boy "about 11 or 12 years old" standing near the front door as Bracamontes's son, Manuel Jr. (32 RT 2984.) Marquez identified himself to the boy, who was actually 13 years old, and asked to speak to Porter. (32 RT 2984-2985, 3016; 36 RT 3399-3400; see 34 RT 3271; 8 CT 1735-1736 [transcript of interaction between Marquez and Manuel Jr.].) Manuel Jr. briefly went inside the house before returning and telling the investigators that his mother was not home and that his father would soon arrive to pick him up. (32 RT 2985, 3016-3017.) Marquez thanked the boy and the investigators walked back to their car. (32 RT 2985-2986, 3017.)

Moments later, Bracamontes rounded the corner in his Ford Explorer and stopped in front of Porter's home. (32 RT 2986, 3018.) Marquez walked up to the car, displayed his badge and gun to Bracamontes, and identified himself by name and title. (32 RT 2986-2987.) Howard drew his gun and opened the door to the passenger side of the vehicle. Manuel Jr. walked up and Howard used his free hand to push him back, telling him he was not to get into the vehicle. (32 RT 2987.) The boy began shouting obscenities at the investigators. (32 RT 2987, 3019; 34 RT 3279.) Howard told Bracamontes he was under arrest for murder. (32 RT 2988, 3020.) Bracamontes looked directly at Howard, removed his hands from the steering wheel for a moment, then grabbed it again and sped off, leaving Manuel Jr. standing in the street. (32 RT 2988, 3020; 34 RT 3283; see 33

RT 3164, 3169 [witness saw SUV driving "really fast" down his street and thought he was going to be run over].) Howard tried, but failed, to stop the Explorer by firing two shots at the tires. (32 RT 2989, 3021.)

Around 2:00 a.m. the next morning, an officer spotted Bracamontes's Explorer parked behind the Bay Cities Motel in Chula Vista. (32 RT 3026-3030.) Police later affixed a GPS unit to the vehicle and were alerted around 10:30 a.m. when it left the motel. (32 RT 3037-3040.) Chula Vista Police Officers Michele Evans and Joseph Picone were called to the area of Palm Avenue and Interstate 5 (I-5), after the Explorer was seen near there. (33 RT 3063-3065, 3100-3101.) Driving separate marked patrol cars, Officers Evans and Picone located the Explorer stopped in an alley and positioned their patrol cars to block the alley. (33 RT 3067-3069, 3102-3103.) As the officers approached the Explorer on foot, they saw the brake lights illuminate and heard the engine start. (33 RT 3070, 3104.) The Explorer made a U-turn and the officers saw Bracamontes was the driver. (33 RT 3070-3071, 3104-3105.) The officers drew their guns and repeatedly ordered Bracamontes to stop. Bracamontes looked directly at the officers, and initially removed his hands from the steering wheel, before accelerating past them and ultimately driving over a curb to get out of the alley. (33 RT 3072, 3095-3096, 3099, 3105-3106; see 34 RT 3253-3257 [an acquaintance of Bracamontes described seeing the interaction between Bracamontes and the officers].)

Officers Evans and Picone returned to their patrol cars and pursued Bracamontes. (33 RT 3073, 3107.) Picone followed Bracamontes onto I-5 to the next exit, where Bracamontes lost control on the freeway off ramp, spun out, and drove back toward Picone. Picone was able to turn into a dirt area to avoid colliding with the Explorer, but Evans had just exited the freeway and was struck by Explorer before it rolled several times and came

to a stop. (33 RT 3074-3075, 3108-3110.) Bracamontes was pulled from his vehicle and arrested. (33 RT 3112.)

G. Defense

About 11 months after Laura's murder, Chula Vista police reinterviewed Laura's friends and they all said they thought "Jessica's dad" seemed nice. (33 RT 3208-3209.) In 1996, Susan Rodriguez, an investigator in the crimes of violence unit of the Chula Vista Police Department, was assigned to review this case. (33 RT 3173-3176.) Rodriguez reexamined Bracamontes's black Jetta, which he had sold in 1992, and again found no blood or other physical evidence. (33 RT 3177-3179.) She also recontacted a psychic who had been consulted and rechecked latent fingerprints that had been taken from the front door of the Arroyo residence during the initial investigation. Neither effort produced further evidence. (33 RT 3180.) Rodriguez did not conduct further testing of Laura's clothing, fingernail clippings, or cavity swabs as the medical examiner had concluded that no sexual assault had taken place and she felt she had no reason to doubt this conclusion or the DNA results. (33 RT 3181-3185.)

Several witnesses testified about the evening Bracamontes sped off after Marquez and Howard tried to arrest him. The witnesses generally described seeing Bracamontes speeding down the street toward a school in his SUV—nearly hitting one witness—and hearing the gunshots fired by Howard. (33 RT 3162-3169, 3187-3189, 3192, 3193-3197, 3205-3206.) The owner of the Bay Cities Motel testified that Bracamontes used his true name and other identifying information when he registered at the motel later that night. (33 RT 3156-3161.)

Bracamontes's son, Manuel Jr., was 14 years old at the time of trial. (34 RT 3271.) He testified that when Marquez and Howard walked up as he was coming out his front door, they identified themselves by name only.

(34 RT 3273.) He also said the investigators refused to tell Bracamontes why he was under arrest and that when Bracamontes sped off, both Marquez and Howard fired at the SUV. (34 RT 3278-3279.)

H. Prosecution's Rebuttal

An audiotape of the encounter between the District Attorney investigators and Manuel Jr. made clear that Marquez had identified himself as a DA Investigator when he approached the boy. (36 RT 3399-3400.) Marquez testified that he also displayed his badge while identifying himself. (36 RT 3403.)

II. PENALTY PHASE

A. Prosecution's Case in Aggravation

1. Impact of Laura's murder on her family and the community

Laura's third grade teacher, Ms. Peterson, testified that Laura was a friendly, bright-eyed girl who enjoyed school and stood out from her class; Laura was "best friends with everybody," the first to be chosen for team sports on the playground, and always willing to show the new students around campus. (42 RT 3768-3773.) Ms. Peterson confessed that Laura was her favorite student that year. (42 RT 3772-3773.)

Ms. Peterson "vividly" recalled the day Laura's body was found. (42 RT 3773-3774.) She had arrived at school to find the parking lot unusually busy. Laura's father was handing out flyers and asking if anyone had seen Laura and children kept running up to tell her that Laura was missing. (42 RT 3774.) Class was supposed to begin at 8:00 a.m., but everyone was still outside and concerned parents remained on campus. (42 RT 3775.) When Ms. Peterson took her students to class, some of them were crying and afraid. Ms. Peterson cried herself when the principal told her a short time later that Laura's body had been found. She recalled her students being

unable to do anything that day; they kept crying and asking if Laura had suffered. (42 RT 3776-3777.)

Laura's death affected the community. In the remaining days of the school year, children no longer walked home from school together and were instead picked up by their parents. (42 RT 3778.) For the funeral, the church was packed and everyone was crying. Ms. Peterson recalled all of the children in attendance, the tiny casket with the teddy bear that held Laura, and the tiny hole in which she was buried. (42 RT 3778-3779.)

Laura's death affected Ms. Peterson personally. She testified that she had called in sick the day before learning of Laura's death just because she wanted to take a day off, not because she was sick, and still felt a "sense of guilt because the last day of [Laura's] life I played hooky and I stayed home." Laura's death professionally affected Ms. Peterson as she could not bring herself to teach third grade again and requested a different grade level and classroom. (42 RT 3779-3780.)

The jury was shown a two-and-a-half-minute video of Laura being interviewed by Ms. Peterson as part of a series of silly interviews the children in the class elected to film during post-testing free time a few weeks before Laura's death. (42 RT 3781-3782; see 40 RT 3595-3596.) Twelve photographs depicting Laura as an infant, with family, and during her baptism and birthdays were also shown to the jury. (42 RT 3759-3762; see 40 RT 3614-3615 [trial court excluded specific photos it deemed prejudicial and limited number of photos to 12].)

Laura's parents and brothers, Jose and Agustin, described Laura as a kind, joyful girl, who loved biking and swimming. (42 RT 3700, 3753-3754, 3759.) Laura was her mother's constant companion and her father's first hug each night after work. (42 RT 3765-3766.) She played often with her brothers and was "friends with everybody," regardless of age. (42 RT 3701, 3746, 3754.) Laura dreamed of being a cheerleader in high school

and wanted to be a teacher when she grew up. She liked to pretend she was a teacher by playing school with the little boys and girls in the neighborhood. (42 RT 3701-3702, 3754.)

Laura's family recalled the pain of abruptly losing their youngest member. (See 42 RT 3710.) Plans for a family trip to Disneyland were replaced by funeral arrangements. (42 RT 3701, 3706.) Laura was buried in a white casket in the dress she was supposed to wear for her first communion. (42 RT 3708.) Agustin was upset that he never got to see his sister again, even at the funeral due to the closed casket. He said that he was old enough to realize that whatever happened to her must have been "something horrifying that nobody could see." (42 RT 3749-3750.) Jose said the day of the funeral was the saddest day of his life. (42 RT 3755.)

Mrs. Arroyo recalled that Jose and Agustin were scared and didn't want to go anywhere after Laura's murder. (42 RT 3765.) Mr. Arroyo spent evenings after work crying in Laura's room, which remained unchanged for six years after her death. (42 RT 3710, 3751.) Jose had a hard time going to his own room each night because it was right next to Laura's and Agustin recalled how empty the house felt without her and how he wished it was all a "big nightmare, that she would come out and hug me." (42 RT 3751, 3757.) Everywhere the family went, there was always a person missing. (42 RT 3752; see 42 RT 3711, 3751.) Though the trial took place more than 14 years after Laura's murder, Mr. and Mrs. Arroyo still visited Laura's grave every Sunday and on her birthday. (42 RT 3766.)

2. Prior conviction for traumatically injuring Maggie Porter

Sometime after 10:00 p.m. on June 8, 1996, Maggie Porter's son called his father—Porter's ex-husband, Daniel—and reported that Porter and Bracamontes were arguing. (42 RT 3712-3713.) Daniel went to Porter's home, but Bracamontes answered the door and told him to leave.

When Daniel insisted on checking on the children's welfare, Bracamontes pushed him and the two "tussled." (42 RT 3714-3715.) Police were called and Porter stated that Bracamontes had become very angry when she told him she wanted to end their relationship. Porter said she asked Bracamontes to leave, but he refused and pushed her down onto the couch. (42 RT 3737.) When Porter tried to get away, Bracamontes held her down by the arm and neck. When Porter started to cry and scream, Bracamontes put his hand over her mouth. (42 RT 3738.) Photos taken that night depicted abrasions on Porter's neck and chest. (42 RT 3728, 3740.)

At trial, Porter blamed the argument on herself. She claimed she was a "jealous person" who had just started hitting the six-foot, three-inch Bracamontes for no reason. (42 RT 3724-3725.) She claimed she continued to hit him incessantly, but he merely asked her to stop and tell her what was bothering her. (42 RT 2725-3727.) She also said that Bracamontes neither covered her mouth nor pushed her onto the couch, and that she "sat down" on the couch of her own volition. (42 RT 3729.)

Based on this incident, the parties stipulated that on July 17, 1996, Bracamontes pleaded guilty to violating Penal Code section 273.5 by injuring Margarita Porter, causing a traumatic condition. (34 RT 3976-3978.)

B. Defense's Case in Mitigation

In mitigation, Bracamontes presented the testimony of seventeen immediate and extended family members, including Porter's two children, as well as two friends, an employer, and a childhood baseball coach. (42 RT 3797-3816; 43 RT 3830-3975.) Family members generally expressed their love for Bracamontes, thought that he was "innocent," and did not want him executed. (42 RT 3799, 3816; 43 RT 3849-3850, 3854, 3857, 3871-3872, 3975.) Several younger family members testified that Bracamontes had never done or said anything inappropriate to them, and

that he always treated his parents and five sisters with love and respect. (42 RT 3798; 43 RT 3860, 3871, 3892; 44 RT 3917-3918, 3924-3925, 3931, 3937, 3968-3969, 3974-3975.) Daniel Porter testified that he did not believe Bracamontes was capable of hurting a child and that he had asked the prosecutor to show leniency for the sake of Manuel Jr. (42 RT 3802-3803.) On cross-examination, he admitted being unaware of the circumstances of Laura's murder, including that Bracamontes's DNA had been found on her body, and said his opinion might change if he "knew for sure that was what happened." (42 RT 3804.)

By all accounts, Bracamontes had a "normal" childhood. (See 42 RT 3812.) Bracamontes was raised with his five sisters in a stable home by loving, employed parents. (42 RT 3812-3813; 43 RT 3853.) He loved baseball, got along well with his sisters, and cared for his pets. (43 RT 3856-3857; 44 RT 3934, 3954-55.) He was especially close to his sister, Teresa; the two were one year apart and did "just about everything" together. (44 RT 3954-3955.) He played sports and generally did "fine" in school; though he dropped out of high school at the end of his sophomore year, he later obtained his GED. (42 RT 4814-3815; 44 RT 3956.)

Several family members recalled times Bracamontes had been helpful as an adult. For example, after his father was hit by a car and suffered severe injuries, Bracamontes visited him during the three months he spent in the hospital and, like all of the children, was a source of comfort to his family. (42 RT 3815-3816; 43 RT 3847-3849, 3862; 44 RT 3965.) After his brother-in-law was shot and killed during a dispute with a neighbor, Bracamontes was "there" for his widowed sister, Teresa, and lived with Teresa and her two children for a year or so afterward in 1993 or 1994. (43 RT 3835-3836, 3874; 44 RT 3966-3968.) And Jessica Porter, who was 19 years old at trial, said Bracamontes was like a father to her; she recalled

him making soup for her and accompanying her family on some trips when she was "little." (44 RT 3938-3942, 3950-3953.)

Maggie Porter testified about greeting cards Bracamontes had sent her for various holidays over the years and said Bracamontes had provided financial support for their son. (42 RT 3806-39808.) Porter had another boyfriend when Bracamontes was arrested in the fall of 2003, but terminated that relationship and began visiting Bracamontes in jail. She realized she still loved Bracamontes and married him just before trial. (42 RT 3808-3809.)

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REQUIRING BRACAMONTES TO WEAR ANKLE RESTRAINTS AND ANY ERROR WAS HARMLESS AS THE RECORD SHOWS, AT MOST, A GLIMPSE OF THE RESTRAINTS BY A FEW PROSPECTIVE JURORS

Bracamontes contends that his state and federal rights to a fair trial and the presumption of innocence were violated because he was required to wear ankle restraints during trial. (AOB 67-88.) The trial court acted within its broad discretion to maintain courtroom security given the nature of the crime, Bracamontes's two prior attempts to flee from police, and the penalty Bracamontes faced upon conviction. Any error was harmless as Bracamontes's claim that the wire to his ankle restraints may have been visible to one or more prospective jurors is entirely speculative. Even had the ankle restraints become visible to one or more prospective jurors, no prejudice ensued as this Court has consistently found jurors' brief observations of a defendant's shackles to be nonprejudicial.

A. Background

Bracamontes filed a pretrial motion to appear at trial without restraints. (2 CT 381.) The accompanying memorandum of points and

authorities stated that this Court's precedent prohibits placing a defendant in physical restraints in the jury's presence without a showing of a "manifest need for such restraints." (2 CT 383-384 [citing *People v. Cox* (1991) 53 Cal.3d 618, 651; *People v. Duran* (1976) 16 Cal.3d 282, 290-292].) The memorandum reiterated this Court's definition of a manifest need as requiring a showing of "unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained. . . .'" (2 CT 384.) Bracamontes argued that no manifest need for restraints was present because he had never been unruly or disruptive in court, and posed no threat to courtroom security. (*Id.* at 385.) The prosecution responded by stating that Bracamontes had correctly listed the legal standard for the use of restraints and submitting the issue to the trial court. (4 CT 852.)

At the hearing on the motion, the trial court stated that it tentatively intended to deny Bracamontes's motion with the explanation that Bracamontes would appear at trial as he had during pretrial appearances—with ankle cuffs tethered to a bolt in the floor, giving him the freedom to stand, and without hand shackles or a waist chain—to "prevent[] [him] from leaving counsel table, which he isn't allowed to do anyway." (7 RT 667.) The court said it would "make every effort to ensure the [jury] panel is not aware that he is chained to the floor" and had successfully used the procedure in past cases. (7 RT 667-668.) When Bracamontes objected on grounds there was no manifest need for any restraints, the court made clear it had considered that Bracamontes had twice fled from law enforcement authorities prior to being arrested and was facing the death penalty at trial. (7 RT 668-669.) Acknowledging that Bracamontes had thus far been "very respectful in court," the court concluded that it would continue the pretrial restraint policy that had been in effect. (7 RT 669-671.) The court added

that Bracamontes would not be shackled during his testimony, should he choose to take the stand. (7 RT 671.)

On August 5, 2005, about 185 prospective jurors were sworn and completed lengthy jury questionnaires. The court also considered juror hardship applications. (20 RT 1511, 1522-1523.) Voir dire of the first 50 prospective jurors commenced on August 10, 2005. (20 RT 1525; 22 RT 1551-1698.) The next day, while waiting for Bracamontes to be transported to court, defense counsel told the court that during the previous day's voir dire it had "appeared" that the "wire" for Bracamontes's ankle cuffs had been visible to some of the prospective jurors seated in the jury box. Counsel said, "I think [it] is a violation of his constitutional rights for the jurors to be aware that he was appearing shackled in front of the jurors in a death penalty [case]." (23 RT 1700.) The court said it would "make every effort to make sure [the prospective jurors] can't see it." Counsel responded that she was "afraid that they already ha[d] seen it." The court said it was "not going to get rid of the [jury] panel," but asked the bailiff to turn the table. (*Id.*) Because there were "more people at the counsel table than expected," however, the bailiff said the table could not be turned. (23 RT 1700-1701.) The court left the table in place and defense counsel moved on to another topic. (23 RT 1701; 10 CT 2072.)

It appears that Bracamontes wore ankle restraints throughout trial—with no further suggestion in the record that they might be visible to the jury—and that the issue of restraints was not raised again until the parties were notified that the jury had reached a verdict in the penalty phase. At that time, Bracamontes appeared in court with his wrists in shackles, in addition to being chained to the floor, and defense counsel requested that the court continue the same procedure it had employed throughout trial—chaining Bracamontes to the floor and keeping his hands free. The court stated that it had received information from jail deputies indicating that the

wrist restraints were appropriate and declined to remove them. (46 RT 4137; 10 CT 2132.)

B. The Trial Court Acted Within Its Discretion in Determining that Physical Restraints Were Appropriate at Trial

A trial court has broad power to maintain courtroom security, and decisions regarding security measures in the courtroom are generally reviewed for abuse of discretion. (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) Some security measures, such as visible shackles on a defendant, carry a high risk of infringing upon a criminal defendant's right to a fair trial by, for example, prejudicing the minds of the jurors, interfering with the accused's ability to communicate with counsel, impairing the accused's decision to take the stand, or intruding on the dignity of the legal system. (*Deck v. Missouri* (2005) 544 U.S. 622, 630 [125 S.Ct. 2007, 161 L.Ed.2d 953].) The court's discretion to impose physical restraints is therefore constrained by constitutional principles. The federal Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Id.* at p. 629.) And under California law, "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) The decision to use physical restraints must be made by the trial court on a case-by-case basis. (*Id.* at p. 293 [explaining that trial court "cannot adopt a general policy of imposing physical restraints on prison inmates"].)

In deciding whether restraints are justified, the trial court may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." (*Deck v.*

Missouri, 544 U.S. at p. 629.) This Court has described these factors as including "evidence establishing that a defendant poses a safety risk, a flight risk, or is likely to disrupt the proceedings or otherwise engage in nonconforming behavior." (*People v. Gamache* (2010) 48 Cal.4th 347, 367.) The decision to shackle a defendant "cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (*People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 12; see *People v. Wall* (2017) 3 Cal.5th 1048, 1069 [describing abuse-of-discretion standard as requiring a showing that the trial court acted in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice].)

Here, the trial court was aware of the rule requiring it to make a finding of manifest need for shackling Bracamontes at trial. (See 2 CT 384-385.) It considered the parties' briefs and held a hearing on the matter. (2 CT 383-385; 4 CT 852; 7 RT 667-671.) In determining that shackling was necessary, the court implicitly found Bracamontes to be a flight risk by relying both on the penalty he was facing and on facts showing he had twice fled from law enforcement authorities trying to arrest him for Laura's murder. (7 RT 668-669.) The court also indicated an intent to use the least obtrusive restraints available to establish courtroom security by explaining that the ankle cuffs would simply prevent Bracamontes from leaving counsel table, but leave his waist and hands free, giving him the freedom to stand. (7 RT 667; see *People v. Stankewitz* (1990) 51 Cal.3d 72, 97 [noting that leg shackles were "least visible or obtrusive restraints available"]. And the court assured Bracamontes that the cuffs would be removed should he choose to testify. (7 RT 671.) Under these circumstances, the court acted within its discretion in ordering the use of ankle cuffs during trial. (Contrast *People v. Duran, supra,* 16 Cal.3d at p. 293 [concluding that "[n]o reasons for shackling the defendant [had] appear[ed] on the record"]; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 745 [finding an abuse of

discretion where "the trial court did not initiate any procedure to determine whether shackling was necessary or make any findings on the record to justify shackling"].)

Bracamontes discounts the trial court's reliance on Bracamontes's two prior instances of fleeing from law enforcement and asserts that the use of restraints was based on "a general policy of shackling defendants in murder cases." (AOB 75.) In support of his claim, he cites to a comment by the trial court during the hearing that it had previously "successfully" employed ankle cuffs in "numerous . . . murder cases." (7 RT 668.) The court made that comment, however, after noting that its imposition of restraints in this case had *not* been prompted by an unrelated recent courtroom murder in Atlanta. (*Id.*) In other words, contrary to Bracamontes's claim, the court's comment was meant to dispel any implication that the decision to use restraints in this case was based on anything other than the particular facts of this case.

Bracamontes also seems to contend that the trial court's assessment must be restricted to a consideration of Bracamontes's courtroom behavior. (AOB 73-74.) The trial court's discretion to order the use of restraints, however, is also appropriate when there is evidence of "'other nonconforming conduct.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 988, quoting *People v. Duran, supra,* 16 Cal.3d at p. 291; see also *Loux v. U.S.* (9th Cir. 1968) 389 F.2d 911, 919-920 [conduct supporting restraints need not take place in courtroom].) Facts and circumstances showing Bracamontes had twice fled from law enforcement authorities as they attempted to arrest him—first driving off at high speed leaving his 13-year-old son in the middle of the street and second leading authorities on a car chase that resulted in both his car and a patrol car careening off a highway ramp—constituted nonconforming conduct indicating he was a flight risk. And the flight instances took place before Bracamontes was facing capital

punishment. So while the court was not permitted to consider penalty alone to justify the use of restraints (*People v. Hawkins* (1995) 10 Cal.4th 920, 944), it was reasonable to conclude Bracamontes posed a flight risk after being charged if released from his ankle cuffs.

C. The Trial Court Had No Sua Sponte Duty to Instruct the Jury to Disregard the Restraints

Bracamontes contends the trial court had the duty to instruct the jury sua sponte to disregard the restraints. (AOB 77-78.) Not so. Such a duty arises only when visible restraints are imposed. (*People v. Duran, supra,* 16 Cal.4th at pp. 291-292.) However, when restraints are concealed from the jury's view, this instruction should not be given unless requested by a defendant as it might invite initial attention to the restraints and thus create prejudice that would otherwise be avoided. (*Id.* at p. 292.) Here, visible restraints were not imposed; rather, the court clearly stated its intention to use the least obtrusive restraints and ensure the jury would be unaware of them. (7 RT 667-668.) And Bracamontes did not request an instruction to disregard the restraints, most likely because his claim that the ankle restraints were briefly visible to the jury is speculative and unsupported by the record.

D. Any Error Was Harmless

Any error in ordering Bracamontes shackled was harmless. It is unclear which harmless error standard—*Chapman*[4] or *Watson*[5]—applies when a court abuses its discretion in ordering a defendant to be shackled. (See, e.g., *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1827-1830.) What is clear is that this Court has consistently found any unjustified shackling harmless where the restraints were not visible to the jurors. (See

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[4] *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

[5] *People v. Watson* (1956) 46 Cal.2d 818, 836.

People v. Foster (2010) 50 Cal.4th 1301, 1322; *People v. Ervine* (2009) 47 Cal.4th 745, 773-774; *People v. Cleveland* (2004) 32 Cal.4th 704, 740; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584.) As this Court has previously explained, the guidelines imposed by *People v. Duran, supra,* 16 Cal.3d 282, 290, are largely intended to avoid prejudice in the minds of jurors "where a defendant appears or testifies in obvious restraints, or where the restraints deter him from taking the stand in his own behalf." (*Tuilaepa, supra,* at 583.)

Here, Bracamontes's claim of prejudice is predicated on an assumption that his ankle restraints were visible to one or more prospective jurors during one afternoon of voir dire. But his assumption is purely speculative as nothing in the record clearly establishes that any juror saw Bracamontes's ankle restraints. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 155 [explaining that "we do not presume the prospective jurors viewed the restraint, and there is no evidence in the record demonstrating they did observe it"]; *People v. Pride* (1992) 3 Cal.4th 195, 233 [declining to assume jury saw shackles where trial court had stated it would have been virtually impossible for the jury to have seen waist chain].) Defense counsel mentioned to the court during voir dire that it had "appeared" that the "wire" for the ankle restraints had been visible to one or more unspecified prospective jurors seated in the jury box a day earlier. (23 RT 1700.) Counsel requested no particular remedy and the court made no finding that the wire had been visible to any juror. In an effort to address counsel's concern, however, the court tried to turn counsel's table, but found the table could not be repositioned due to the number of people sitting around it. (23 RT 1700-1701.) The issue of restraints was never mentioned again until the end of the penalty phase when counsel requested that newly placed wrist restraints be removed. Nothing about the ankle restraints was mentioned. (46 RT 4137; 10 CT 2132.) Because the record

fails to establish that any juror actually viewed Bracamontes in shackles, he only speculates that they did. But speculation is insufficient to establish his claim of prejudicial error. (See *People v. Tuilaepa, supra,* 4 Cal.4th at p. 584 [to establish a claim of prejudicial error, appellant is required to demonstrate that jurors actually viewed him in shackles].)

Even if the ankle restraints had been glimpsed during a portion of voir dire by one or more prospective jurors who ultimately sat on the jury, there was no prejudice. "[A] jury's brief observations of physical restraints generally have been found nonprejudicial." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213; see *People v. Ervine, supra,* 47 Cal.4th at p. 774 [finding glimpse of restraints by prospective jurors during voir dire to be harmless beyond a reasonable doubt]; *People v. Tuilaepa, supra,* 4 Cal.4th at pp. 584-585; *People v. Duran, supra,* 16 Cal.3d at p. 287, fn. 2.) As this Court explained in *Tuilaepa*:

> Prejudicial error does not occur simply because the defendant "was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen." (*People v. Duran, supra,* 16 Cal.3d 282, 287, fn. 2.) The judgment was reversed in *Duran* based on multiple errors in a close case, including improper exclusion of evidence, restrictive cross-examination, and the heavy shackling of a defendant who took the stand and whose credibility was presumably damaged as a result. (*Id*. at pp. 295-296.) In subsequent cases, however, visible shackling did not warrant reversal of the judgment. (*People v. Sheldon* (1989) 48 Cal.3d 935, 946; *People v. Rich* (1988) 45 Cal.3d 1036, 1084-1085.)

(*Id.* at p. 584.)

Here, if a juror saw the restraints, it had to have been for the briefest moment, and most likely only prior to the jury being impaneled. Counsel

brought up the issue of visibility just once, chose not to ask particular jurors whether they had seen the shackles, and chose not to request a jury instruction to disregard the shackles. This indicates not only that the claim of visibility was speculative, but that any visibility was likely fleeting and not repeated. Moreover, the jury would not have been surprised that a person on trial for a brutal murder was minimally restrained. The shackling could not have been prejudicial.

Citing *Deck v. Missouri, supra,* 544 U.S. 622, in which this Court held that the federal Constitution forbids the use of visible shackles during the penalty phase as it does during the guilt phase, Bracamontes separately contends that he was prejudiced during the penalty phase by the use of ankle restraints. (AOB 85-88.) Any glimpse of Bracamontes's ankle restraints by one or more prospective jurors at voir dire—the only time the record indicates any juror possibly saw the restraints—was not prejudicial during the penalty phase for the same reasons discussed above. And, unlike the defendant in *Deck*, who was shackled with leg irons, handcuffs, and a belly chain that were indisputably visible throughout the penalty trial, Bracamontes wore minimally obtrusive ankle cuffs that may have briefly become visible long before the penalty phase began. (See *Deck v. Missouri, supra,* 544 U.S. at pp. 625, 634.)

Finally, while shackles "have the potential to impair an accused's ability to communicate with counsel or participate in the defense," the erroneous imposition of those restraints may be harmless where the record "does not reveal that any such impairment occurred." (*People v. Ervine, supra,* 47 Cal.4th at pp. 773-774; see *People v. Combs* (2004) 34 Cal.4th 821, 839 [noting no evidence or claim that defendant's leg restraints influenced him not to testify, or "distracted him or affected his demeanor before the jury"].) Here, the record contains no suggestion—and Bracamontes does not claim—that wearing ankle restraints inhibited

Bracamontes's ability to confer with counsel and participate in his defense. Nor could the restraints have influenced his decision to testify as the trial court made clear the restraints would be removed in the event Bracamontes chose to testify. (7 RT 671.)

In short, the trial court properly exercised its discretion to impose ankle restraints and even if it was error to restrain Bracamontes, it was harmless. The claim that the restraints were visible is speculative and Bracamontes makes no claim the restraints otherwise affected his constitutional rights. At most, a prospective juror—who may or may not have ended up on the jury—glimpsed the restraints during voir dire, a scenario this Court has consistently found to be nonprejudicial.

II. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON ABSENCE OF FLIGHT

In 2003, Bracamontes twice fled from law enforcement authorities trying to arrest him for Laura's murder, so the jury was instructed under a modified version of standard flight instruction CALJIC No. 2.52 [flight after crime].[6] He concedes that this instruction was proper. (AOB 96.)

He contends that the trial court prejudicially erred in rejecting his proposed jury instruction[7] regarding his absence of flight after Laura's

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[6] The jury was instructed as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime and has knowledge of the accusation, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." (8 CT 1756.)

[7] Defense counsel requested the following instruction be given: "The absence of flight of a person immediately after the commission of a crime, or after he is accused of a crime, although the person had the opportunity to take flight, is a fact which may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The absence of flight may

murder in 1991 and before his 2003 arrest. Citing *Wardius v. Oregon* (1973) 412 U.S. 470, which held that due process requires reciprocal discovery rights for the prosecution and the defense, he argues that the trial court's failure to give his proposed instruction denied him "balanced" jury instructions regarding flight and consciousness of guilt in violation of his constitutional rights to due process and a fair trial. (AOB 88-100.) The constitution requires no absence-of-flight instruction and the trial court properly declined to give it. Any error in not instructing the jury on absence of flight was harmless.

During jury instruction discussions, Bracamontes requested a modified version of CALJIC No. 2.52, which added language stating that Bracamontes had to have "knowledge of the accusation" when he fled in 2003 before the jury could consider his flight in determining his guilt. The trial court granted the request. (35 RT 3347-3358.) Bracamontes also requested a separate instruction on absence of flight for the time period between Laura's 1991 murder and his eventual arrest in 2003. The court found the instruction to be an unnecessary "pinpoint instruction on the negative," and declined to give it. (35 RT 3358-3359.)

During closing argument, the prosecutor mentioned the jury instruction on flight and argued that when Bracamontes fled from the district attorney investigators after they told him he was under arrest for murder, he did so with a guilty mind. The prosecutor emphasized that Bracamontes left his own son in the middle of the street when he sped away the first time, and that he fled again the next day when uniformed officers tried to arrest him. (36 RT 3451-3453.) The defense argued that

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tend to show that the defendant did not have a consciousness of guilt and this fact alone may be sufficient to create a reasonable doubt as to the defendant's guilt. The weight and significance of such circumstances are matters of the jury to determine." (8 CT 1705.)

Bracamontes knew he was a suspect in 1991, yet he did not flee the county, state, or country, and was still "living and working" in San Diego 12 years later. The only interpretation of this evidence, argued the defense, was that Bracamontes did not flee because he is innocent. (36 RT 3483.) And the defense argued that Bracamontes only fled from law enforcement in 2003 because the officers were looking for a reason to shoot him and he did not want to be shot. (36 RT 3484-3488.)

Trial courts are required under Penal Code section 1127c to give jury instructions on flight as it pertains to consciousness of guilt sua sponte when supported by the record. (Pen. Code, § 1127c; see *People v. Green* (1980) 27 Cal.3d 1, 39-40, fn. 26.) But there is no reciprocal right to instruction on the *absence* of flight as showing a lack of guilt, even upon request and even if supported by the evidence. (*People v. Staten* (2000) 24 Cal.4th 434, 459.) Indeed, section 1127c makes clear that "no further instruction on the subject of flight need be given." Citing its earlier decision in *Green*, this Court in *Staten* explained that "such an instruction would invite speculation [and] there are plausible reasons why a guilty person might refrain from flight. [Citation.]." (*Id.*; see *People v. Green, supra,* 27 Cal.3d at p. 39 [holding that refusal of an instruction on absence of flight was proper and not unfair in light of Penal Code section 1127c].) This Court also stated that its conclusion in *Green* "also forecloses any federal or state constitutional challenge based on due process." (*Id.*; see also *People v. Williams* (1997) 55 Cal.App.4th 648, 652-653 [rejecting constitutional argument with regard to instruction on absence of flight].)

Flight and the absence of flight are qualitatively dissimilar. (*People v. Williams, supra,* 55 Cal.App.4th at p. 653.) Flight is by its nature "an active, conscious activity," which logically tends to support an inference of consciousness of guilt. And "the inference of consciousness of guilt from flight is one of the simplest, most compelling and universal in human

experience. The absence of flight, on the other hand, is far less relevant, more inherently ambiguous and 'often feigned and artificial.'" (*Id.* at p. 652.) For example, as this Court observed more than 140 years ago, a suspect may choose not to flee "from a fear that he would be recaptured" and his fruitless escape attempt used as evidence of guilt. Or, "he may have felt so strong a confidence of his acquittal, for want of the requisite proof of his guilt, that he deemed it unnecessary to flee." (*People v. Montgomery* (1879) 53 Cal. 576, 577-578.) Moreover, this Court has described the probative value of evidence involving absence of flight as "slight," explaining that "the scales tip so heavily against admission of evidence of absence of flight that it must be excluded as a matter of law." (*People v. Green, supra,* 27 Cal.3d at pp. 38-39, fn. omitted; see also *People v. Williams, supra,* 55 Cal.App.4th at p. 653 ["the absence of flight presents such marginal relevance it is usually not even admissible"].) In short, because flight and the absence of flight "are not on similar logical or legal footings, the due process notions of fairness and parity in *Wardius* [*v. Oregon, supra,* 412 U.S. 470] are inapplicable." (*People v. Williams, supra,* 55 Cal.App.4th at p. 653.)

Here, Bracamontes's claim that it was unfair to instruct the jury on flight under CALJIC No. 2.52 without providing a reciprocal instruction on absence-of-flight is unavailing as it was expressly rejected by this Court in *Staten*, which also foreclosed his constitutional claim based on due process. (*People v. Staten, supra,* 24 Cal. 4th at p. 459.) He acknowledges this Court's precedent, but fails to distinguish it, and mischaracterizes California's flight instruction as a mere "'pinpoint'" instruction, when it was statutorily required by Penal Code section 1127c in this case.

Bracamontes's main argument seems to be that the flight instruction was the type of "one-way instruction[] favoring the prosecution" found "fundamentally unfair" by the United States Supreme Court in *Cool v.*

United States (1972) 409 U.S. 100, 103, fn.4. (AOB 91-92.) In *Cool*, a case where an accomplice provided testimony completely exculpating the defendant, the Court held unconstitutional an instruction permitting the jury to credit the testimony only if it found it to be true beyond a reasonable doubt. (*Id.* at pp. 101-103.) The Court found the instruction impermissibly burdened the defense while reducing the prosecution's burden by allowing it to discredit relevant evidence, and added that it was also unfair to tell the jury "that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis." (*Id.* at p. 103 & fn.4.) There was no similar infirmity with the flight instruction given here, however, as it assumed neither guilt nor flight, and was actually helpful to the defense by admonishing "circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181 [flight instruction does not impermissibly direct the jury to make only one inference].) Unlike the instruction in *Cool,* which provided a basis for conviction, the flight instruction here merely helped the jury interpret the evidence. No reciprocal jury instruction was necessary.

Bracamontes relies on a footnote in *Wong Sun v. United States* (1963) 371 U.S. 471, in which the United States Supreme Court observed that those who flee might also be innocent, to argue that the inference of guilt that may be derived from a defendant's flight is "not a particularly strong or convincing one." (AOB 93-94.) There, the Court said that "men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses." (*Wong Sun v. United States, supra,* 371 U.S. at p. 483, fn.10.) As this Court explained in *Green*, however, California requires an instruction on flight "not because such evidence is free of ambiguities or will not complicate the jury's task, but simply because Penal Code section

1127c makes the instruction mandatory when supported by the record." (*People v. Green, supra,* 27 Cal.3d at p. 39, fn. 26, citing *People v. Cannady* (1972) 8 Cal.3d 379, 391 [declining to reevaluate the efficacy of the flight instruction based on *Wong Sun's* observation].)

In short, there was no fundamental unfairness in not instructing on absence of flight in this case because flight and the absence of flight are qualitatively dissimilar. (See *People v. Williams, supra,* 55 Cal.App.4th at p. 653.) The trial court properly instructed the jury under CALCRIM No. 2.52 because it was supported by the evidence and no further instruction on flight was necessary. (Pen. Code § 1127c.)

Even if the trial court erred in declining the proposed instruction, the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. The jury knew that Bracamontes had not fled the jurisdiction in the 12 years following Laura's murder, and counsel argued this demonstrated his innocence. (36 RT 3483.) Significantly, the court had excluded evidence of three felonies committed by Bracamontes, including a 1995 robbery, 1996 auto theft, and 1998 possession for sale of methamphetamine, as well as of the resulting six years he spent in state and federal custody until around 2003. (See 9 CT 1950-1952; 13 RT 1232-1233; 40 RT 3574-3575.) Accordingly, the jury was not aware that his incarceration meant he was unable to flee the jurisdiction for half of that 12 years. Yet it still rejected the argument that his absence of flight meant he was innocent, which was unsurprising given that no rational inference of innocence—jury instruction or not—could be drawn from Bracamontes's failure to leave his parents' home and nearby son by moving away, especially after the case grew cold and police were no longer actively contacting him. On the other hand, Bracamontes's sperm DNA was ultimately found in Laura's mouth and on

her neck and pajama top.[8] And when police finally confronted Bracamontes to arrest him, he fled—twice. Under these circumstances, it is not reasonably probable that an absence-of-flight instruction would have affected the outcome of trial in any way. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

III. TO THE EXTENT THE TRIAL COURT EXCLUDED EVIDENCE OF THIRD-PARTY CULPABILITY, IT DID NOT ABUSE ITS DISCRETION AS THERE WAS NO EVIDENCE LINKING ANY THIRD PARTY TO THE ACTUAL CRIMES COMMITTED AGAINST LAURA

Bracamontes claims that the trial court refused to permit the defense to "develop and argue its theory of third-party culpability" based on the Arroyo family's "acrimonious" sale of a taco shop, thereby depriving Bracamontes of his constitutional right to present a complete defense. (AOB 100-110.) The trial court did not refuse to permit the development of third-party liability evidence as there was no request to refuse. Accordingly, the claim is forfeited. Even if the evidence was not excludable as hearsay, the court did not abuse its discretion to the extent it did exclude evidence of third-party culpability, because Bracamontes failed to make an offer of proof that was adequate under this Court's authority in *People v. Hall* (1986) 41 Cal.3d 826. In any event, any error was harmless as it is not reasonably probable that Bracamontes would have achieved a more favorable result.

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[8] The insinuation throughout the opening brief that the DNA evidence was the result of "contamination" or malfeasance is unfounded. (See, e.g., AOB 50-51 & fn. 21, 22, 109, 111.) Bracamontes had never provided sperm or semen samples to law enforcement, yet the matching DNA profile that was eventually generated derived in part from the sperm fraction of the oral swabs. (See 26 RT 2205; 28 RT 2291, 2300-2301; 30 RT 2673; 31 RT 2861.)

A. The Defense Did Not Seek to Present a Third-Party Culpability Defense Based on the Evidence Bracamontes Claims Was Improperly Excluded

During a pretrial discussion on outstanding discovery, defense counsel suggested it might present evidence of third-party culpability based on a years prior Drug Enforcement Administration investigation of someone who had apparently telephoned Laura's father on several occasions. (7 RT 654-655.) In discussing the matter, the trial court stated that third-party culpability evidence based on a particular individual had to be presented in a "noticed motion" so the court could rule on the admissibility of the evidence. (7 RT 655-656.) The specific discovery request turned out to be fruitless in terms of third-party culpability and counsel did not further pursue it. (8 RT 741.)

During a pretrial hearing on a motion to dismiss for delay of prosecution, former Chula Vista Police Detective Wayne Maxey testified that in the course of his investigation he had looked into the circumstances surrounding the sale of a taco shop by Laura's family after Mr. Arroyo mentioned "the selling of the taco shop" with two names, including a woman named Guadalupe Echeverria, as one of five "possible causes that would have created [Laura's murder]." (12 RT 963-965; 13 RT 1217-1218.) Apparently, Echeverria was disgruntled after purchasing the taco shop from the Arroyos, and retained a lawyer to pursue "misrepresentations" made by Mr. Arroyo during the transaction. (12 RT 967-968.) Detective Maxey had interviewed various individuals, including a lawyer who represented Echeverria in her claim of misrepresentation, but did not interview Echeverria, who had died in December 1991. (*Id.*; 12 RT 970-971; 13 RT 1218; 16 RT 1396; see 2 CT 361.)

At trial, defense counsel cross-examined various witnesses about the presence of what counsel termed a "suspicious small brown Datsun" in a

cul-de-sac near the apartment complex. (See, e.g., 25 RT 2065.) Neighbors Enrique "Kiki" Loa and Robert Vasquez had gone to a liquor store and returned around 8:45 p.m. (25 RT 2046; 26 RT 2070; 30 RT 2614, 2625.) Loa testified that he had seen a car with people inside parked in the cul-de-sac. He said it had looked "normal" to him because there was a park nearby, but he had mentioned it to officers because it was something he remembered. He saw "several individuals" inside, but did not get a good look at them. (25 RT 2051-2052; 26 RT 2070-2071; see also 26 RT 2073 [Loa mentioned seeing the car in response to a police inquiry as to what other people and vehicles he might have noticed].) Robert Vasquez had described the car to police as "reddish-brown" with a Filipino male and three Filipino females inside. (30 RT 2625-2626.) Loa's sister, Teresa Thomas, recalled Loa telling her that he had seen a small brown Datsun with three men and a woman inside, and that the occupants had seemed to squat down to hide when Loa and Vasquez arrived. (25 RT 2065-2066.) And Mrs. Arroyo had reported to police that people told her about a small brown car with three men and a woman inside. (26 RT 2087.) The people who told her about the car said they left the park around 8:50 or 9:00 p.m. because they felt "frightened" by the occupied car. (*Id.*)

During cross-examination of Detective Maxey, defense counsel inquired about different avenues of investigation followed by police, including whether people involved in the taco shop transaction might have been involved in Laura's murder. (31 RT 2801-2805.) He testified that he had reviewed documentation, and interviewed Mr. Arroyo and other parties involved in the transaction. He was precluded on hearsay grounds from testifying to specific statements made by the parties to the transaction. (31 RT 2802-2804.) When the defense proceeded to ask about Mr. Arroyo's statements that he had recently received threats at his place of employment, the prosecution requested a sidebar. (31 RT 2804-2805.)

At sidebar, the prosecutor objected to "all these lines of questioning having to do with third-party culpability and trying to get it in through hearsay," to which the trial court responded:

> Exactly. I don't know why the objections didn't come earlier. [¶] It was never noticed. We even talked about it in pretrial motions. . . . All this stuff is irrelevant. [¶] You can say someone else did the murder, but you can't point to who it is. . . . All of this third-party liability stuff has to be noticed, has to be litigated pretrial. The offer was made. We discussed it during pretrial motions. No pleadings were filed. I don't see any reason to let you go into it now.

(31 RT 2805.) Defense counsel replied that there was no intention of offering the evidence for its truth; rather, the intention was "to find out what the investigator did to follow up on any of these leads in connection with their investigation." (*Id.*) The court reiterated that the inquiries were "all pointed towards third-party liability," the specifics of which require a hearing on admissibility: "We are going to have to go through all of this and see what's not coming in. To do it in cross-examination in the middle of trial of this detective . . . is not appropriate." (31 RT 2805-2806.) Defense counsel stated that it was "not pointing the finger at a particular person" and was "just trying to find out what leads the detectives followed [] during their investigation." (31 RT 2806.) When the court again admonished counsel for not resolving third-party culpability issues pretrial, counsel said, "But we are not making a third-party culpability claim," to which the court replied, "Then it's not relevant." (31 RT 2806.)

While subsequently discussing jury instructions, the court stated its understanding that a third-party culpability defense involved not a general claim that someone other than the accused committed the crime—which was admissible, but the identification of a specific person, e.g., "Joe Johnson" as being responsible for the crime. The court added:

> The notice requirement, I think—isn't *Hall* the third-party liability case? The reason they have it, the logic I see is when the

> defense wants to say, "Joe Johnson did this, and we are pointing the finger at him. Not our guy," that lets you know that you can investigate Joe Johnson and you have to make a threshold determination whether—I don't know what the standard is. A certain amount of evidence to suggest that the jury could infer that Joe Johnson committed the crime.

(35 RT 3311.)

B. By Failing to Seek Admission at Trial of Evidence He Now Claims Constituted Third-Party Culpability Evidence, Bracamontes Has Forfeited His Claim that the Trial Court Erred in Excluding It

A finding may not be set aside nor a judgment or decision based thereon reversed by reason of exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means. . . . ." (Evid. Code § 354.) "[T]he proponent of evidence must identify the specific ground of admissibility at trial or forfeit that basis of admissibility on appeal." (*People v. Ervine, supra,* 47 Cal.4th at p. 783.) For, "[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Bracamontes at no time asked the court to consider whether evidence involving the circumstances surrounding the taco shop sale was admissible to establish third-party culpability. The trial court's comments during the sidebar indicate the court (and prosecution) initially assumed Bracamontes was attempting to introduce third-party culpability evidence on cross-examination through hearsay statements regarding the particulars of the taco shop sale, which is why the court essentially told counsel that such evidence should have been considered pretrial for admissibility. (31 RT 2805.) Bracamontes made clear, however, that his intention was not to elicit the evidence to support a third-party culpability defense, but to

illustrate the avenues followed by police in investigating Laura's murder. (31 RT 2806.) Accordingly, he has forfeited the issue of whether such evidence should have been admitted to support a third-party culpability defense.

C. To the Extent the Trial Court Excluded the Evidence as to Third-Party Culpability, Bracamontes Fails to Demonstrate an Abuse of Discretion in Doing So

While an accused may defend against criminal charges by showing that a third person, not the defendant, committed the crime charged, "evidence of *mere motive or opportunity* to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be *direct or circumstantial evidence linking the third person to the actual perpetration of the crime*." (*People v. Hall, supra,* 41 Cal.3d at pp. 832, 833, italics added.) In assessing an offer of proof relating to third-party culpability evidence, the court must decide whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368; *People v. Hall, supra,* 41 Cal.3d at pp. 833-834.) A trial court's ruling on the admissibility of third-party culpability evidence is reviewed for abuse of discretion. (*People v. Elliott* (2012) 53 Cal.4th 535, 581.)

Here, the evidence of third-party culpability Bracamontes claims he was precluded from presenting is specifically derived from the record of pretrial hearings and from his own queries on cross-examination. At best, it shows that Mr. Arroyo was involved in a business transaction involving the sale of a taco shop some months before Laura's murder, and that the transaction resulted in a disgruntled female buyer who had retained a lawyer. And that on the night of Laura's disappearance, witnesses saw a brown car parked in the cul-de-sac with unidentified occupants—more than

one person and probably including a woman—who seemed to hide when Loa walked by (but were "frighten[ing]" enough to cause another eyewitness to leave the park). Not only was there no connection between the occupants of the car and parties to the taco sale, but there was no connection between the occupants of the car and Laura's family, let alone her murder. And given the overwhelming DNA evidence that Bracamontes sexually assaulted Laura, there would further need to be a connection between the parties and Bracamontes, but there was none.

The evidence at issue here is far less probative than evidence held properly excluded in other cases considered by this Court. In People v. Lucas (2004) 60 Cal.4th 153, the defendant was charged with murder and moved to question the victim's father about her former boyfriend and crank-calls she received before she disappeared. The defense motion was based on an offer of proof that the victim's former boyfriend repeatedly tried to contact her; she was afraid of him; he visited her house the morning after her disappearance; he appeared nervous; he returned there later that night; he acted unusual by not looking anyone in the eye; and the victim received anonymous telephone calls from women who would laugh and hang up. The trial court decided the evidence did not make the former boyfriend a third-party suspect and was, therefore, irrelevant, misleading and confusing. (*Id.* at p. 280.)

In *People v. Kaurish* (1990) 52 Cal.3d 648, the defendant was charged with the sexual molestation and murder of a 12-year-old girl. (*Id.* at p. 669.) The trial court excluded the defendant's proposed evidence that someone named Sheffner might have committed the crimes based on an offer of proof that the victim and her mother stole money and a painting from Sheffner and bragged about it, that Sheffner said he would get even with them one or two weeks before the murder, and that Sheffner had a past history of child sexual molestation. (*Id.* at pp. 684-685.) In holding the

evidence had been properly excluded, this Court explained, "The most that counsel was prepared to establish was that Sheffner had a motive for being angry with the victim's mother, and possibly with the victim. But such evidence does nothing to link Sheffner to the actual perpetration of the crime, as required by *Hall.*" (*Id.* at p. 685.)

In this case, the trial court did not abuse its discretion to the extent it precluded the presentation of a third-party culpability defense because the evidence Bracamontes now claims supported the defense—Echeverria's frustration with the taco shop sale and people seen in the brown car—was remote, speculative, and lacking any direct or circumstantial connection to the actual perpetration of the crimes against Laura. (See *People v. Hall, supra,* 41 Cal.3d at pp. 832, 833.) Indeed, the evidence is far more specious than the evidence in *Lucas* and *Kaurish*. Even assuming Echeverria was so angry she had a motive to physically harm the Arroyo family—rather than simply await the resolution of her legal action—there was no evidence she had the opportunity. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1137 [noting cases holding "mere evidence of third party's anger toward victim was insufficient," and third party's possible motive alone insufficient to raise reasonable doubt of defendant's guilt"].) There was no link between Echeverria and the unidentified people of varying description in the brown car, and further no link between the people in the car and Laura's murder. And there was nothing about any of this evidence that tended to raise a reasonable doubt about Bracamontes's guilt given the DNA evidence. (See *People v. McWhorter, supra,* 47 Cal.4th at pp. 367-368.) In other words, the probative value of the evidence for third-party culpability purposes was slight, whereas its potential for delay and confusion of issues was great. (See Evid. Code, § 352.)

Bracamontes's federal constitutional argument also fails. A defendant has a right to present "a complete defense." (*California v. Trombetta*

(1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *People v. Brown* (2003) 31 Cal.4th 518, 538.) Generally, however, "'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Court's retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]'" (*People v. Cudjo* (1993) 6 Cal. 4th 585, 611 [noting this principle is equally applicable to evidence of third-party culpability].) Indeed, evidence proffered to show third-party culpability may be excluded without violating the federal Constitution "'where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.'" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 327 [126 S.Ct. 1727, 164 L.Ed.2d 503]; see *People v. Prince* (2007) 40 Cal.4th 1179, 1242-1243.) The evidence here met that description and was properly excluded.

Bracamontes contends that a viable third-party culpability defense "emerged" at trial, but he was precluded from fully developing the defense because the trial court "created new and unique restrictions"—namely a notice requirement—on third-party culpability evidence at trial. (AOB 101, 103, 106.) First, the facts supporting a purported third-party culpability defense did not emerge at trial, they were contained in the police reports and elicited by counsel on cross-examination. In fact, they were discussed at length in connection with Bracamontes's pretrial motion to dismiss for delay of prosecution. Second, while the court did mention the need for "notice" on several occasions during that sidebar, the colloquy, in context, shows the court found the testimony to be irrelevant and admonished counsel for not earlier litigating its admissibility, despite the court's pretrial invitation to do so. (See, e.g., 31 RT 2805 ["All this stuff is irrelevant."].)

Third, to the extent the evidence was not further developed, it was because counsel expressly intended to elicit the evidence for a purpose other than third-party culpability. (See 31 RT 2806 ["[W]e are not making a third-party culpability claim."].)

D. Any Error Was Harmless Under the Controlling Review Standard of *Watson*

Any error in excluding the evidence was harmless. The exclusion of third-party culpability evidence did not implicate the federal constitution and therefore is not governed by the Chapman9 standard of review.

Rather, the standard for determining prejudice where a court errs in excluding such evidence is the harmless error standard under *People v. Watson, supra,* 46 Cal.2d at p. 837. (*People v. Hall, supra,* 41 Cal.3d at p. 836.) Reversal is not required unless it is "reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. [Citation.]" (*Ibid.*)

No such reasonable probability exists as the case against Bracamontes was extremely strong in light of the sperm DNA evidence that ultimately connected him to the sexual assault on Laura. The jury heard about "frighten[ing]" people in a brown car and a woman who may have held a grudge against Mr. Arroyo, but none of this evidence explained how Bracamontes's sperm ended up on Laura after she was abducted.

Indeed, as the trial court observed during jury instruction discussions, it would have been "absolutely ludicrous" to suggest some other party kidnapped Laura without Bracamontes's knowledge, then just drove up to Bracamontes and offered to let him sexually assault her. (35 RT 3309-3310.)

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[9] *Chapman v. California, supra,* 386 U.S. 18, 24.

IV. BRACAMONTES'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS WERE NOT VIOLATED AS THE RESULT OF THE FILING OF THE COMPLAINT 12 YEARS AFTER LAURA'S MURDER BUT ONLY ONE DAY AFTER DNA TESTS PROVIDED SUFFICIENT EVIDENCE TO CHARGE HIM

Nine-year-old Laura Arroyo was murdered on June 20, 1991. Twelve years later, on October 24, 2003, the San Diego County District Attorney's Office filed a complaint charging Bracamontes with murder. Bracamontes contends the precomplaint delay "hobbled" his ability to mount guilt and penalty defenses and thereby violated his state and federal rights to due process. (AOB 111-135.) As the trial court found after a lengthy hearing, however, the justification for the delay outweighed the weak showing of prejudice made by Bracamontes. Accordingly, Bracamontes's claim that reversal is required is meritless.

A. After A Full Hearing on Bracamontes's Motion to Dismiss for Prosecutorial Delay, the Trial Court Found No Meaningful Prejudice Had Been Shown and Denied the Motion

The defense filed a pretrial motion to dismiss, claiming violation of due process due to loss of evidence and unjustified prosecutorial delay stemming from the 12-year time period between Laura's murder and the filing of charges against Bracamontes. (2 CT 344-361; see also 5 CT 1128-1131 [reply to People's opposition arguing a pretrial hearing is appropriate].) The motion stated that in assessing prejudice, "it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligence of law enforcement ag[e]ncies or the prosecution." (2 CT 352-353 [citing, inter alia, *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 507.])

In opposing the motion, the prosecution described the medical examiner's 1991 findings—including the absence of sperm on the prepared slides he examined, the lack of injury to Laura's anal and vaginal areas, and

the appropriate placement of her pajama bottoms and underpants—which led investigators to conclude that no sexual assault had occurred prior to Laura's murder. (4 CT 832.) The prosecution further described how Bracamontes was interviewed more than three weeks after Laura's body was discovered and how, more than two weeks after that, a search warrant for Bracamontes's car and homes was executed. (4 CT 832-833.) At the time, the only physical evidence connecting Bracamontes to Laura's murder seemed to be a single blue-green fiber found on her pajama pants that shared microscopic characteristics with fibers found in Bracamontes's car and on several items of his clothing. (4 CT 833.) But in 2003, a reexamination of some of the forensic evidence led to the discovery of sperm on Laura's oral swabs and the subsequent arrest of Bracamontes. (4 CT 833-834.) Despite a lengthy investigation, police were initially unable to discover enough evidence to charge Bracamontes with Laura's murder, until 2003 when substantial DNA evidence linked him to the crime. (4 CT 839.) The prosecution concluded by arguing that the motion should either be reserved until after trial when the court is in a better position to assess prejudice, or denied on the merits given sufficient justification for the delay and Bracamontes's failure to show substantial prejudice. (4 CT 834-836, 839-840.)

At a pretrial hearing on the matter, the court indicated it had considered the parties' briefs and tentatively intended to deny Bracamontes's motion to dismiss. (7 RT 665.) The defense requested and was granted the opportunity to present 22 witnesses in support of its effort to demonstrate prejudice stemming from the delay. (8 RT 742.)

Bracamontes was born on August 22, 1963. (8 RT 797.) Maggie Porter—Bracamontes's longtime on-again, off-again girlfriend with whom he shared a 14-year-old son—testified that her recently deceased parents had really liked Bracamontes and wanted them to marry. (8 RT 790-792.)

Bracamontes's uncle with whom he was "very close" had also recently died. (8 RT 784-786.) Bracamontes's one-year younger sister, Teresa, said she had acted as an interpreter for her parents during parent-teacher meetings at school, that she told authorities that a U-Haul had been rented and Bracamontes had helped her move on the day Laura was abducted, and that her parents had an alarm system. (8 RT 797-800.) Any U-Haul records or alarm company records no longer existed. (8 RT 825, 831.) And hospital records pertaining to Bracamontes's 1963 birth and his father's 1989 hospitalization following an accident also no longer existed. (8 RT 834, 836.)

Elementary and high school representatives were called to testify as to the school records that remained for Bracamontes. (8 RT 839-855.) The *only* permanent record kept by Bracamontes's elementary school for *any* student is a single card showing a history of the student's enrollment in the school and the names of his or her teachers; that card still existed for Bracamontes; it showed he attended the school from October 1967 through June 1975, and listed his teachers. (8 RT 839-842.) Transcripts for Bracamontes for school years 1977 through 1980 were also still available, but the "cumulative folder"—which contains behavior records and report cards—for *any* student is destroyed five years after graduation or dropping out from school. (8 RT 841, 847, 850.) Bracamontes's preschool, kindergarten, second-, and third- grade teachers were deceased, and his first-grade teacher had no recollection of him. He had the same teacher for both fourth and fifth grade, but she did not recall him either. And the same was generally true of his sixth-grade teacher and several high school teachers who were contacted by the defense. (12 RT 984-994.)

Several witnesses were called to testify whether employment records existed for random short periods of time for which Bracamontes had provided pay stubs. Aside from Ortiz Corporation, which provided a few

documents indicating Bracamontes was employed there in 1993 (8 RT 859-860), none of the employers still retained employment records for him. This included the custodians of records for Chula Vista Transit's parent company, who identified a pay stub indicating Bracamontes was employed on the date Laura was murdered (8 RT 856) and T.C. Construction, who identified pay stubs indicating Bracamontes's employment in the year of 1990 (8 RT 863-865). The owner of Ham Bros. Construction distinctly recalled Bracamontes's father, but had no records for, or memory of, Bracamontes, who was employed with the company for four months ending in March 1989. (8 RT 742-744.) The custodian of records for Atomic Investments said a 1985 paystub indicated Bracamontes had been employed with the company that year, but no records existed, and even if they did, they would not have included performance evaluations. (8 RT 874.) The custodian of records for Zarcon Corp. said a paystub from 1982 indicated Bracamontes's employment that year, but no employment records would have been available after 1987 due to the company's record-keeping policy. (8 RT 868-872.) And CV Farms had no records for Bracamontes's 1979 employment. Three men who would have supervised him at CV Farms were contacted; they recalled Bracamontes's parents as employees and one thought he recalled Bracamontes working there that year, but neither of the others recalled him at all. (12 RT 978-979.)

Finally, testimony about Echeverria—the woman who was disgruntled by apparent misrepresentations made during the taco shop transaction with Mr. Arroyo—was presented, including evidence that Echeverria had died in December 1991. (12 RT 963-970; 13 RT 1217-1218.)

After hearing the defense evidence, the trial court found the defense had not shown "substantial prejudice," but discussed at length whether a showing of any amount of prejudice was sufficient for dismissal if law

enforcement had been negligent in its investigation of Laura's murder, particularly with regard to Dr. Blackbourne's conclusion that no sperm existed on the oral swabs. (12 RT 1054-1062.) The court invited the prosecution to present witnesses on the issue of why there was a delay. (12 RT 1060-1063.)

The prosecution presented several witnesses to explain prevailing professional standards that existed in 1991 with regard to autopsies and DNA testing, and to detail how Laura's murder investigation evolved over the years. (13 RT 1066-1233; 14 RT 1234-1289.) The testimony made clear that it was not uncommon for a swab to fail to transfer sperm to a smear due to the water-based extraction procedure in use in 1991. (13 RT 1071-1072, 1136-1137.) In fact, there was no sperm present on the smear made by Dr. Blackbourne in 1991, so his determination in that regard had been correct. (13 RT 1071-1073, 1107-1109.) Only later, did forensic scientists begin to realize that sperm was failing to transfer from swab to slide—resulting in false negatives—due to the ineffectiveness of water-based extraction. (See, e.g., 13 RT 1072, 1135-1138.)

Several experts testified that it was standard procedure for an investigator to rely on the expert conclusions of the medical examiner—here, the determination that no sexual assault had occurred—in determining whether to pursue a particular course of investigation. (13 RT 1074, 1088, 1091-1092, 1137.) This was especially true in this case because the surrounding circumstances—the lack of injury to Laura's anal and vaginal areas and her intact panties and pajamas—supported the conclusion of Dr. Blackbourne, who was a "very" well-respected medical examiner. (13 RT 1073, 1089-1091, 1099-1100.) Moreover, the DNA testing method that was prevalent in 1991—RFLP— required significantly more sperm to generate a DNA profile than were present on all of the oral swabs collected in this case. (13 RT 1110-1115, 1129-1133.)

Bracamontes's sister, Teresa, testified about the numerous friends and family members who were available to testify at Bracamontes's penalty phase. (13 RT 1157-1159, 1165-1166.) Being very close to her brother and just one year younger, Teresa also discussed Bracamontes's "normal" childhood, which included Little League and Boy Scouts, as well as the lack of any childhood abuse, accidents, mental illness, gang involvement, and drug or alcohol problems. (13 RT 1158-1162.)

Finally, a district attorney investigator interviewed Bracamontes's employers at Chula Vista Transit—where he was employed at the time of Laura's murder—and learned that they indeed recalled Bracamontes; he had been disciplined for not performing his job correctly and for physically threatening his supervisor with violence. (14 RT 1278-1279.)

The defense concluded by presenting three more witnesses, including a former Fresno County Deputy Sheriff who said he would have conducted the murder investigation differently and a forensic technician familiar with labs in *Texas* who said some of the DNA testing methods not used in this case became available in late 1991 and 1992. (15 RT 1294-1363.)

In denying the motion to dismiss, the trial court found that Bracamontes had failed to demonstrate any meaningful prejudice stemming from the precharging delay. The court further found that the prosecution had been justified in its decision not to prosecute Bracamontes in 1991 as the decision had been made in good-faith reliance on the evidence available at that time. The court concluded that this justification, along with society's interest in solving murders as shown by the absence of any statute of limitations on the crime, outweighed the "minimal, if any, prejudice" shown by the delay. (7 CT 1560-1570.)

B. Bracamontes Fails to Show a Due Process Violation Stemming from the 12-Year Prearrest Delay in Prosecution

"'The statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges,' and there 'is no statute of limitations on murder.' [Citation.]" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) Nevertheless, delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate affirmative prejudice arising from the delay. (*Ibid*.) Prejudice may be shown by "'loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) "The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.]" (*Ibid.*; see *People v. Nelson, supra,* 43 Cal.4th at p. 1250; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504-507.) While "[a] claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant" (*People v. Catlin, supra,* 26 Cal.4th at p. 107), "under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process" (*People v. Nelson, supra,* 43 Cal.4th at p. 1255).

As this Court has explained: "'The ultimate inquiry in determining a claim based upon due process is whether the defendant will be denied a fair trial. If such deprivation results from unjustified delay by the prosecution coupled with prejudice, it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was

caused by negligence of law enforcement agencies or the prosecution. In both situations, the defendant will be denied his right to a fair trial as a result of governmental conduct.' [Citation.]" (*People v. Nelson, supra,* 43 Cal.4th at p. 1255.) However, "whether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Id.* at p. 1256.)

A trial court's ruling on a motion to dismiss for prejudicial prearrest delay is reviewed for abuse of discretion and its underlying factual findings are upheld on appeal if supported by substantial evidence. (*People v. Cowan* (2010) 50 Cal.4th 401, 431.)

Here, substantial evidence supports the trial court's conclusion that the justification for the delay outweighed the weak showing of prejudice made by Bracamontes. As to the guilt phase, the "alibi" evidence Bracamontes claimed was prejudicially lost due to unavailable U-Haul, alarm system, and transit authority business records merely showed what Bracamontes may have been doing at irrelevant times during the day of Laura's murder, and did nothing to rebut several witnesses who saw him at the apartment complex at the time of her abduction. The "third-party culpability" claim was unaccompanied by any "competent" evidence connecting Laura's murder to Mr. Arroyo's taco shop transaction; indeed, the lead was followed and apparently found unsubstantiated by police back in 1991. (See 31 RT 2801-2802; also Argument III, supra.)

As to the penalty phase, the mitigating evidence Bracamontes claimed was lost was remote, speculative, and often overstated. For example, he said he was prejudiced by missing grammar school records. But school records still existed in 2003 to the same extent they would have existed in

1991. (8 RT 839-842, 847, 850.) He also said he was prejudiced by the deaths or fading memories of his teachers. But he was nearly 28 years old when he murdered Laura, so teachers from his early school years were about as likely to recall him in 1991 as they were in 2003. Accordingly, any lack of recollection was not attributable to the delay in prosecution. (See *People v. Catlin, supra,* 26 Cal.4th at p. 107.) Rather, the failure of any of Bracamontes's available teachers or employers to recall him merely confirms that his normal childhood and limited work history involved nothing material to the penalty phase—aside from the negative testimony by transit company employees, which provided no mitigation. On the other hand, numerous friends and family members, including Bracamontes's parents, were available to testify at the penalty phase. Notably, Teresa was capable of speaking to Bracamontes's school years as she attended parent-teacher conferences with her parents to translate for them. (8 RT 798.)

In short, most of the evidence presented by Bracamontes at the hearing on the motion to dismiss failed to demonstrate any prejudice stemming from the 12-year delay. At most, he showed possible prejudice, but "[p]ossible prejudice is inherent in any delay," whatever the length. (See *United States v. Marion,* (1971) 404 U.S. 307, 321–322.)

Against Bracamontes's weak showing of prejudice, the prosecution provided ample justification for the delay. The forensic techniques used in this case—and generally accepted in 1991—failed to reveal Bracamontes's sperm on the oral swabs, which affected the course of the criminal investigation of Laura's murder. (See *People v. Nelson, supra,* 43 Cal.4th at pp. 1256-1257 [court may not find negligence by second-guessing how law enforcement agencies could have investigated a given case].) Later developments in DNA testing, including better extraction methods and a new awareness that earlier methods had resulted in false-negative outcomes, led to the decision to retest the evidence in 2003. (See *People v.*

Catlin, supra, 26 Cal. 4th at p. 109 [development of forensic techniques provides justification for a delay in prosecution].) Given the lack of such awareness in 1991, Dr. Blackbourne could not have been negligent in reaching his conclusion that there was no completed sexual assault—especially considering the absence of other indicia of sexual assault. Similarly, investigators were reasonable to rely on the result in determining how to allocate state resources in conducting their murder investigation. (See *People v. Nelson, supra,* 43 Cal.4th at pp. 1256-1257.)

Even if the detrimental reliance on Dr. Blackbourne's conclusion could be deemed negligence, Bracamontes still did not suffer a due process violation. First, "whether the delay was negligent or purposeful is relevant to the balancing process." (*People v. Nelson, supra,* 43 Cal.4th at p. 1256.) Here, the trial court properly considered this factor in determining that the prosecution had acted in good faith in delaying prosecution based on its understanding of the state of the evidence in 1991. (See 7 CT 1564-1565.) Second, where delay is "merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Id.* at p. 1256.) Here, Bracamontes's failure to show any meaningful prejudice stemming from the delay means he cannot establish a due process violation. (See 7 CT 1560-1561.)

In sum, the investigation of Laura's murder was not perfect; "no investigation is." (*People v. Cowen, supra,* 50 Cal. 4th at p. 437.) There is no evidence that law enforcement or the prosecution deliberately delayed the investigation to gain a tactical advantage over Bracamontes and minimal, if any, evidence of negligence. Indeed, as in *Nelson,* the delay was the result of insufficient evidence to identify Bracamontes as a suspect and the limits of forensic technology, or at least the limits of forensic knowledge. (See *People v. Nelson, supra,* 43 Cal.4th at p. 1257 [justification outweighed prejudice stemming from 26-year delay in

prosecution].) Balancing Bracamontes's weak showing of prejudice against the justification for the prearrest delay, no due process violation occurred. A contrary conclusion would mean that so long as a murder suspect could mislead authorities long enough to cause a single misstep in an otherwise competent investigation, he would get away with murder. This conclusion should be avoided and Bracamontes's claim rejected.

V. THE TRIAL COURT PROPERLY ADMITTED THE VICTIM-IMPACT TESTIMONY OF LAURA'S THIRD-GRADE SCHOOL TEACHER AS IT WAS RELEVANT TO THE IMPACT OF THE MURDER ON THE COMMUNITY

Bracamontes contends that the testimony of Laura's third-grade teacher exceeded the bounds of permissible victim-impact evidence under California's Evidence Code and state and federal constitutions. (AOB 135-149.) Permissible victim-impact evidence under both state and federal standards includes the effect of the crime on the community; Laura's teacher was a part of that community and her testimony was relevant and not unduly prejudicial.

A. The Trial Court's Ruling

Before trial, the prosecution filed a notice of evidence in aggravation it intended to present at the penalty phase, including victim-impact evidence, and evidence of the assault on Porter and a 1995 robbery by force committed by Bracamontes. (1 CT 82-83.) Bracamontes generally moved to either completely exclude victim-impact evidence or strictly limit it to the victim's personal characteristics known to Bracamontes at the time of the murder. (4 CT 725-744.) Following a hearing, the trial court denied the defense motion and said it would monitor victim-impact evidence "subject to [Evidence Code] section 352 as well as a continuing objection that the presentation is cumulative." (9 RT 914-920.)

Prior to the commencement of the penalty phase, Bracamontes more specifically moved to preclude the victim-impact testimony of Laura's teacher, Ms. Peterson. He argued that allowing a non-family member to testify as a victim-impact witness would violate his rights under the state and federal constitutions. (40 RT 3596-3598.) The trial court ascertained that the prosecution intended to call just five victim-impact witnesses at the penalty phase—Laura's four immediate family members and her teacher. (40 RT 3599.) Relying on this Court's precedent recognizing that the "broad scope" of victim-impact evidence includes testimony of the impact of the crime on "friends" and "community," the trial ruled that Ms. Peterson's testimony was admissible. (40 RT 3598-3600 [citing *People v. Marks* (2003) 31 Cal.4th 197].) The court limited Ms. Peterson's testimony to the days immediately following Laura's murder. (40 RT 3601-3602.)

B. Bracamontes Forfeited His Claim by Failing to Properly Object at Trial

To the extent Bracamontes claims Ms. Peterson's testimony was unconstitutionally prejudicial because it was excessive and overly emotional, he has forfeited the issue on appeal by failing to contemporaneously object to the evidence at trial. (*People v. Simon* (2016) 1 Cal.5th 98, 139; *People v. Huggins* (2006) 38 Cal.4th 175, 236, 238.) In *Simon,* the defendant had raised many objections to the scope of permissible victim impact evidence prior to the penalty phase, but the trial court had reached few express rulings. This Court found the issue of whether the amount or emotional nature of victim-impact evidence was unconstitutionally prejudicial to be forfeited. It explained that because the court had deferred making any specific rulings pretrial, it was "incumbent upon the defendant to monitor the victim impact evidence on an ongoing basis during the penalty phase and raise any specific objections at that time." (*People v. Simon, supra,* 1 Cal.5th at p. 139.)

Here, Bracamontes objected to Ms. Peterson's testimony under state and federal constitutional law on the basis that she was a non-family member (40 RT 3596, 3598) and under hearsay rules to any of her testimony that might address how Laura's death impacted others in the community (40 RT 3600-3601). He further objected to any testimony by the teacher outside the time period immediately following Laura's death (40 RT 3602). The trial court expressly overruled the first two objections, but limited Ms. Peterson's testimony to the days after the murder. (40 RT 3596-3602.) As in *Simon*, Bracamontes failed to object to any of Ms. Peterson's testimony as being excessive or overly emotional. (See 42 RT 3769-3783.) At the pre-guilt-phase hearing, the court had deferred making specific rulings and said it would recognize a continuous objection under Evidence Code section 352, but it was still incumbent upon Bracamontes to monitor the victim impact evidence on an ongoing basis during the penalty phase and raise any specific objections at that time. (See Evid. Code § 353; *People v. Mayfield* (1993) 5 Cal.4th 142, 172.) By failing to do so, Bracamontes forfeited his claim on appeal.

C. The Trial Court Properly Admitted the Victim-Impact Testimony of Laura's Teacher; Any Error Was Harmless as No Prejudice Ensued

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." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 829 [111 S.Ct. 2597, 115 L.Ed.2d 720].) 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 [her] family.'" (*Id.* at 825; see *People v. Linton* (2013) 56 Cal.4th 1146, 1203; *People v. Marks* (2003) 31 Cal.4th 197, 235-236 [noting that separate opinions in *Payne* recognized "broad scope" of victim impact evidence, including impact on "friends" and "community"].) Thus, the Eighth Amendment permits the admission of evidence "'showing how a defendant's crimes directly impacted the victim's family, friends, and the community as a whole, unless such evidence is "so unduly prejudicial" that it results in a trial that is "fundamentally unfair."'" *People v. Pearson* (2013) 56 Cal.4th 393, 466–467 [quoting *Payne, supra,* 501 U.S. at p. 825].)

State law is consistent with federal principles. "'Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under [Penal Code] section 190.3, factor (a).'" (*People v. Dykes* (2009) 46 Cal.4th 731, 781; see *People v. Edwards* (1991) 54 Cal.3d 787, 833-836.) Specifically, the victim-impact evidence barred under California law is that which is "so inflammatory as to elicit from the jury an irrational or emotional response *untethered to the facts of the case*." (*People v. Dykes, supra,* 46 Cal. 4th at p. 781, italics added.)

Here, the trial court's admission of victim-impact testimony from Ms. Peterson comported with both state and federal standards. As Laura's third-grade teacher for nearly the entire school year, Ms. Peterson was a member of Laura's community. She had daily contact with Laura and other members of that community, including Laura's classmates and their parents. Her recollection of the reactions of her students and their parents to Laura's death was based on her own observations in the days following the murder. (42 RT 3776-3778.) She also attended the funeral and personally observed others in attendance, the tiny casket with the teddy bear that held Laura, and the tiny hole in which she was buried. (42 RT

3778-3779.) Victim-impact evidence includes the impact of a crime on the community and Ms. Peterson was well-qualified to testify not only to the impact of Laura's death on her personally as a member of that community, but on the community as a whole. (See *People v. Pearson, supra,* 56 Cal.4th at pp. 466–467 [noting that Eighth Amendment permits admission of evidence showing how crime impacted victim's family, friends, and the *community as a whole*]; *People v. Dykes, supra,* 46 Cal.4th at p. 781 [finding evidence of devastating effect of capital crime on loved ones and the *community* to be relevant and admissible].

Ms. Peterson's "testimony, though emotional at times, fell far short of anything that might implicate the Eight Amendment." (*People v. Huggins* (2006) 38 Cal.4th 175, 238-239.) Bracamontes chose a nine-year-old child as his victim. Ms. Peterson's testimony was "what one would expect in any case involving the murder of a child." (*People v. Smith* (2005) 35 Cal.4th 334, 365 [admissible victim-impact evidence included mother's testimony concerning the loss of her child, how the pain would never go away and how what happened to him stayed in her mind]; see also *People v. Dykes, supra,* 46 Cal.4th at p. 782 [testimony of victim's grandmother regarding victim's plan to use his allowance to buy a toy for his brother on the day of the murder properly admitted as circumstances of the crime].) Ms. Peterson's testimony was relatively brief. The prosecutor's questioning of all five victim-impact witnesses constituted less than 45 pages of transcript, and Ms. Peterson's testimony accounted for just 13 pages of that testimony, including two pages of video-authentication. (42 RT 3769-3783.) And, contrary to Bracamontes's characterization of the prosecutor's use of Ms. Peterson's testimony during closing argument as "extensive" (AOB 142), the record shows that portion of argument constituted barely two pages of a 27-page argument (45 RT 4042-4069).

Bracamontes argues that Ms. Peterson's testimony improperly encompassed the harm suffered by Laura's classmates and their parents. (AOB 146.) But Laura was a popular, friendly child, whose community included her classmates and their parents. Ms. Peterson's testimony based on her own observations of the impact on that community was well-within the bounds of permissible victim-impact testimony. (See *People v. Dykes, supra,* 46 Cal.4th at pp. 779-780 [child victim's teacher testified to victim's popularity and the memorial conducted for him in school]; *People v. Linton, supra,* 56 Cal.4th at p. 1203 [testimony by child victim's parents and two school friends, as well as admission of 13 photographs that depicted occasions of victim's life, a memorial plaque at her school, and an empty chair at graduation, held within scope of permissible victim-impact testimony]; also *Payne v. Tennessee, supra,* 501 U.S. at p. 825 [permitting evidence designed to show "each victim's 'uniqueness as an individual human being'"].)

Bracamontes takes particular exception to Ms. Peterson's testimony regarding Laura's funeral, arguing it was "evocative" and "served only to inflame the passions and prejudices of the jurors." (See, e.g., AOB 146-147.) But this testimony was no different than the testimony found permissible by this Court in *Dykes,* where the child victim's 21-year-old sister had to make the funeral arrangements and described "in moving terms the sorrow and sense of unreality she experienced while making those arrangements: "We . . . "special ordered [a casket], a medium-sized one because the large ones made him look too small and the baby one made him look too big." (*People v. Dykes, supra,* 46 Cal. 4th at pp. 780, 782.) In fact, the testimony about Laura's funeral presented here paled in comparison to mourning process evidence allowed in other cases. (See *People v. Brady* (2010) 50 Cal.4th 547, 570, 579–581 [testimony and videotape of slain police officer's memorial and funeral services, including

flag-draped casket in church, attendance by 4,000 uniformed police officers and other mourners, motorcade that stretched for miles, and bagpipe procession to gravesite]; *People v. Verdugo* (2010) 50 Cal.4th 263, 296–297 [testimony and photographs of funeral service of two teenage murder victims, including release of two doves and a child's act of kissing the coffin].)

In short, Ms. Peterson's testimony was probative of the impact of Laura's death on the community and was not unduly inflammatory. Accordingly, there was no error in its admission.

Even assuming the trial court erred in admitting Ms. Peterson's testimony, no prejudice ensued. Erroneous admission of victim-impact evidence is subject to harmless error analysis. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1246.) Here, there is no reasonable possibility that Bracamontes would have enjoyed a more favorable outcome, absent the testimony of Laura's teacher. (*People v. Gonzales* (2006) 38 Cal.4th 932, 960-961 [explaining test for state law error at penalty phase is whether there is a reasonable possibility the error effect the verdict, which is the equivalent of *Chapman*'s beyond-a-reasonable-doubt standard].) The trial court instructed the jury not to be swayed by prejudice against Bracamontes (CALJIC No. 8.84.1; 9 CT 1897) and that it was "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider" (CALJIC No. 8.88; 9 CT 1930). The jury is presumed to have followed these instructions. (*People v. Thomas* (2011) 51 Cal.4th 449, 489.) Even if Ms. Peterson's testimony had been excluded, the outcome would have remained the same. Bracamontes's death sentence was not the product of unduly prejudicial victim-impact evidence. It was direct result of the circumstances of his senseless, unconscionable crime of abducting a child from her home,

sexually assaulting her, brutally killing her, and leaving her body to be found by strangers in a business park.

VI. AS THERE ARE NO ERRORS TO CUMULATE, BRACAMONTES'S CUMULATIVE-ERROR CLAIM FAILS

Bracamontes contends that the cumulative effect of errors at trial resulted in prejudice warranting a reversal of the death judgment. (AOB 149-150.) No error occurred, and even in the few instances where error may have occurred, Bracamontes has failed to show prejudice. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472. 523.) Bracamontes's claim should be rejected.

VII. AGGRAVATING CIRCUMSTANCES ARE NOT CONSTITUTIONALLY REQUIRED TO BE PROVED BEYOND A REASONABLE DOUBT

Bracamontes contends that California's death penalty statute violates the federal Constitution by not requiring the jury to make findings beyond a reasonable doubt that an aggravating circumstance has been proved. (AOB 150-167.) This Court has repeatedly held that no such findings are constitutionally required. (*People v. Homick* (2012) 55 Cal.4th 816, 902; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319.) The statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. The jury's finding beyond a reasonable doubt of the truth of a special circumstance satisfies the requirement of the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (*People v. Lewis* (2008) 43 Cal.4th 415, 521.) As this Court recently made clear in *People v. McDowell* (2012) 54 Cal.4th 395, 444, nothing in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166

L.Ed.2d 856], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], affects this conclusion. (See also *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Smith* (2007) 40 Cal.4th 483, 526.)

Bracamontes contends that this Court's prior authority has been undermined by *Hurst v. Florida* (2016) 577 U.S.__ [136 S.Ct. 616, 624, 193 L.Ed.2d 504]. In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment in light of *Ring v. Arizona, supra,* 536 U.S. 584. In Florida, the maximum sentence a capital felon could receive based on a jury conviction alone was life imprisonment. (*Hurst,* at p. 620, citing Fla. Stat. § 775.082(1)).) It was then up to the judge—with an advisory jury recommendation—to make findings in aggravation or mitigation, and determine the sentence. (*Id.* at 622.) As this Court has since explained, the California sentencing scheme materially differs from Florida's scheme. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235 & fn. 16.) Here, a jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict that "impose[s] a sentence of death" or life imprisonment without the possibility of parole. (*Id.*, citing Pen. Code §§ 190.3, 190.4.) Unlike Florida, this verdict is not merely "'advisory.'" (*Id.*, citing *Hurst*, at p. 622.) Moreover, "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt," imposing the death penalty does not constitute an increased sentence within the meaning of *Apprendi, supra*, 530 U.S. 466. (*People v. Henriquez* (2017) 4 Cal.5th 1, 46, quoting *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.)

Bracamontes's contention is meritless.

VIII. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL

Bracamontes acknowledges that this Court has considered and rejected each of the contentions he advances in support of his claim that California's death penalty scheme is overbroad and unsupported by sufficient procedural safeguards. He presents the claims to urge reconsideration and preserve them for federal review. (AOB 167-181.) The claims are meritless.

A. California's Death Penalty Scheme Appropriately Narrows the Class of Death-Eligible Offenders

Contrary to Bracamontes's claim (AOB 167-168), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) Bracamontes's claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the pool of murderers eligible for the death penalty has been repeatedly rejected. (*Pully v. Harris* (1984) 465 U.S. 37, 51-53 [104 S.Ct. 871, 79 L.Ed.2d 29]; *Brown v. Sanders* (2006) 546 U.S. 212, 224 [126 S.Ct. 8854, 163 L.Ed.2d 723]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 924; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1141, fn. 11; *People v. Homick* (2012) 55 Cal.4th 816, 903; *People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck* (2005) 37 Cal.4th 240, 304; *People v. Arias* (1996) 13 Cal.4th 92, 187.) This Court should again reject the claim.

B. The "Circumstances of the Crime" Factor Under Penal Code Section 193, Subdivision (a), Provides a Constitutionally Relevant and Clear Consideration in Determining the Appropriate Penalty

Bracamontes contends that subdivision (a) of Penal Code section 190.3, allowing the jury to consider the circumstances of the crime in determining the appropriate penalty, results in a "wanton and freakish" application of aggravating factors. (AOB 168-169.) This Court has rejected the claim that the jury's consideration of the "circumstances of the crime" results in an arbitrary and capricious imposition of the death penalty, which is akin to concluding such consideration does not result in the "wanton and freakish" application of aggravating factors. (*People v. Brown* (2004) 33 Cal.4th 382, 401.) Bracamontes provides no compelling reason for this Court to reconsider its precedent.

C. The Death Penalty Statute and Accompanying Jury Instructions Are Constitutionally Clear and Complete

1. Appropriateness of death need not be found beyond a reasonable doubt

Bracamontes contends that his death sentence violates the due-process and cruel-and-unusual-punishment clauses of the federal Constitution because it is not premised on a jury finding beyond a reasonable doubt that death is the appropriate penalty. (AOB 169-170.) This Court has expressly held that neither clause requires such findings to be made by a jury. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Bracamontes has provided no compelling reason to revisit this holding.

2. The prosecution bears no burden of persuasion in the penalty phase

Bracamontes contends that Evidence Code section 520, which imposes on the prosecution the burden of proving guilt, should apply in determining a capital defendant's penalty in the same manner it does in

determining his guilt. (AOB 170-171.) This Court has repeatedly held that the prosecution generally bears no such burden of proof at the penalty phase because the decision whether to sentence a defendant to death is essentially moral and normative, and thus different in kind from the determination of guilt. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137; see also *People v. Virgil, supra*, 51 Cal.4th at p. 1289; *People v. Hayes* (1990) 52 Cal.3d 577, 643; see also *People v. Blair* (2005) 36 Cal.4th 686, 753 [trial court "need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase"].) This Court has thus rejected the notion that Evidence Code section 520 creates a penalty phase burden of proof, as well as the alternative contention that capital juries must be expressly informed that no party bears a burden of proof at the penalty phase. (*People v. Dunkle* (2005) 36 Cal.4th 861, 939.) This Court should decline Bracamontes's invitation to revisit these issues.

3. Unanimity as to aggravating factors is not required

Bracamontes's claim that unanimity as to aggravating factors is constitutionally required should also be rejected. (AOB 171-173.) This Court has repeatedly held that neither state nor federal law requires that the jury unanimously agree on the aggravating circumstances that support a penalty of death on the rationale that aggravating circumstances are not elements of any offense. (*People v. Jackson* (2009) 45 Cal.4th 662, 701; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Bolin* (1998) 19 Cal.4th 297, 335-336.) And, contrary to Bracamontes's assertion that *Ring v. Arizona, supra,* 536 U.S. 584 mandates jury unanimity on aggravating circumstances, this Court has made clear that *Ring* does not apply because California's penalty phase determination is normative, not factual. (*People v. Prieto* (2003) 30 Cal.4th 226, 275.) Accordingly, Bracamontes's claim fails.

4. The "so substantial" language in the penalty phase jury instructions is not impermissibly vague

The trial court instructed the penalty-phase jury under pattern jury instruction CALJIC No. 8.88, which describes the process of weighing the factors in aggravation and mitigation to arrive at the penalty determination. (9 CT 1930-1931.) The instruction reads in relevant part as follows: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life without parole." Bracamontes claims the instruction is "vague and directionless" for using the phrase "so substantial." (AOB 173.) This Court has repeatedly rejected this claim and should do so again. (See, e.g., *People v. McDowell, supra,* 54 Cal.4th at 444, and cases cited therein.)

5. CALJIC NO. 8.88 properly guides the jury in determining whether death is the appropriate penalty

Bracamontes takes issue with the portion of CALJIC No. 8.88 that tells the jury it must be persuaded "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." Specifically, Bracamontes contends that the instruction should have told the jury to find whether the death penalty was "appropriate," not whether it was "warrant[ed]." (AOB 173-174.) In context, however, the instruction twice informs to determine whether the death penalty is appropriate. First, the instruction states that a mitigating circumstance "may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." Second, the sentence just preceding the one Bracamontes challenges tells the jury to "determine under the relevant evidence which penalty is *justified and appropriate* by considering the totality of the aggravating

circumstances with the totality of the mitigating circumstance." (9 CT 1930; italics added.) This Court has repeatedly rejected this claim and should do so again. (*See People v. Taylor* (2010) 48 Cal.4th 574, 658.)

6. The court need not expressly instruct the jury to return a life sentence if it finds mitigating factors outweigh those in aggravation

Bracamontes contends that CALJIC No. 8.88 unconstitutionally fails to expressly instruct the jury that it is required to return a life sentence if it determines mitigating factors outweigh those in aggravation. (AOB 174-175.) This Court has denied this "familiar challenge[] to CALJIC No. 8.88" and should do so again. (*People v. Williams* (2015) 61 Cal.4th 1244, 1287; *see People v. Fuiava* (2012) 53 Cal.4th 622, 732-733.)

7. The jury was properly instructed on penalty phase evaluation of mitigating circumstances

Bracamontes contends that the penalty instructions violated the Sixth, Eighth, and Fourteenth Amendments by failing to expressly inform the jury of the standard of proof and lack of need for unanimity as to mitigating circumstances. (AOB 175-177.) This Court recently reaffirmed its prior holdings that an instruction on the absence of a burden of proof is not constitutionally required. (*People v. Winbush* (2017) 2 Cal.5th 402, 490.) It further held that no express instruction telling the jury it need not be unanimous in relying on a mitigating circumstance is necessary. (*Ibid.* ["[N]othing in the penalty phase instructions would mislead a jury into believing mitigating factors had to be found unanimously, [so] a specific instruction to this effect was not required."].) *Kansas v. Carr* (2016) 577 U.S. __ [136 S.Ct. 633, 193 L.Ed.2d 535], cited by Bracamontes, provides no basis for revisiting these holdings and, in fact, supports this Court's prior holdings regarding a burden-of-proof instruction as to mitigating

circumstances. (*Id.* at 642 [penalty phase evaluation of mitigating circumstances is not susceptible to a standard of proof].)

8. No presumption of life instruction is constitutionally required

Bracamontes contends that the jury was constitutionally required to be instructed that life without parole is presumed to be the appropriate sentence. (AOB 177-178.) This Court has previously held to the contrary and should do so here. (*People v. Arias, supra,* 13 Cal.4th at p. 190, relying on *Tuilaepa v. California*, (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

D. The Jury Need Not Prepare Written Findings Identifying the Aggravating Factors On Which It Relied

Bracamontes contends that California law violates the federal Constitution because the jury is not required to keep written findings regarding aggravating factors. (AOB 178.) This Court has repeatedly rejected this claim and should do so again. (*People v. McDowell, supra,* 54 Cal.4th at p. 444; *People v. Parson* (2008) 44 Cal.4th 332, 370.)

E. The Jury Instructions on Mitigation and Aggravating Factors Were Constitutionally Sound

1. Restrictive adjectives do not restrict the consideration of mitigation

Contrary to Bracamontes's claim that the use of restrictive adjectives in the list of mitigating factors restricted the jury's consideration of those factors (AOB 178), this Court has made clear that the use of restrictive adjectives, such as "extreme" and "substantial" in the list of mitigating factors (Pen. Code, § 190.3), "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Hoyos* (2007) 41 Cal.4th 872,

927.) Bracamontes urges reconsideration of this Court's precedent, but provides no reason to do so.

2. It is unnecessary to delete inapplicable sentencing factors

Bracamontes claims the trial court should have omitted inapplicable sentencing factors from its instructions to the jury. This Court has repeatedly rejected the same claim, and should do so again. (See *People v. Jones* (2011) 51 Cal.4th 346, 381; *People v. Cook* (2006) 39 Cal.4th 566, 618.)

3. The statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not invite the jury to aggravate the sentence based on the absence of mitigating factors

Bracamontes maintains that the trial court should have instructed the jury that certain statutory factors are relevant solely in mitigation. (AOB 179-180.) This Court has held otherwise. (See *People v. Jones, supra,* 51 Cal.4th at p. 381; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) His more specific contention that the prefatory language "whether or not" introducing the mitigating factors (d), (e), (f), (g), (h), and (j) in Penal Code section 190.3, invited the jury to convert a mitigating factor into an aggravating circumstance has also been repeatedly rejected by this Court. (See, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Frye* (1998) 18 Cal.4th 894, 1027; *People v. Carpenter* (1997) 15 Cal.4th 312, 420.)

F. Intercase Proportionality Review Is Not Constitutionally Required

Bracamontes contends that California's death penalty statute is unconstitutional because it lacks a requirement for intercase proportionality. (AOB 180.) Again, this Court has repeatedly rejected this

claim and should do so again here. (See *People v. Clark* (1993) 5 Cal.4th 950, 1039, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [regarding conflict-free counsel].) Neither the federal nor the state Constitution requires intercase proportionality review (*Pulley v. Harris, supra,* 465 U.S. at pp. 43-54; *People v. McDowell, supra,* 54 Cal.4th at p. 444), and this Court has specifically held that it is not required for purposes of due process, equal protection, the guarantee of a fair trial, or the prohibition against cruel and unusual punishment. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Hoyos, supra,* 41 Cal.4th at p. 927.) Accordingly, this Court has consistently declined to undertake it. (*People v. Gonzales* (2011) 51 Cal.4th 894, 957; *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Cook* (2007) 40 Cal.4th 1334, 1368.) Bracamontes provides no reason for this Court to depart from its prior holdings.

G. California's Capital Sentencing Scheme Does Not Run Afoul of the Equal Protection Clause

Bracamontes contends that California's death penalty scheme violates the Equal Protection Clause by providing capital defendants with fewer procedural guarantees than are afforded to noncapital defendants. (AOB 180-181.) This Court has found that the two groups are not similarly situated and repeatedly rejected the claim. (*People v. Johnson* (2016) 62 Cal.4th 600, 656, and cases cited therein.) Bracamontes provides no reason for this Court to depart from its prior holdings.

H. California's Death Penalty Scheme Does Not Violate International Law

Finally, Bracamontes challenges California's death penalty scheme as violating international law, the Eighth and Fourteenth Amendments, and evolving standards of decency. (AOB 181.) This Court has repeatedly held that a sentence of death that complies with state and federal constitutional

and statutory requirements does not violate international law. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Lewis, supra,* 43 Cal.4th at p. 539; *People v. Prince* (2007) 40 Cal.4th 1179, 1299, and cases cited therein.) This Court should so hold here.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: September 13, 2018 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 22, 854 words.

Dated: September 13, 2018

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BRACAMONTES (MANUEL)**
Case Number: **S139702**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **theodore.cropley@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
RESPONDENT'S BRIEF	Respondents Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Office Of The State Public Defender - Ok A.J. Kutchins, Senior Deputy State Public Defender SFD	kutchins@ospd.ca.gov	e-Service	9/13/2018 11:53:14 AM
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AJ Kutchins Office of the State Public Defender 102322	aj.kutchins@ospd.ca.gov	e-Service	9/13/2018 11:53:14 AM
California Appellate Project CAP Department of Justice, Office of the Attorney General-San Diego	filing@capsf.org	e-Service	9/13/2018 11:53:14 AM
Holly Wilkens Department of Justice, Office of the Attorney General-San Diego 88835	Holly.Wilkens@doj.ca.gov	e-Service	9/13/2018 11:53:14 AM
Natalie Rodriguez Department of Justice, Office of the Attorney General-San Diego	Natalie.Rodriguez@doj.ca.gov	e-Service	9/13/2018 11:53:14 AM
OSPD Docketing Office of the State Public Defender 000000	docketing@ospd.ca.gov	e-Service	9/13/2018 11:53:14 AM
San Diego District Attorney Department of Justice, Office of the Attorney General-San Diego	da.appellate@sdcda.org	e-Service	9/13/2018 11:53:14 AM
San Diego Superior Court Department of Justice, Office of the Attorney General-San Diego	Appeals.Central@SDCourt.ca.gov	e-Service	9/13/2018 11:53:14 AM

SDAG Docketing Department of Justice, Office of the Attorney General-San Diego	sdag.docketing@doj.ca.gov	e-Service	9/13/2018 11:53:14 AM
Stephen McGee Department of Justice, Office of the Attorney General-San Diego	Stephen.McGee@doj.ca.gov	e-Service	9/13/2018 11:53:14 AM
Theodore Cropley Department of Justice, Office of the Attorney General-San Diego 181362	theodore.cropley@doj.ca.gov	e-Service	9/13/2018 11:53:14 AM

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

9/13/2018

Date

/s/Theodore Cropley

Signature

Cropley, Theodore (181362)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm