In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. Alfred Flores III, Defendant and appellant.	)	No. S116307

Appellant's Reply Brief

Automatic Appeal From a Judgment of Death
Of the Superior Court of The State of California,
County of San Bernardino
Honorable Ingrid A. Uhler, Judge
No. FVA-015023

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DEATH PENALTY

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Table of Contents

Table of Authorities

Statutes

Penal Code

Evidence Code

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Introduction

In this reply, appellant Alfred Flores addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, is not a concession, abandonment, or waiver of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) Mr. Flores addresses each issue in the order it was raised in his opening brief.

Argument

I. The striking of Juror S.M. denied appellant Flores his rights to due process, to an impartial jury taken from a fair cross-section of the community, and to a reliable penalty determination.

The court sustained a prosecution challenge to juror S.M. on the ground S.M.'s views on the death penalty substantially impaired his ability to fulfill his oath as a juror. S.M. repeatedly stated his opposition to the death penalty rested on policy grounds, not moral or religious grounds, and he could impose death if he thought it was warranted by the evidence. (5 RT 951.) Although the court noted the questioning of S.M. was "limited," it did not question the juror to clarify his qualifications to serve.

The exclusion of prospective juror S.M. was error. The juror unequivocally stated he could follow the law and impose the death penalty. The prosecution did not prove by a preponderance of the evidence that S.M.'s views on the death penalty substantially impaired his ability to follow the law.

A. The prosecutor did not prove by a preponderance of the evidence that S.M. was unqualified to serve.

The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial

situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Stewart* (2004) 33 Cal.4th 425.) The trial court's ruling will be upheld on appeal if supported by substantial evidence. (*Wainwright v. Witt, supra,* 469 U. S. at pp. 426-430; *People v. Pearson* (2012) 53 Cal.4th 306, 330.)

Respondent claims S.M. was "morally opposed" to capital punishment and thus could not fulfill his oath as a juror. The evidence does not support this argument. Viewed fairly and in context, nothing in S.M's answers evidenced a "definite impression" that his views "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instrucitons and his oath." (*Wainwright v.Witt, supra,* 469 U.S. at p. 426 [citation omitted].)

B. S.M. did not have a "moral objection" to capital punishment.

Respondent argues that S.M. "repeatedly" indicated he had a "moral objection" to the death penalty, and he "made clear" that

his moral objection would cause him to be unfair to the prosecution. (RB at 30.) Not so.

S.M. had no religious or philosophical objection to the death penalty. To the contrary, his religious beliefs taught him capital punishment was appropriate when used sparingly. (18 CT 4942.) His concern about capital punishment did not stem from a "moral opposition" to capital punishment, but from his beliefs that the death penalty did not deter crime, and was sometimes applied unfairly. (18 CT 4939.) He favored the death penalty "to protect society" where the offender was beyond rehabilitation, and "the crime [was] serious enough to warrant it." (18 CT 4939.) He declared he was *not* "fundamentally opposed" to the death penalty. (5 RT 942.)

The record rebuts respondent's argument that S.M. was "morally" opposed to the death penalty. He was not.

C. S.M. stated unequivocally that he would follow the law.

Respondent argues S.M. was inclined to "ignore the law" with respect to the special circumstance allegation. (RB at 30.) In responding to questions from defense counsel, S.M. stated he was

aware that a special circumstance had to be found true before the death penalty could be imposed. However, he explained the special circumstance finding might not be enough, in his mind, to warrant the death penalty. He stated his reason: "I'm trying to decide whether I agree with if something is indeed a special circumstance, you know. I understand the law defines it one way, but I have to look within and decide *whether I can use that factor* in determining whether I can take someone's life or vote that someone's life be taken." (5 RT 945 [emphasis added].)

S.M.'s explanation that he would have to decide "whether I can use that factor in determining whether I can take someone's life or vote that someone's life be taken" does not mean he was willing to find a special circumstance allegation untrue because it might lead to the death penalty. His response meant only that he would have to decide for himself if the commission of the special circumstance was a factor that warranted death.

S.M.'s views conformed to the law. The decision to impose life or death is "inherently moral and normative." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) There is no burden of proof; each juror assigns whatever weight to the circumstances that he

or she deems appropriate, and each juror decides for himself or herself whether death is appropriate. (*Ibid.*; *Tuilaepa v. California* (1984) 512 U.S. 967, 979 [holding jury "need not be instructed how to weigh any particular fact in the capital sentencing decision"]; *People v. Boyde* (1988) 46 Cal.3d 212, 253 [holding a juror in a capital case is "free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider"].) Thus, S.M. correctly stated he would have to decide for himself whether the circumstances were sufficient to warrant the death penalty.

Moreover, S.M. more than once denied that his views on the death penalty would impair his ability to fulfill his duty as a juror. He stated he would follow the law and stated he would weigh the aggravating and mitigating circumstances, and that he could vote for death in an "appropriate case." (5 RT 946.) He declared he could consider both life without parole and death as "realistic and practical" possibilities. (18 CT 4944.) He said he would be a "fair and impartial juror." (18 CT 4945.)The record simply does not support respondent's argument that there was substantial evidence that S.M. was unwilling to follow the law.

D. A reluctance to impose the death penalty does not make a prospective juror unfit to serve.

Respondent argues S.M. was properly excused because he stated he was "very uncomfortable with being placed with the responsibility of taking someone's life" and that this would put him in a "moral dilemma." (5 RT 942.) Both the United States Supreme Court and this Court have previously rejected respondent's argument.

Neither a reluctance to impose the death penalty, nor the moral discomfort caused by the prospect of imposing a death sentence, is a valid ground to excuse a prospective juror. "Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn.8.) A juror "might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v.*

Stewart, supra, 33 Cal.4th at p. 447.)

It is well understood that to impose the death penalty would be a difficult task for most people. "In light of the gravity of the punishment, for many members of society their personal and conscientious views concerning the death penalty would make it 'very difficult ever to vote to impose the death penalty.'" (*Ibid.*) Yet even a juror who would find it difficult to impose the death penalty, such as S.M., is eligible to sit on the jury, as long as the juror states he or she could weigh the aggravating and mitigating circumstances and determine whether death was the appropriate sentence. (*Ibid.*)

S.M. said exactly that, more than once. (18 CT 4939-4940, 4942, 4944, 4945; 5 RT 946.) He equivocated at one point, and said he did not know if he could "in good conscience vote for the death penalty," but upon reflection said he could vote for death in an appropriate case. (5 RT 946.) Taken as a whole, S.M.'s statements during voir dire show he was able and willing to follow the law. The prosecutor did not prove by a preponderance of the evidence that S.M.'s views on capital punishment substantially impaired his ability to act as a juror. In context,

S.M.'s answers all point in the same direction: he disfavored capital punishment, but found the penalty necessary in some cases in order to protect society. Although he would be reluctant to sentence a person to death, he could and would follow the law, and he could and would vote for death in an appropriate case. Nothing more is required.

Thus, the record does not support the trial court's finding that the prosecution proved by a preponderance of the evidence that S.M.'s views on the death penalty "substantially impaired" his ability to return a death sentence if he found it warranted by the evidence. At most, S.M. would have found it difficult to impose the death penalty, but as this Court has made clear, difficulty in imposing death does not provide a ground for a challenge for cause. (*Stewart, supra*, 33 Cal.4th at p. 447.) Although S.M. may have been a juror that the prosecutor would have exercised a peremptory challenge upon, there was no ground for a cause challenge. The prosecution did not meet its burden of showing that prospective juror S.M. was biased and the court erred in dismissing the juror.

E. A prospective juror's single inconsistent statement is not grounds for this Court to defer to the trial court's discharge of the juror.

Respondent contends that because S.M. suggested he might be unable to impose the death penalty in "good conscience," this Court *must* defer to the trial court's ruling, even though the juror stated several times that he could follow the law, weigh the aggravating and mitigating circumstances, and impose the death penalty if warranted. (RB at 31, 34-35.) But deference is not mandatory. Rather, if a prospective juror's answers on voir dire are conflicting or equivocal, "the trial court's findings as to the prospective juror's state of mind are binding . . . if supported by substantial evidence." (*People v. Duenas* (2012) 55 Cal.4th 1, 10.) As argued above, the court's finding was not supported by substantial evidence.

Moreover, not every slight hesitation by a juror, or any slight equivocal statement requires deference to the trial court's ruling. The deference rule as presently articulated goes back to 1970. Its present iteration stems from *People v. Ghent* (1987) 43 Cal.3d 739, 768, which, in turn, relies on *People v. Fields* (1984) 35 Cal.3d 329, 355-5, and *Fields* itself relied on *People v. Floyd*

(1970) 1 Cal.3d 694, 724-25. But since *Floyd* was decided in 1970, the United States Supreme Court has issued two decisions that suggest this Court's present rule of deference is too rigidly applied. (See *Adams v. Texas* (1980) 448 U.S. 38, 49-50; *Gray v. Mississippi* (1987) 481 U.S. 648, 661.)

In *Adams*, the Court held that a number of prospective jurors had been improperly excused for cause because the State had not carried its burden of proving that the jurors' views on the death penalty would prevent or substantially impair the performance of their duties as jurors. (*Adams, supra*, 448 U.S. at p. 45.) The voir dire in *Adams* involved several jurors who were equivocal about whether their penalty phase deliberations would be affected by the fact that death was an option. As to each, the trial court resolved the ambiguity in the State's favor, discharging them all for cause.

But the United States Supreme Court did not defer to any of the trial court's conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking any of these jurors for cause. (*Adams, supra,* 448 U.S. at pp. 49-50.) The Supreme Court reversed without deferring to the trial court's

decision, and held that jurors could not be discharged simply "because they were unable positively to state whether or not their deliberations would in any way be affected." (*Id.* at pp. 49-50.) In other words, when a juror gives conflicting or equivocal responses, the state has not carried its burden of proving that the juror's views would prevent or substantially impair the performance of his duties as a juror. (*Adams, supra,* 448 U.S. at p. 45.)

Seven years after *Adams*, the Court again held it was unconstitutional to exclude a juror who had been equivocal about her ability to serve. (*Gray v. Mississippi, supra*, 481 U.S. 648.) During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were "equivocal." (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.) As the actual voir dire shows, the state supreme court's characterization was entirely correct. When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at p. 16.) When asked if she would automatically vote

against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at pp. 17, 18.) When pressed by the trial court to commit to a position, she agreed that she did not have scruples against the death penalty where it was "authorized by law." (*Id.* at p. 18.) However, when directly asked by the prosecution whether she could vote for death, she said "I don't think I could." (*Id.* at p. 19.)

Before the United States Supreme Court, the State "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (*Gray, supra*, 481 U.S. at p. 661 n.10.) But *Gray* rejected the State's arguments that (1) the trial court was free to discharge equivocal jurors for cause, and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford any deference to the trial court's finding in Gray, but it concluded that the discharge of juror Bounds violated the constitution. (*Gray, supra*, 481 U.S. at p. 661 n.10.) The Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." (*Ibid.*)

In the context of capital sentencing, where the jury is making a largely discretionary decision as to whether a defendant should live or die, there is a greater concern over the impact of an imbalanced jury on the reliability of the judgment, as well as with ensuring that the State not seat juries predisposed to a death verdict. (*Witherspoon v.Illinois, supra,* 391 U.S. at p. 519, fn.15.) Accordingly, in both *Adams* and *Gray*, the Supreme Court made clear that when a prospective capital-case juror gives equivocal responses, the State has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." (*Adams, supra*, 448 U.S. at p. 45.) The Court reaffirmed this principle recently, when it stated that in spite of the rule of deference to a lower court's rulings on issues of fact, the reviewing court must find error in the exclusion of the juror "where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9, 20.)

No basis for a finding of impairment exists here. S.M. expressed his views on capital punishment in a 37-page questionnaire, and over several pages of voir dire. Yet out of all

this, respondent points to but a single instance where S.M. made a statement that was anything less than a full-throated expression of fealty to the juror's oath to follow the law. The prosecutor simply did not carry its burden of proving S.M.'s views on capital punishment prevented or impaired him from fulfilling his oath to follow the law.

To uphold the trial court's decision based on the existence of a single equivocal or arguably inconsistent statement, without considering the voir dire record as a whole, reduces appellate review in this context "almost to the vanishing point." (*People v. Whalen* (2013) 56 Cal.4th 1, 99 (conc. opn. of Liu, J.).) Viewing the record as a whole, the record does not support a finding that S.M.'s views prevented or impaired his ability to follow the law.

Prospective juror S.M, age 40, was in all respects the sort of person who would be a good juror in any case – thoughtful, conscientious, and civic-minded. He graduated from the University of California, worked as a legislative analyst, and volunteered time to youth organizations in his community. (18 CT 4916-4918.) He opposed capital punishment purely on policy grounds. (18 CT 4910 [questionnaire];5 RT 941-946.) Counsel

asked many times, in many different ways, if S.M. could impose the death penalty even though he was opposed to it. He repeatedly said he could, but believed the "death penalty should be applied sparingly," and only for the "most heinous of crimes." (5 RT 941; 18 CT 4938; 5 RT 943.)

These views did not make S.M. unfit to serve as a juror in a capital case. Nothing in what he said was contrary to law; he accurately described the narrowing function of the death penalty statute, and he correctly believed the death penalty should be reserved for the most serious of crimes and offenders. He did not believe a "garden variety first degree murder" warranted the death penalty. His views follow the law articulated by the United States Supreme Court. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 319 [capital punishment is reserved for those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution"]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433 [setting aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder"].)

Taken as a whole, S.M.'s answers to the juror questionnaire and in voir dire show he was a man who was not categorically opposed to capital punishment on religious or moral grounds. He questioned whether the death penalty was an effective crime deterrent. He questioned whether it was fairly applied. He admitted he would be reluctant to impose a death sentence, and he wondered whether he could do it, but he affirmed he would follow the law, weigh the aggravating and mitigating circumstances, and vote for death in an "appropriate case." (5 RT 946.)

The trial court erred in excluding this juror for cause. The unjustified removal of this juror violated defendant's rights to due process, to an impartial jury drawn from a fair cross-section of the community, and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 15 and 17 of the California Constitution. (See *Morgan v. Illinois* (1992) 504 U.S. 719, 727; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) The error is reversible per se. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 666-668.) The death sentence must be reversed.

F. The court's disparate treatment of pro-death jurors resulted in a jury biased towards death, and violated Flores's rights to due process, to an impartial jury, and to a reliable guilt and penalty determination under the Sixth, Eighth, and Fourteenth Amendments.

In addition, the record shows a separate ground of error in the death-qualification process: the court did not treat alike those jurors who ardently favored the death penalty and those jurors who expressed reservations about it. Thus, as shown above, the court summarily discharged S.M. without questioning him. In contrast, the court personally questioned and rehabilitated a pro-death juror who expressly declared she"could not" impose life without parole under the circumstances of this case. (6 RT 1375.) After extensive questioning by the court, the prospective juror backed o ff her earlier statement, and offered that she would not "automatically" vote for death. (6 RT 1379.) Despite her starkly inconsistent answers, the court denied a defense challenge to this juror. (6 RT 1379.) The court denied defense challenges to two other jurors who declared they would automatically vote for death. (5 RT 839; 5 RT 1012.)

In his opening brief, Flores argued that the trial court did

not apply the *Witt* standard evenly to both sides. (AOB at 70.) The court denied challenges to jurors who stated they would "automatically" vote to impose death. And unlike the voir dire of S.M., the court personally questioned these jurors in an effort to rehabilitate them. (AOB at 70-78.)

Trial courts possess broad discretion over both decisions regarding the qualifications of prospective jurors to serve and the conduct voir dire. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 29.) Courts must be "'be evenhanded in their questions to prospective jurors . . . and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors.' " (*People v. Mills* (2010) 48 Cal.4th 158, 189.) Evenhandedness is encouraged because "a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515, fn. 7.) An abuse of discretion in conducting voir dire will be ground for reversal if it renders the trial

fundamentally unfair. (*People v. Whalen, supra*, 56 Cal.4th at p. 31.)

Respondent claims (1) the court committed no error because these jurors expressed a willingness "to remain open-minded or not automatically vote for death"; (2) Flores used peremptory challenges on each juror, and (3) Flores did not seek to excuse any of the prospective jurors who sat on the trial. (RB at 36.) Respondent's arguments do not address the issue.

The issue is not whether the pro-death jurors eventually promised to keep an open mind as to sentencing; the issue is that the court treated them differently than it treated S.M. As detailed in the opening brief, three jurors declared they would vote for death under the circumstances of this case. Prospective juror L.T. answered "probably" to the question whether she would automatically vote for death if defendant was found guilty of murdering three people. (5 RT 839.) Juror D.S. said he would have a "hard time" imposing life without parole here because the act of killing three separate people was "kind of extreme." (5 RT 1010-11.) Juror S.T. said she "could not" vote for life without parole in this case. (6 RT 1375-76.)

In contrast to these jurors' express admission that they would impose death in this case, juror S.M.'s hesitation was indirect and momentary. His limited opposition to the death penalty was a based on policy grounds, but the pro-death were inclined to vote for death based on the specific facts of this case. Yet the court excluded S.M. without questioning him, but kept the three pro-death jurors after personally intervening and obtaining a clarification of their views to avoid a challenge for cause.

Moreover, although the court found the voir dire of S.M. "limited," it did not ask him any questions. On the other hand, the court questioned the pro-death jurors to rehabilitate them, and sometimes used leading questions. (5 RT 951, 5 RT 841, 6 RT 1379.)

This sort of questioning is problematic. Questioning by the court can lead a prospective juror to the very answer the juror thinks the court wants him or her to give. (See *People v. Whalen, supra*, 56 Cal.4th at p. (conc. opn. of Liu, J.)(observing that "the formality of the setting of a superior court, over which the trial judge presides in a commanding display of authority" makes it

natural for a prospective juror to defer to the judge and to answer accord deference to the judge and "to answer 'yes' when the judge individually instructs the juror on the law and asks "can you follow my instructions?").)

Respondent's other points – Flores exercised peremptory challenges on these three jurors and did not challenge the jurors who sat on the trial – do not address the fundamental issue: the court forced Flores to use his peremptory challenges on jurors that should have been excused for cause.[1] It is not possible to prove with absolute precision that the court's disparate treatment directly resulted in the pro-death jury that sat in judgment of Flores. It is possible to show, however, that 14 of the 17 jurors who were sworn were in favor of keeping the death penalty. (11 CT 2802 through - 13 CT 3357.)

Respondent demands a showing of irrefutable prejudice in a situation where such can never be shown. But "[a] Procrustean demand for a showing of prejudice is ill-suited to a case where the

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[1] Defense counsel exercised all of her peremptory challenges. (8 RT 1708.) She was forced to exercise two peremptory challenges on jurors whom her challenges for cause were improperly denied. (5 RT 878 [prospective juror L.T.]; 6 RT 1376, 1381.)

very integrity of the judicial process is at stake and where the inability to demonstrate prejudice offers little assurance that prejudice did not exist." (*United States v. Kyle* (D.C. Cir. 1972) 469 F.2d 547, 551 [diss. opn. of Bazelon, J.].)

The court's disparate treatment was an abuse of discretion that resulted in an unfair trial. The court violated defendant's rights to due process, to an impartial jury drawn from a fair cross-section of the community, and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 15 and 17 of the California Constitution. (See *Morgan v. Illinois, supra,* 504 U.S. at p. 727; *People v. Fauber, supra,* 2 Cal.4th 792, 816.) Reversal of the conviction and sentence is required.

II. The court erred in denying Flores's motion to exclude the

firearm evidence and to instruct the jury on the state's bad faith destruction of evidence; the error violated Flores's rights to due process and to a reliable guilt and penalty verdict under the state and federal constitutions.

A. Summary of Flores's argument.

In his opening brief, Flores argued the trial court erred in denying his motion to exclude the gun retrieved from Mexico, or to instruct the jury that by wiping the surface of the gun, the State denied Flores the opportunity to inspect it. Flores argued the error violated his right to due process under the Fourteenth Amendment and to a reliable guilt and penalty phase determination under the Eighth Amendment. (AOB at 79.)

Briefly, these facts support the argument: A few days after the victims were shot, the San Bernardino sheriff's deputies came to believe the handgun used in the shootings was in Mexico. They set out to recover it. (11 RT 2177.) Although there was a treaty in place between the United States and Mexico that governed criminal investigations and the recovery of evidence from Mexico, the deputies chose not to follow it. Instead, the deputies used Maria Jackson, Carmen Alvarez's mother, to act as a go-between in the recovery of the gun, and paid Trini Cambreros, a Mexican

police officer, to assist them in the investigation and recovery of evidence. (11 RT 2179; 15 RT 3009.)

Maria Jackson gave money to her nephew, Juan Miranda, to purchase the gun from an unidentified third party. (11 RT 2182.) According to Maria Jackson, who had no reason to lie about this, when Miranda returned with the gun, both Detective Acevedo and Trini Cambreros handled the weapon, and Cambreros wiped it clean with a bed sheet before putting it in Jackson's purse. (11 RT 2290, 2310.)

The wiping of the gun resulted in the loss of potentially exculpatory evidence and violated due process. First, the deputies acted in bad faith by choosing to bypass the Mutual Legal Assistance Cooperation Treaty with Mexico. (Sen. Treaty Doc. No. 100-13, eff. May 3, 1991, 27 I.L.M. 443 [hereafter the "Treaty"].) Cambreros wiped the gun clean in order to remove his own fingerprints and hide his involvement in the case. (15 RT 3008, 3021; 11 RT 2310.) Had the San Bernardino deputies followed the Treaty protocol, all steps in the investigation would have been transparent from the outset, and Cambreros would not have needed to conceal his identity by destroying the evidence. The

Treaty violation is evidence the deputies destroyed potentially exculpatory evidence in bad faith. (*California v. Trombetta* (1984) 467 U.S. 479, 488; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

The misconduct in handling this critical evidence, and the concomitant loss of potential evidence, should have resulted in the exclusion of the gun from evidence. (See AOB at 97.) At the very least, the trial court should have advised the jury that by wiping the gun clean, the deputies deprived Flores of the opportunity to inspect the evidence and subject it analysis and testing. (See *United States v. Sevilla* (9th Cir. 2013) 714 F.3d 1168, 1173.)

B. Reply to respondent's argument.

Respondent concedes the deputies did not proceed under the Treaty. (RB at 38.) But respondent contends there was no error because : (1) the Treaty does not provide a protocol for recovering evidence from Mexico, (2) the Treaty does not provide for the exclusion of evidence obtained in violation of the Treaty, (3) the Treaty is not the only means of recovering evidence from Mexico (4) the deputies did not destroy known exculpatory evidence in bad faith. (RB at 36-37, 39.)

Flores does not contend that the evidence should be excluded because the police violated the Treaty. Flores contends the violation of the Treaty was evidence that the police acted in bad faith.

The State has a constitutional obligation to preserve "evidence that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta, supra,* 476 U.S. at p. 488.) The State violates a defendant's right to due process when it destroys evidence that has "constitutional materiality" — i.e., evidence that (1) has "an exculpatory value that was apparent before the evidence was destroyed" and (2) is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta, supra*, 467 U.S. at p. 479.)

The Jennings gun had "constitutional materiality." Not only was it *likely* the gun would bear exculpatory evidence, it *did* bear such evidence. DNA obtained from the gun showed it could have been handled by Abraham Pasillas or Jason Van Kleef. (16 RT 3319.)

The issue is whether the police acted in bad faith by

allowing the Mexican officer to wipe the gun clean to hide his involvement in the case. (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.) Evidence that the police deliberately failed to follow established procedure shows bad faith under *Youngblood*. (See *United States v. Elliott* (E.D. Va. 1999) 83 F.Supp.2d 637, 647 [failure to follow "established procedures" that were "clear and unambiguous" is probative evidence of bad faith]; *United States v. Montgomery* (D. Kan. 2009) 676 F.Supp.2d 1218, 1245 [government's destruction of marijuana plants without documenting their number violated explicit Drug Enforcement Administration policy and was one factor weighing "strongly in favor of bad faith"]; *State v. Durnwald* (2005) 163 Ohio App.3d 361, 371, 837 N.E.2d 1234 [accidental erasure of video documenting a driving under the influence stop in violation of state patrol policy "encompasses more than mere negligence or an error in judgment;" rather, "such a continuing cavalier attitude toward the preservation of . . . videotape evidence rises to the level of bad faith"].)

Here, the police failed to follow the established protocol for obtaining evidence from Mexico. Rather than using the Treaty to

obtain the evidence in a transparent, above-board fashion, the police used unauthorized means to recover potentially critical evidence. As a direct result, the Mexican officer wiped the gun clean to hide his role in the case.

The destruction of the evidence and the court's refusal to exclude it denied Flores a fair trial and undermined his right to a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) The prosecution case would have been seriously undermined if the gun was not linked to Flores. By destroying potentially useful evidence, the State denied Flores access to evidence that would have raised a reasonable doubt of his guilt as to the Ayala and Torres homicides, where the firearm evidence was most incriminating. Under these circumstances, reversal of the conviction and/or judgment of death is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

III. The trial court abused its discretion in admitting the speculative testimony of a gang expert on the motive for the crimes; the erroneous admission of this testimony violated Flores's rights to due process and to a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments.

A. Summary of argument.

Flores contends the court erred in admitting Detective Penney's opinion that Ricardo Torres was shot because he had "some information" on the person that shot him and because his refusal to join the El Monte Trece gang was "disrespectful." (AOB at 99.) This opinion was unsupported by the evidence. It was no more than the prosecutor's theory of the case, put to the jury through the testimony of a police officer. The admission of this testimony violated Flores's rights to due process and a fair trial, and to a reliable guilt and penalty determination, under the Fourteenth And Eighth Amendments to the United States Constitution and Article I, section 15 of the California Constitution, and Evidence Code sections 1101 and 352.

B. Summary of respondent's argument.

Respondent contends: (1) Flores forfeited the claim by failing to make a timely and specific objection, (2) Detective

Penney's opinion was grounded in the evidence, and (3) the error is harmless under *Chapman* or *Watson*. (RB at 45-48.)

C. Flores made a timely and specific objection to Penney's opinion regarding the motive for the crimes.

Respondent argues Flores failed to make a timely and specific objection to Detective Penney's opinion on the motive for the crimes. The argument is meritless.

An objection will be deemed sufficient to preserve an issue for appeal if "the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Partida* (2005) 37 Cal.4th 428, 435 [holding an objection need only inform the court and opposing counsel of the reason why the evidence should be excluded].)

The court understood the defense objection to this evidence. Before trial, the prosecutor moved to introduce evidence of Flores's gang participation. The prosecutor argued Flores killed the three victims because they insulted him by not joining the gang. (2 RT 259.) The prosecutor argued that "[w]hen people do not respond to [Flores's] need for respect he kills them. This motive is similar in all of the San Bernardino County homicides."

(3 CT 691.) The prosecutor argued the testimony of the gang expert witness was necessary for the jury to "understand the mentality and motivations of gang members . . . ." (3 CT 691.) The court tentatively admitted the evidence because it was relevant to "motive and intent." (2 RT 262.) The court acknowledged it understood Flores's counsel had objected to "the entire information about the defendant's involvement with the gang *and the theory that goes to the prosecution in terms of motive and intent* . . . ." (2 RT 264 [emphasis added]. Thus, the gist of the gang expert's testimony was known at the time the parties discussed the subject before trial. Defense counsel specifically objected to the gang expert's proffered testimony on motive and intent. The court said it understood the objection. (2 RT 264.)

Nevertheless, respondent claims the in limine ruling was only tentative, and that Flores was required to renew his objection at trial in order to preserve the objection. (RB at 45.) "Generally when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal." (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3.) "The

reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Ibid.*)

Respondent's argument is meritless. Defense counsel renewed the motion to exclude gang evidence on the very day the gang expert testified. (4 CT 959.) In this motion, defense counsel objected to the testimony that was "speculative at best." (4 CT 961.) The proposed testimony of the gang expert had not changed, and the alleged "evidence" the expert relied upon to form his opinion had not changed. Thus, it would have been futile to renew the entire motion. A defendant will be excused from the necessity of an objection or motion if the objection would have been futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159.)

Respondent next contends that, with one exception, the gang expert's testimony was "rooted" in a hypothetical based on the evidence presented at trial. (RB at 46.) The exception was Detective Penney's opinion that Flores killed Ricardo Torres because Torres had "some information" on Flores. (RB at 47.)

Respondent concedes there was no evidence to support this opinion. (RB at 47.)

But no evidence supported the other parts of the hypothetical, or Penney's other theories regarding Flores's alleged motive. Penney speculated as to possible motive; he simply told the jury how he thought the case should be decided, but his theories were not grounded in evidence. (See *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [holding gang expert's testimony was speculative and inadmissible].)

Penney testified Flores killed Torres because Torres refused to join a gang. (19 RT 4054.) However, there was no evidence that (1) Flores asked Torres to join a gang, or (2) a refusal to join a gang was punishable by death in gang culture. Respondent argues the record shows that Flores "tried to recruit [Torres] into his gang." (RB 46.) Respondent cited several pages of the record, but none supported its argument. There was no evidence Flores recruited anyone into a gang. At best, there was evidence Flores wanted to do it, but was told not to.

Specifically, the following are the record pages respondent cited to in support of its argument to, and the relevant testimony

from those pages:

12 RT 2425: Andrew Mosqueda testified he did not remember saying that Flores wanted Torres to join the gang.

12 RT 2429-2430: Mosqueda did not remember talking to Flores about Torres jumping into the gang. Flores asked Mosqueda if Torres was going to jump into the gang, but Flores did not ask him about it repeatedly.

15 RT 3051: Carmen Alvarez testified Flores wanted to recruit Mosqueda's friends into the gang, but Carmen advised him not to do it.

Respondent ignores evidence that Mosqueda testified Flores never asked Torres or Ayala to join the gang. (12 RT 2378.) In one of his several versions of the events Mosqueda furnished to the police, he said Flores killed Torres and Ayala because they would not join the gang. But at trial, Mosqueda testified he had no reason to believe that was true. (12 RT 2427.) Mosqueda offered it as a motive because he knew of no reason for Flores to kill Torres and the others. (12 RT 2427.)

Not only was there no evidence that Flores recruited Torres into the gang, there was no evidence that gang culture

demanded punishment for those who refused to join a gang. Detective Penney's opinions supposedly rested on his "experience" as a gang investigator, yet in his experience he had never heard of anyone being killed for refusing to join a gang. (19 RT 4094.) On appeal, recognizing that Penney's opinion did not rest on his knowledge of gang culture, respondent argues that Penney's opinion was simply that Flores felt disrespected by Torres. But Penney was not qualified to testify as an expert on what Flores felt, or how Flores would respond to given situations. At this point, Penney was simply telling the jury how to decide the case.

Finally, respondent contends the error was not prejudicial. Respondent claims the error, if any, is one of state law only, and "given the evidence," it is not reasonably probable the jury would have reached a different verdict had the error not occurred. (RB at .)

The error was one of federal and state law. The erroneous admission of Detective Penney's unfounded opinions made the trial fundamentally unfair, and violated Flores's constitutional rights to a fair trial and due process of law and to a reliable guilt and penalty determination. (*People v. Partida, supra,* 37 Cal.4th

at p. 439 [holding the erroneous admission of evidence under state law violates due process under Fourteenth Amendment when it makes the trial fundamentally unfair]; *People v. Alberran* (2007) 149 Cal.App.4th 214, 229 [holding that admission of gang evidence rendered trial fundamentally unfair and required reversal under *Chapman*; citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 15 & 17.)

Here, the evidence was prejudicial because (1) it was used to fill a gap in the prosecution case – the motive for the killings – and (2) the evidence incriminating Flores was otherwise not strong. The prosecutor repeatedly relied on Penney's opinions to portray Flores as a gang killer; she repeatedly referred to Penney's conclusions in her opening and closing statements to the jury. (9 RT 1811, 1821; 20 RT 4326-27, 4395.) Penney's opinions, even though unsupported by the evidence, likely carried great weight with the jury simply because it was the opinion of an experienced police officer who specialized in gang crimes. The danger exists the jury adopted his conclusions because his status

as a law enforcement officer gave his testimony an "unmerited credibility" before the jury. (See e.g., *United States v. Dukagjini* (2nd Cir. 2003) 326 F.3d 45, 53; *United States v. Alvarez* (11th Cir. 1988) 837 F.2d 1024, 1030 ["When the expert is a government law enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased."].)

Respondent argues the evidence of Flores's guilt was strong. The jury evidently disagreed. It deliberated four and one-half days before reaching a verdict. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [noting lengthy deliberations are a sign the case was not "open and shut"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [holding six hours of deliberations suggest that errors in the admission of evidence were prejudicial].)

The only witnesses to the Torres killing were Mosqueda and Carmen Alvarez, both of whom were potential accomplices with obvious motives to lie. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 571-572 (Kennard, J., concurring) [observing that accomplices have a "powerful built-in motive to aid the

prosecution in convicting a defendant, regardless of the defendant's actual guilt or level of culpability, in the hope or expectation that the prosecution will reward the accomplices' assistance with immunity or leniency"].)

Both Alvarez and Mosqueda were gang members, and both had committed other violent crimes in the same month as these homicides. Mosqueda minimized his and Alvarez's role in the crimes. He gave various conflicting versions of the Torres incident. He persistently denied his own gang membership, and was reluctant to admit that Carmen Alvarez, another gang member, was in the van when Torres was shot.

There were no witnesses to the Ayala and Van Kleef homicides, and there was little evidence connecting Flores to those crimes. The case against Flores rested largely on the theory that he used the same weapon — the Jennings 9 mm — in each crime. However, the gun was found in Mexico, not in Flores's possession, and there was no evidence that he brought the gun to Mexico.

In any event, the forensic evidence is far from positive proof that the Jennings gun was the firearm used in the crimes. As the

United States Supreme Court recently observed, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 319.) Here, the prosecution's firearms examiner conceded the Jennings handgun did not leave "really good reproducible marks." (17 RT 3468.) Moreover, she admittedly did not use the most reliable method of comparing the test fires to the suspected crime bullets. (17 RT 3454, 3456.)

Accordingly, given the significance of the evidence to the prosecution case, the accusing witnesses' strong motive to shift blame to Flores, and the absence of any other credible evidence linking Flores to the crimes, the admission of Detective Penney's unfounded opinions violated Flores's rights to a fair trial and due process, and to a reliable guilt and penalty determination, under the Fourteenth and Eighth Amendments. The conviction and judgment must be reversed. (*Chapman v. California, supra,* 366 U.S. at p. 24.)

IV. Prosecutorial misconduct violated Flores's rights to confrontation, due process, and to a reliable guilt and penalty determination under the Sixth, Fourteenth, and Eighth Amendments.

The prosecution case depended heavily on two facts: (1) the Jennings 9 millimeter handgun recovered by the police in Mexico was the weapon used in the Torres and Ayala homicides, and (2) Flores possessed the gun and brought it to Mexico after the killings. The evidence on these two points was weak.

First, the prosecution's firearms examiner conceded the Jennings handgun did not leave "really good reproducible marks." (17 RT 3468.) Moreover, she admittedly did not use the most reliable method of comparing the test fires to the suspected crime bullets. (17 RT 3454, 3456.)

Second, there was no evidence Flores brought the Jennings handgun to Mexico. No witness testified to this key issue, although one would assume that it could have been proven if it happened. Instead, the prosecutor falsely told the jury in her opening that Flores *admitted* he possessed the weapon used in the killings. (9 RT 1822.) Then, in the direct examination of Officer Todd Loveless, Loveless falsely claimed Flores admitted possessing the Jennings gun. (19 RT 3857.) Finally, to make the point that Flores brought the gun to Mexico and sold it there, the

prosecutor elicited from Maria Jackson that Juan Miranda (who was never called to testify) identified Flores as the man who came to Mexico. (11 RT 2289.)

Respondent claims defense counsel made no objection to the prosecutor's false statement in her opening. (RB at 50.) This is true. Respondent then concedes defense counsel objected to the Maria Jackson hearsay, but did not object on misconduct grounds or request an admonition. (RB at 50.) But an admonition would not have been effective; it would have had the counter-productive effect of calling attention to Jackson's testimony. Under this circumstance, no request for an admonition was required.

The failure to request an admonition is excused when "an objection would have been futile or *an admonition ineffective*." (*People v. Arias, supra,* 13 Cal.4th at p. 159 [emphasis added]; *People v. Hill* (1998) 17 Cal.4th 800, 821-22.) Thus, the failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333 [citation omitted].)

Here, it is highly unlikely the jury could have put this information out of its mind as it weighed the case. (See *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [noting admonition to

ignore highly prejudicial evidence has no "realistic effect"]; *Richardson v. Marsh* (1987) 481 U.S. 200, 208 [holding admonition to ignore evidence cures harm only when "the jury can possibly be expected to forget it in assessing the defendant's guilt"].) The jury could not possibly have ignored Miranda's identification when evaluating the evidence. The harm occurred when the jury heard the testimony. Once heard, the jury could have forgotten that Miranda saw Flores in Mexico.

Respondent contends two "isolated incidents" cannot amount to a pattern of deceptive practices. (RB at 53.) But each incident concerned the same subject. It is inconceivable that the prosecutor and an investigating officer went to trial in a death penalty case mistakenly believing the defendant had admitted he possessed the alleged murder weapon. "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill, supra,* 17 Cal.4th at p. 823.) A prosecutor's presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343.) The prosecutor committed misconduct in misstating the evidence, then by failing to correct Officer Loveless's testimony, and finally by eliciting hearsay

testimony.

Respondent contends there was no harm because defense counsel corrected Officer Loveless's testimony on cross-examination. (RB at 51.) It is true that Loveless's testimony was corrected, but the hearsay testimony of Maria Jackson remained in the minds of the jurors. Respondent claims Juan Miranda's identification of Flores had nothing to do with the murder weapon. (RB at 52.) This argument fails to take into account the context in which Maria Jackson's testimony was made.

Jackson's testimony focused exclusively on how the Jennings handgun was located in Mexico and transferred to the police. Juan Miranda stood in the center of her testimony. Jackson paid Miranda $100; he returned five minutes later with the handgun. (11 RT 2182, 2205, 2211-2212, 2288; 15 RT 3009.) Jackson then showed Miranda a photo of Flores. (11 RT 2288.) Miranda looked at the photo and said, "That's the man that was here." (11 RT 2289.) In context, Miranda meant Flores was the man who came to Mexico and sold gun. At the very least, a reasonable juror could have inferred that was what Miranda meant.

Respondent contends the misconduct and hearsay evidence was harmless error because it was clarified at trial. (RB at 53.)

However, the hearsay was not "clarified." Although the court granted Flores's request to strike Jackson's testimony about Miranda's identification, the jury was never told that Jackson's answer had been stricken and could not be considered. (11 RT 2289.) The motion to strike was made days after the hearsay objection was sustained. (12 RT 2326.) In granting the motion, the trial court judge erroneously believed that she had "indicated to the jury that that comment was stricken from the record" when the hearsay objection was first raised. (12 RT 2326.) In fact, the jury was never admonished to disregard the statement. The misconduct and the hearsay cannot be held harmless under *Watson* or *Chapman*. Without the inadmissible hearsay evidence from Maria Jackson that Miranda identified a photograph of Flores as "the man who was here," there was no credible evidence to establish that Flores brought the gun to Mexico, or that he sold it to Miranda or anyone else. The fact that Miranda was unavailable for cross-examination, and the fact that the police wiped the gun clean made it impossible for Flores to refute the prejudicial inadmissible hearsay evidence elicited by the prosecutor's misconduct.

Without evidence connecting Flores to the Jennings pistol, the case against Flores is greatly diminished. Under these

circumstances, and for all the reasons stated in Flores's opening brief, the errors cannot be considered harmless.

V. The court violated Flores's right to confrontation, to due process, and to a reliable guilt and penalty determination under the Sixth, Fourteenth, and Eighth Amendments by forcing him to sacrifice his right to cross-examine a witness.

In his opening brief, Flores argued that the court erred and violated his constitutional rights in ruling that if defense counsel cross-examined the polygraph examiner Robert Heard on whether Flores stated he was present during one of the homicides, the court would allow the prosecution to present a videotape of the interrogation. (18 RT 3734.) Defense counsel argued this was error because the videotape "shows it's a polygraph room, it shows that it's during a polygraph examination." (18 RT 3735.) The court overruled the objection. (18 RT 3736.)

Respondent claims no Confrontation Clause error occurred because defense counsel in fact cross-examined Heard on the issues, and the videotape could have been edited to omit any evidence of the polygraph machine. (RB at 58.)

The issue has been adequately covered by Flores's opening brief and respondent's brief. Flores here incorporates by reference the points and authorities presented in his opening brief.

VI. Officer Loveless's testimony that Flores was taken to the "polygraph unit" made the trial unfair, and violated Flores's rights to due process and to a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments.

During his testimony, Officer Loveless testified that after Flores was interviewed he was "escorted over to the polygraph unit." (19 RT 3911.) The court immediately called for a recess, and then discussed the matter with counsel. (19 RT 3911.)

The prosecutor claimed Loveless "slipped" in mentioning the polygraph. (19 RT 3912.) Defense counsel observed that Loveless had been present when the issue was discussed before trial, and he knew not to mention of the polygraph examination. (19 RT 3912.) The court did not believe Loveless intentionally committed misconduct, but admitted his testimony was "[c]ertainly . . . prejudicial." (19 RT 3913.) The court stated the "jurors are going to want to know what happened at the polygraph unit. That's obvious. Whether they think Mr. Heard gave the polygraph exam, I don't think that is completely clear. They are going to wonder whether or not the defendant submitted his person to a polygraph examination at this point." (19 RT 3913-14.) Investigator Robert Heard had testified earlier in the

trial that Flores told him he was present when Van Kleef was shot, but denied he was present when Torres and Ayala were killed. (18 RT 3814-3815.)

Defense counsel moved to strike Heard's testimony. (19 RT 3914.) The motion was denied. (19 RT 3914.) Counsel then moved for a mistrial. The motion was denied. (19 RT 3914.) The court sought to cure the error by falsely telling the jury that Flores was neither offered a polygraph examination nor did he submit to one. The court explained Flores was taken to the polygraph unit because it was near Detective Heard's office. (19 RT 3917-3921.)

On appeal, Flores argued the court erred in denying the motion to strike Heard's testimony and for a mistrial. The error violated appellant's rights to due process and to a reliable guilt and penalty determination under the Eighth and Fourteenth Amendments. (AOB at 144.)

Respondent contends the court did not abuse its discretion in refusing to grant a mistrial because (1) the reference to the polygraph was brief, (2) the reference to the polygraph "unit" did not necessarily mean Flores took a polygraph examination, and (3) the court cured any prejudice by telling the jury that Flores

did not take a polygraph test. (RB at 59-62.) The arguments are meritless.

First, the court's instruction to the jury that Flores did not take a polygraph examination was unbelievable. As the court noted, the jurors were "not stupid," and they were going to believe Flores was taken to the polygraph unit "to submit to a polygraph examination." (19 RT 3919.) The jury knew that Flores had already been interrogated by two police officers, Elvert and Loveless. When Loveless concluded his interview, he took Flores to the "polygraph unit," where Flores was interviewed again by Investigator Heard. (19 RT 3911.)

But the jury also knew Heard was *not* a police officer. Heard testified that he "medically retired" from the police force in 1981 and "went to work" for the sheriff's department in 1999. (18 RT 3764.) His work was described as "assisting" homicide detectives with "interviewing particular witnesses." (18 RT 3764.) Moreover, Heard's examination of Flores consisted of yes or no questions, exactly the sort of questions that a polygraph examiner would ask. (18 RT 3814.)

Under the totality of the evidence, it was plain Heard

worked in the polygraph unit, and that he gave a polygraph examination to Flores. There would have been no other reason for a non-police officer to interview Flores after he had been questioned by Officers Elvert and Loveless. The court's admonition that Flores had not taken a polygraph test was unbelievable, and ineffective to cure the prejudice. The court abused its discretion in denying the motion for mistrial.

Second, as the trial court judge admitted, the reference to the "polygraph unit" was "[c]ertainly . . . prejudicial." (19 RT 3913.) California law expressly bars even a "reference" to a polygraph examination in a criminal case. (Evid. Code, § 351.1, subd. (a).) Because of the likelihood that jurors "will attach unjustified significance" to the test, even the mention of a polygraph examination is prejudicial. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 390.)

As stated in Flores's opening brief, the polygraph evidence violated his right to a fair trial by an impartial jury under the Sixth and Fourteenth Amendments. The erroneous admission of polygraph evidence improperly invades the province of the jury and its "exclusive power to judge credibility." (*People v. Basuta,*

supra, 94 Cal.App.4th at p. 390.) "[B]y its very nature, polygraph evidence may diminish the jury's role in making credibility determinations" because the "aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt." (*United States v. Scheffer* (1989) 523 U.S. 303, 313.) The polygraph reference also violated Flores's right to a reliable guilt and penalty determination under the Eighth and Fourteenth Amendments. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638; *Manson v. Braithwaite* (1977) 402 U.S. 98, 104-107; *People v. Badgett* (1995) 10 Cal.4th 330, 347-348.)

The polygraph reference told the jury that Flores lied when he said he was not present when Torres and Ayala were killed. This was critical given that Flores had no motive to commit these crimes, and the most incriminating evidence against came from persons who were gang members deeply involved in violent criminal activity. For these reasons, and for the reasons stated in the opening brief, the denial of the motion for a mistrial was prejudicial error. The conviction and sentence must be reversed.

VII. The erroneous admission of hearsay testimony that Torres was afraid of Flores violated Flores's rights to due process and a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments.

In his opening brief, Flores argued the court erred in admitting Erick Tinoco's hearsay testimony that Ricardo Torres thought he "might be in trouble" because he did not join the gang when Mosqueda did. (AOB at 154.) Flores's attorney objected to this testimony; the court overruled the objection. (17 RT 3594.) Immediately after the objection was overruled, the prosecutor asked Tinoco to explain his answer. (17 RT 3594.) Defense counsel did not object again. (17 RT 3595.) Flores's attorney did not object.

In his opening brief, Flores argued that evidence of a victim's fear of the defendant is admissible only when relevant to an element of the offense or to prove the victim's conduct. (Evid. Code, § 1250; *People v. Hernandez* (2003) 30 Cal.4th 835, 872.) Under Evidence Code section 1250, "evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule" when the evidence is offered to prove the declarant's state of mind "when it is itself an issue in

the action" or the evidence is offered "to prove or explain acts or conduct of the declarant."[2] Thus, to be admissible, the declarant's state of mind must be factually relevant. (*People v. Jablonski* (2007) 37 Cal.4th 774, 819-20.)

For example, in *People v. Thompson* (1988) 45 Cal.3d 86, the decedent's fear of the defendant was properly admitted to refute the defendant's claim that he and the victim engaged in consensual sexual intercourse before her death, and thus to prove an alleged rape-murder special circumstances. (*Id.* at pp. 103-04.) Similarly, where the decedent's statement that she feared

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[2] Evidence Code section 1250 states in full:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

defendant was relevant to whether she would have consented to defendant's entry into her residence where burglary special circumstance was alleged. (*People v. Waidla* (2000) 22 Cal.4th 690, 723.)

However, evidence of the victim's fear of the defendant is not admissible to prove the identity of the person who committed the homicide. (*Hernandez, supra,* 30 Cal.4th at p. 872.) A host of cases have so held. (See, e.g., *Hernandez, supra,* 30 Cal.4th at p. 872; *People v. Noguera* (1992) 4 Cal.4th 599, 622 [victim's state of mind and conduct not in issue when the only dispute was the identity of the killer]; *People v. Ruiz* (1988) 44 Cal.3d 589, 608 [Evidence Code section 1250 does not apply where there is no purpose for admitting evidence of the victims' expressions of fear of defendant other than as proof that those fears were justified, and that defendant in fact killed them].)

In the present case, Torres's fear was not relevant to an element of the offense. Nor was his fear relevant to prove his conduct before he was killed. The court erred in admitting these hearsay statements.

Respondent contends the failure to object forfeited the issue

for appeal, but does not specifically identify the question to which Flores allegedly failed to object. (RB at 64-65.) If respondent contends Flores was required to make a second objection to Tinoco's testimony at pages 3294-3295, respondent is mistaken. Flores's objection to that testimony was overruled. A second objection to what was essentially a follow-up to the same question would have been futile. A party is not required to make futile objections. (*People v. Hill, supra,* 17 Cal.4th at pp. 821-22.)

Respondent next contends the error was harmless because it involved only a single statement by one of the three victims. (RB at 66.) However, the "single statement" was part of the larger effort to prove Flores's motive. The prosecutor's gang witness, Detective Penny, testified that Torres was killed because he refused to join the gang. (19 RT 4055.) No evidence supported this speculative theory. But in her examination of Erick Tinoco the prosecutor attempted several times to elicit testimony that Torres believed Flores was angry at him, and that Torres was afraid of Flores. ((17 RT 3594-3595, 3601, 3602.)

The admission of this hearsay evidence was prejudicial. The prosecution could not prove Flores's motive to commit these

crimes. The prosecution theory that Flores committed homicide because Torres refused to join a gang lacked evidence. The erroneous admission of the hearsay evidence that Torres feared Flores was prejudicial precisely because it was the only evidence that supported the prosecutor's theory of Flores's motive to kill. The erroneous admission of this evidence contributed to the cumulative prejudice from the trial errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Chapman, supra,* 386 U.S. at p. 24.)

VIII. There is insufficient evidence that Flores murdered Alexander Ayala and Jason Van Kleef; the convictions and special circumstance allegation must be stricken and the judgment reversed.

In his opening brief, Flores argued that no direct evidence, physical evidence, or eyewitness evidence connected appellant to the crimes, and the minuscule amount of circumstantial evidence was not "reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *(People v. Johnson* (1980) 26 Ca1.3d 557, 578.) Instead, the conviction likely was based on speculation and suppositions put forth by the prosecution and the prosecution's gang expert. (AOB at 160.) The irrelevant and prejudicial gang evidence, particularly the prosecution's gang expert's opinion testimony that appellant killed the victims because of their refusal to join the El Monte Trace gang, improperly influenced the jury to convict appellant of these murders despite the lack of sufficient evidence on which to base these convictions. The prosecution failed to prove every element of first degree murder beyond a reasonable doubt, and appellant's convictions of these

offenses thus violated due process under the state and federal constitutions. (U.S. Const., 5th and 14th Amends; *In re Winship* (1970) 397 U.S. 358, 364; see AOB at 163-168.)

Respondent contends the circumstances, and the inferences to be drawn from them, were sufficient to support the convictions. (RB at 68-73.) Respondent asserts Flores had the motive and opportunity to kill Ayala and Van Kleef. (RB at 69-70.) Moreover, respondent argues Flores fled to Mexico. Once there, he burned the van. (RB at 71.)

Respondent's arguments were anticipated and addressed in the opening brief. (AOB at 163-169.) Flores here incorporates by reference the points and authorities raised in his opening brief.

IX. Flores's in-custody statements to Detective Kusch were obtained in violation of *Miranda*, and the admission of his statements violated Flores's rights to remain silent, to counsel, to due process, and to a reliable penalty determination under the Fifth, Sixth, Fourteenth, and Eighth Amendments.

In his opening brief, Flores argued that his clear and direct answer ("no") to the question whether he wanted to discuss the Mark Jaimes homicide was an unequivocal invocation of his right to remain silent. (AOB at 170-201.) Respondent argues the officer's question was unclear, making Flores's response ambiguous, and thus the officer properly continued to interrogate Flores in order to clarify his response. (RB at 78-79.)

Flores also argued that: (1) assuming his assertion of his right to remain silent was ambiguous, the officer was required to stop and clarify Flores's response; (2) assuming he waived his right to remain silent, his waiver was limited to questions about his name and age; and, (3) assuming Flores waived his right to remain silent, the waiver was coerced and involuntary.

Finally, Flores argued that the admission of his confession, involuntarily obtained, violated his rights to remain silent and not incriminate himself, to counsel, to due process and a fair trial,

to a reliable penalty verdict, and to be free from cruel and unusual punishment, and requires reversal of the death penalty. (U.S. Const. 5th, 6th , 8th & 14th Amends; Cal. Const., art. I, § 15; (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 473-74.)

A. Flores invoked his right to remain silent with the simple, unambiguous response of "No," he did not wish to talk.

The facts are set forth in full in the opening brief. (AOB at 172.) To put the argument in context, the essential facts are summarized as follows:

Detective Rod Kusch of the Los Angeles County Sheriff's Department interrogated Flores about the November 2000 homicide of Mark Jaimes. The interview was audio-recorded. (Ex. 222; 22 RT 4852-54.)[3] Detective Kusch told Flores he was there to talk about a "case" that occurred in Maywood on November 17, 2000. (22 RT 4855.) Kusch advised Flores of his right to remain silent, that anything he said could be used against him, that he had the right to an attorney, and that an attorney would be appointed for him if he could not afford one. (22 RT 4856.) Flores

[3] The transcript is exhibit 223. It is set forth in full in the reporter's transcript. (22 RT 4855.)

said he understood his rights. (22 RT 4856-57.) The following exchange occurred immediately thereafter:

> RK: Basically what I'd like to do is talk about the the [sic] case that we investigated that we got call out on back on November 17th, 2000. Uh I'll tell you how we got called out on in a minute but uh do you want to take a few minutes to talk a little bit about that?
>
> AF: No.

Flores unambiguously invoked his right to remain silent. When a suspect makes a "simple, unambiguous statement[]" that he wants to-remain silent or does not want to talk with the police, he invokes his right to remain silent and the "right to cut off questioning." *(Berghuis* v. *Thompkins (2010)*560 U.S. 370, 130 S.Ct. 2250, 2260.) In *Berghuis*, the police interrogated the defendant for 3 hours. The defendant was "largely silent" during first two hours and 45 minutes of the interrogation, but at the end made incriminating statements. (130 S. Ct. at p. 2256.) He argued on appeal that his silence was an invocation of his right to remain silent. The Supreme Court disagreed. The Court ruled mere silence was insufficient to invoke the right to remain silent under *Miranda*. The Court observed the defendant "did not say

that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his " 'right to cut off questioning.' " (*Berghuis, supra,* 130 S.Ct. at p. 2260 [citation omitted].)

Flores did exactly that. He said no, he did not wish to talk with the police. The questioning should have stopped immediately.

After a suspect has been advised of his *Miranda* rights, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 473-74.)

Respondent contends Flores's invocation of his rights was

ambiguous because Detective Kusch's question was unclear. According to respondent, it was unclear whether Kusch asked Flores if he wanted to talk about how the police got "called out" in the Jaimes incident or whether he asked if Flores wanted to talk about the incident itself. (RB at 79.) Respondent's interpretation is unreasonable.

First, Kusch stated expressly he wanted to talk about the case. He then said he would tell Flores how he called out on it, but did Flores "want to take a few minutes to talk a little bit about that?" (5 CT 1411.) It is plain Kusch wanted to talk to Flores about the Jaimes homicide, that he asked Flores if he wanted to talk about it, and Flores said no.

Indeed, this is precisely how it was interpreted by Sergeant Dean of the Sheriff's Department, who sat in on the interrogation. (2 RT 208.) In a hearing before trial, Sergeant Dean was asked if he heard anything during the interrogation that indicated Flores did not wish to speak to Officer Kusch. Dean replied that at "one point" he did. (2 RT 210.) Dean explained, "Lieutenant Kusch asked Mr. Flores if he wanted to talk about that, meaning the Maywood murder, and Alfred replied, 'No.'" (2 RT 211.)

This testimony, from a person who was in a position to observe the demeanor of both Detective Kusch and Flores, is entitled to weight. As this Court has explained in other contexts, deference is owed to persons who are in a position to observe a person's tone and demeanor. (*People v. DePriest* (2007) 42 Cal.4th 1, 21 [explaining that deference is owed to trial court in ruling on qualifications of prospective jurors because the court is in a position to assess a prospective juror's demeanor, where as the reviewing court is not].)

Here, a reliable witness to the interrogation testified that Flores stated expressly that he did not want to talk about the Jaimes homicide. This corroborates what is plain from the record. The admission of Flores's confession was a violation of his right to remain silent. (*Miranda v. Arizona, supra,* 384 U.S. at p. 474.)

B. The interrogating officer did not attempt to clarify this unambiguous statement.

Respondent next contends that Kusch's questioning after Flores cut off questioning "makes clear [Kusch] was trying to ascertain the meaning of the reply." (RB at 79.) But Kusch did not seek to clarify Flores's reply. He did not ask Flores what he

meant by "no." Instead, Kusch immediately reassured Flores he did not "have to answer any questions." (22 RT 4857.) By acknowledging that Flores had a right to remain silent, Kusch indicated that he knew Flores had cut off questioning. But Kusch did not stop questioning Flores. Instead, Kusch explained that Flores could choose which questions he wanted to answer, and then he continued to question him. (22 RT 4857.)

Kusch suggested to Flores that his questions would be "simple," things like "your name and birth date and stuff like that which are pretty simple questions." (22 RT 4857.) Kusch then asked, "Do you want to take a few minutes and talk to me about that stuff?" At that point, Flores answered, "Oh yeah, well whatever." (22 RT 4857.)

There is nothing in Kusch's response that shows he was confused by Flores's reply. To the contrary, Kusch conceded Flores had the right to cut off questioning, but maneuvered around Flores's invocation of rights by saying that he wanted to ask "pretty simple questions" like Flores's name and birth date. (22 RT 4857.) Under *Miranda*, Kusch was required to stop questioning Flores the moment Flores refused to waive his rights.

(*Miranda, supra,* 384 U.S. at pp. 473-474 [holding that if the suspect "indicates in any manner" that he does not wish to speak, "the interrogation must cease"].) Kusch's continuing questions did not seek to clarify Flores's response, but instead sought to keep Flores talking. Thus, Flores's right to cut off questioning was not "scrupulously honored," and the confession he ultimately made was inadmissible. (*Michigan v. Mosely* (1975) 423 U.S. 96, 104 [observing that continuing the questioning of a suspect after he invokes his right to remain silent "would clearly frustrate the purposes of *Miranda*" undermining the will of the person being questioned].)

C. Assuming Flores waived his rights at all, the waiver was limited to identifying background information.

In his opening brief, Flores argued that to the extent he waived his right to remain silent at all, he agreed to answer the questions that Kusch described as "pretty simple questions," such as his "name and birth date and stuff like that . . . . " (22 RT 4857.)

A person in custody may selectively waive his right to remain silent by indicating that he will respond to some

questions, but not to others. "A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.' " (*People v. Clark* (1992) 3 Cal.4th 41, 122, quoting *People v. Silva* (1988) 45 Cal.3d 604, 629-630.) That is what occurred here.

Respondent's brief does not address this issue.

D. Flores's statement was involuntary.

In his opening brief, Flores argued the statement the police obtained from him was coerced and involuntary. (AOB at 193.) Flores argued his statements were coerced by the psychological pressure of custodial interrogation, combined with Kusch's refusal to honor Flores's right to remain silent, and Kusch's implied promise that Flores would be treated more leniently if he explained what happened in the Jaimes incident. (AOB at 193-197.)

Respondent contends there was no coercion because (1) Kusch ignored Flores's invocation of the right to remain silent only once, not several times, as in *People v. Neal* (2003) 31 Cal.4th 63, (2) Kusch did not promise leniency, and (3) Kusch did not threaten Flores with a murder charge. ((RB at 80-81.)

Whether a statement is voluntary is based on the totality of the circumstances. (*Withrow v. Williams* (1993) 507 U.S. 680, 693.) The prosecution bears the burden of proving voluntariness by a preponderance of the evidence. (*People v. Williams* (1997) 16 Cal.4th 634, 659.)

It is the combination of circumstances here that shows Flores's statement to be involuntary. First, Flores unequivocally told Kusch he did not wish to talk about the Jaimes homicide. Kusch pushed on anyway, and continued to question Flores despite Flores's clear invocation of rights. Kusch's deliberate violation of *Miranda* "manifested his determination to extract an uncounselled statement of some sort." (*People v. Neal, supra,* 31 Cal.4th at p. 82.) Kusch's continued interrogation told Flores that Kusch would not honor his right to silence until Flores confessed. (*Ibid.*)

Second, Kusch implied that Flores could get charged with "something less than" murder if he told his side of the story. ((22 RT 4974.) Kusch did not directly threaten Flores with a murder charge if he did not speak, but suggested that Flores's only way to avoid a murder conviction was to tell his side of the story. A

confession that is extracted by a suspect in custody through "direct or implied promises, however slight" is by definition involuntary. (*Malloy v. Hogan* (1964) 378 U.S. 1, 7 [citation omitted].)

Thus, the totality of the circumstances shows the confession to be involuntary. The court violated Flores's rights under the Fifth, Fourteenth, and Eighth Amendments in admitting this involuntary, unreliable statement.

E. The admission of the statement was prejudicial error that requires reversal of the judgment of death.

Flores argued the admission of his statement to Kusch was federal constitutional error that required reversal of the death penalty. (AOB at 198, citing *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 306-312; *Chapman v. California, supra,* 386 U.S. at p. 23; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) Flores noted that the dramatic description of the death of Mark Jaimes likely had an indelible impact on the jury's decision to sentence him to death. (22 RT 4875-4889.)

Further, without the confession, there was little evidence to prove that Flores killed Jaimes. The only evidence that connected

Flores to the Jaimes shooting was the testimony of the prosecution's firearms examiner, who concluded that cartridge casings found at the 2000 Mary Muro shooting were fired from the same gun (a Raven .25 caliber handgun) as the cartridge casings found at the Jaimes homicide. (21 RT 4667-4670.) However, the prosecutor never established that Flores used the .25 caliber Raven handgun in the Muro incident. The evidence suggested a second person used that gun. (21 RT 4568-4569.)

The prosecutor emphasized the Jaimes murder in her argument for the death penalty. (23 RT 5136-5141.) She repeatedly referred to it by saying that Flores kills people who disrespect him (23 RT 5145), and asking, "How many people need to become his victim before he's given the ultimate penalty." (23 RT 5147.) The prosecutor's reliance in argument on the evidence is an objective means of assessing prejudice. (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 [prosecutor's heavy reliance on defendant's statements in closing showed prejudicial error].)

Finally, there was significant mitigating evidence presented, including testimony that Flores's childhood was remarkably unstable, that he bounced back and forth between

different family members and social service programs, that he was forced into joining a street gang at age 10, that he witnessed violence in his home and on the streets from an early age, that his mother and uncles were deeply involved in gangs, and that his father, who spent five to six years in prison, was mostly absent. (23 RT 5061-64.)

Respondent does not address any of these arguments in its brief. (RB at 73-81.) Respondent argues only that Flores's statement was properly admitted. It was not, and the error in admitting it was prejudicial.

X. Prosecutorial misconduct violated Flores's rights to confrontation, due process, and to a reliable guilt and penalty determination under the Sixth, Fourteenth, and Eighth Amendments.

In his opening brief, Flores argued that in the penalty trial the prosecutor elicited patently inadmissible hearsay, just as she had done in the guilt trial. (AOB at 202.) In her direct examination of Detective Kusch regarding the Mark Jaimes homicide, the prosecutor asked, "Now, did you at some point – well basically Lillian Perez told you basically her son is the one who shot Mr. Jaimes, correct?" Kusch immediately responded, "In short, yes." (22 RT 4843.) Defense counsel objected on hearsay grounds; the court sustained the objection and struck the testimony. (22 RT 4843.)

The question and answer was blatant misconduct. The deliberate asking of questions by a prosecutor calling for inadmissible and prejudicial evidence is misconduct. (*People v. Bell* (1989) 49 Cal.3d 502, 532.) Here, as in *Bell*, the misconduct was particularly egregious because the prosecutor put before the jury the hearsay statement of a person who was not available for cross-examination. (*Id.* at p. 533.) Surely an experienced

prosecutor would have known the question called for hearsay.

Respondent contends the issue was forfeited for appeal because Flores's defense attorney did not specifically object and request an admonition. (RB at 82.) Respondent claims an objection would not have been futile because the court had already sustained Flores's hearsay objection. (RB at 83.)

However, a defendant's failure to object and to request an admonition is excused when either an objection would have been futile or an admonition would have been ineffective. (*People v. Arias, supra,* 13 Cal.4th at p. 159 [emphasis added]; *People v. Hill, supra,* 17 Cal.4th 800, 821-22.) The failure to request an admonition does not forfeit the issue if "an admonition would not have cured the harm caused by the misconduct." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333 [citation omitted].)

Here, no admonition could have cured the harm. It is highly unlikely the jury could have put this information out of its mind as it weighed the case. (See *People v. Gibson, supra,* 56 Cal.App.3d at p.130 [noting admonition to ignore highly prejudicial evidence has no "realistic effect"]; *Richardson v. Marsh, supra,* 481 U.S. at p. 208 [holding admonition to ignore

evidence cures harm only when "the jury can possibly be expected to forget it in assessing the defendant's guilt"].)

The misconduct violated Flores's rights to due process, confrontation, and to a reliable penalty determination under the Fourteenth, Sixth, and Eighth Amendments. The misconduct was prejudicial for all the reasons set forth in Flores's opening brief. (AOB at 203-206.)

XI. The court erred in instructing the jury on mitigating factors not supported by the evidence and in failing to instruct the jury that the absence of mitigating factors is not an aggravating factor.

Flores argued in his opening brief that the trial court erred by instructing the jury on mitigating factors that were not supported by the evidence. (AOB at 207; see 6 CT 1485-86) There was no evidence presented at trial on six of the mitigating factors listed under Penal Code section 190.3:

Factor (d): Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Factor (e): Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

Factor (f): Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

Factor (g): Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

Factor (h): Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

Factor (j): Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

Although this Court has consistently held in non-capital cases that a jury should not be instructed on principles of law that are unsupported by the evidence, it has carved out a single exception for capital cases. (See, e.g., *People v. Williams* (1992) 4 Cal.4th 354, 361 [holding defendant not entitled to consent instruction absent evidence].) In capital cases, the Court has held it is permissible to instruct the jury on mitigating factors that have nothing to do with the case. (*People v. Ghent, supra,* 43 Cal.3d at pp. 776-777.)

Respondent notes this Court has rejected the claim raised by Flores. (RB at 84.) Further, respondent argues the intoxication instruction was warranted by the evidence that Carmen Alvarez

had purchased beer before Torres was shot, and that the instruction tells the jury to decide which factors are "applicable." (RB at 84-85.) Respondent notes that this Court has observed that a jury is "unlikely" to conclude that the absence of mitigating factors is entitled to "significant" aggravating weight. (RB at 85, quoting *People v. Livaditis* (1992) 2 Cal.4th 759, 784-785.)

There are several responses. First, a defendant is entitled to instruction on voluntary intoxication as a defense to specific intent crime only when there is substantial evidence that defendant's voluntary intoxication affected his actual formation of specific intent. (*People v. Williams, supra,* 16 Cal.4th at p. 677 [holding that evidence the defendant was "doped up" was not sufficient to warrant intoxication instruction in capital case].) Here, there was no evidence that Flores drank any of the beer, or that he drank enough to become intoxicated.

Second, the argument that telling the jury to apply only those factors that are "applicable" is beside the point. Including irrelevant factors for the jury's consideration introduced confusion, capriciousness and unreliability into the capital decision-making process. Instructing jurors on irrelevant matters

dilutes their focus, distracts their attention, and introduces confusion into their deliberations. Instructing on irrelevant matters creates a needless risk that the death penalty will be imposed because the evidence in mitigation consists of only one or two of the several possible factors that could be considered. The inclusion of non-applicable factors inflates the weight of the aggravating factors, and violates the constitutional requirement of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama, supra,* 447 U.S. at p. 637.)

Finally, this Court's observation that prejudice is "unlikely" is based on speculation that a hypothetical reasonable juror would understand not to consider the unsupported mitigating factors. (*People v. Livaditis, supra,* 2 Cal.4th at pp. 784-785.) In fact, research shows jurors often do not fully understand the penalty phase instructions, and do not follow them expertly. (See Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 423-424, 428-429.)

The inclusion of inapplicable factors in the list of aggravating

and mitigating factors violated the defendant's federal constitutional right to due process and to a reliable and fair sentencing process under the Eighth and Fourteenth Amendments. Instructing the jury on inapplicable mitigating factors was error because those extraneous instructions injected irrelevant information into the jury's deliberations.

XII. California's death penalty statute, as interpreted by this court and applied at Flores's trial, violated the United States Constitution.

Flores argued the California death penalty scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in several different ways. (AOB at 216-252.) Respondent states the Court has previously rejected the same arguments. (RB at 84.)

Flores acknowledges this is so. However, Flores raises these arguments again to preserve his right to federal review of them. Even though the Court has rejected these arguments in the past, Flores does not concede or withdraw any of his arguments that the California death scheme is constitutionally flawed, and that these flaws require reversal of the death judgment in this case.

XIII. The admission of evidence of a crime committed by Flores when he was a juvenile as an aggravating factor in the penalty trial led to cruel and unusual punishment, and violated due process and the right to a reliable penalty determination under the Fourteenth and Eighth Amendments.

In his opening brief, Flores argued the court erred in allowing the jury to consider as an aggravating factor those crimes Flores committed when he was less than age 18. (AOB at 253.) Flores argued that prohibiting the use of juvenile crimes as a basis for the death penalty was a logical extension of *Roper v. Simmons* (2005) 543 U.S. 551, which barred states from imposing the death penalty upon persons who committed murder before age 18. (*Id.* at p. 574.)

Respondent notes this Court rejected the same argument in *People v. Bivert* (2011) 52 Cal.4th 96, 122.) Flores acknowledges this; the issue was raised to preserve it for federal review.

XIV. The admission of victim-impact testimony violated Flores's rights to due process and to a reliable penalty determination under the Fifth, Eighth and Fourteenth Amendments.

The victim-impact evidence introduced in Flores's case had no probative value to the jury's assessment his moral culpability or his individual character. As a result, Flores's state and federal constitutional rights to due process and a fair trial were violated by the admission of the unfairly prejudicial victim impact evidence. (See *People v. Sutton* (1993) 19 Cal.App.4th 795, 799-802; *Estelle v. McGuire, supra,* 502 U.S. 62). For these reasons, state law, due process, fair trial rights, and as well as Article I sections 1, 17, and 24 of the California Constitution require the exclusion of the victim impact evidence in this case.

In his opening brief, Flores argued that victim impact must be limited to evidence that related to circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. This standard was suggested by Justice Kennard in *People v. Fierro* (1994) 1 Cal.4th 173, 264 (conc. & dis. opn. of Kennard, J.).) Without these limits, the risk is high that a death sentence

will be based on considerations that are constitutionally impermissible, or totally irrelevant.

Respondent contends that Flores's argument lacks "specificity to the record." (RB at 92.) The argument is baseless. The factual basis for the argument is not controversial. No family member was present when any of the victims were killed. Respondent does not expressly contend otherwise.

As for legal authority, Flores cited *Payne v. Tennessee* (1991) 501 U.S. 808 and Justice Kennard's concurring and dissenting opinion in *People v. Fierro, supra*, 1 Cal.4th at p. 264. (AOB at 258-260.) In *Payne,* a mother and her three-year-old daughter were killed with a knife in the presence of the mother's three-year-old son, who survived injuries he suffered in the attack. (*Payne, supra,* 501 U.S. at p. 814.) The boy's grandmother testified that the boy missed his mother and sister, and cried for them. (*Ibid.*)

The Tennessee Supreme Court held it was not error to admit the grandmother's testimony. The court determined that the prosecutor's comments during closing argument were "relevant to [Payne's] personal responsibility and moral guilt."

(*State v. Payne* (Tenn. 1990) 791 S.W.2d 10, 19.) The court explained that "[w]hen a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his 'blameworthiness.' " (*Ibid.*)

The United States Supreme Court held that victim-impact evidence is not per se inadmissible. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.) In California the admission of victim-impact testimony is permitted only to the extent it is related to the "circumstances of the crime" under factor (a) of Penal Code section 190.3. (*People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) The circumstances of the crime cannot logically extend to all consequences, whether foreseeable or not. If the defendant was unaware of the impact of the crime at the time he committed it, then the impact cannot be part of the circumstances of the crime. *People v. Fierro, supra,* 1 Cal.4th at p. 264 (conc. & dis. opn. of Kennard, J.).)

Although the Court has rejected this argument in prior cases, Flores raises it here to preserve his right to federal review. The admission of the victim-impact evidence in this case violated Flores's rights to due process and a reliable penalty-phase determination under the Fifth, Fourteenth and Eighth Amendments to the United States Constitution.

XV. The death penalty is cruel and unusual punishment proscribed by the Eighth Amendment.

Before trial, and on appeal, Flores argued the death penalty violates due process and equal protection under the Fourteenth Amendment, and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution, and the counterparts under the California Constitution. (2 CT 529; see *Gregg v. Georgia* (1975) 428 U.S. 153, 227-231 [the infliction of the death penalty is cruel and unusual punishment in all cases][dis. opn. of Brennan, J.], & 231-241 [dis. opn. of Marshall, J.].)

Respondent states the Court has previously rejected this argument. (RB at 93.) Flores acknowledges this, and raises the argument to preserve it for federal review.

XVI. The cumulative effect of the errors at trial violated Flores's rights to due process and to a reliable guilt and penalty determination under the Fourteenth and Eighth Amendments.

In his opening brief, Flores argued that if any one of the trial errors was not itself cause for reversal, the cumulative effect of the errors, in any combination, created a trial that was fundamentally unfair and denied Flores due process and a reliable guilty and penalty phase determination under the Fourteenth and Eighth Amendments to the United States Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 289-290, fn.3; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459 [holding cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution].)

Respondent simply denies that any error occurred, and Flores "has failed to show prejudice." (RB at 94.) Given the summary nature of respondent's argument, there is nothign to reply to. But as discussed above in this brief, and in Flores's opening brief, significant errors in the guilt and penalty trials deprived Flores of due process, a fair trial, the right to

confrontation, and the right to reliable guilt and penalty determinations in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. The cumulative effect of these errors, as described in Flores's opening brief, was not harmless. (AOB at 264-268.) Reversal of the convictions and sentence of death is required.

Conclusion

For the reasons stated above, and in the opening brief, the judgment must be reversed.

Date: 2/13/2014

Respectfully submitted,

Robert Derham

Attorney for defendant and
appellant Alfred Flores III

Word Count Certificate

This reply brief contains 17,440 words, within the limit set forth in rule 8.630(b) of the California Rules of Court.

Robert Derham

Certificate of Service

I, Robert Derham, am over 18 years of age. My business address is 769 Center Boulevard #175, Fairfax, CA 94930. I am not a party to this action. On, _____, 2014, I served the **Appellant's Reply Brief** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Anselmo, CA, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, 2014, in San Anselmo, California.

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