IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF ON AUTOMATIC APPEAL

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INTRODUCTION

In this reply brief, Montes addresses specific contentions made by respondent where necessary to present the issues fully to the Court. Contentions which were adequately addressed in appellant's opening brief are not reiterated herein. However, the absence of a reply by appellant to any specific contention or allegation made by respondent, or the decision not to reassert any particular point made in appellant's opening brief, does

not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but instead reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief (which were also utilized by respondent).

I.

EXAMINATION OF FACTS BEARING ON MONTES' PERSONAL CULPABILITY FOR MARK WALKER'S MURDER.

In its statement of the facts, and throughout the brief, respondent takes the view that Montes was the one who shot and killed Mark Walker. This position is integral to respondent's assertions that any error should be found non-prejudicial, and that a death sentence was properly imposed in this case.

As part of its argument, respondent has created a new theory on appeal, seeking to transform this into a gang-motivated killing. This theory was neither advanced by the prosecutor at trial, nor is it supported by the evidence. In addition, in an effort to paint Montes as most culpable for the crime, respondent has made other assertions which are unsupported by the record (including its own record citations).

A. RESPONDENT'S NEW THEORY ON APPEAL.

As support for the contention that Montes personally shot Walker, respondent has created a new theory on appeal, asserting that Montes killed Walker to get into "the gang." (RB at pp. 215 and 228.) Not only is this theory unsupported by the record in this case, it was not what the prosecutor argued in the trial court. The prosecutor's theory was that Walker was

carjacked to get the use of his car, and possibly to take his money, and killed to prevent him from identifying the assailants. (See, e.g., 12 RT 1944-1946; 12 RT 1958; 44 RT 7873, 7883-7884.)

However, the identity of the shooter was not part of the jury verdict in this case. The jury's verdict against Montes therefore establishes only the minimum elements necessary for liability as an aider and abettor to a felony murder. Ample evidence exists that Ashley Gallegos was the actual shooter, and in fact the District Attorney himself argued to the jury in the guilt phase that Hawkins, Gallegos, or Montes could have committed the murder, but it was more likely that either Montes or Gallegos was the actual shooter. (36 RT 6519-6520.)

The prosecution did not seek the death penalty against Montes simply out of a belief that he was most culpable for Walker's death. (Volume 4 of Reporter's Transcript of Pretrial Proceedings, hereinafter "PRT" at pp. 799, 893 [according to the prosecutor all the defendants were equally guilty].) However, both Hawkins and Gallegos were exempt from the death penalty because they were minors (Gallegos was three months shy of his eighteenth birthday at the time of the offenses).

B. RESPONDENT'S ATTEMPTS TO TURN THIS INTO A "GANG-RELATED" CRIME.

According to respondent, Montes and the co-defendants had a "gang-related relationship." (RB at pp. 95, 117.) This assertion is not supported by the facts. Hawkins was identified as a member of VBR, and Gallegos was identified as an "associate." But neither Montes nor Varela were identified as VBR members. (33 RT 5809, 5819, 5823, 5822.) As did the prosecutor in the trial court, respondent simply wants to insert the specter of gangs into this case because it creates a more sinister overtone. This was not a "gang" case, however, and no gang enhancements were even alleged.

Respondent also claims that Montes told people about earning his stripes "for the gang." (RB at p. 167.) Although there was testimony that Montes made one or more comments about earning "stripes," there was never any mention made of gangs. In fact, Marci Blancarte testified that she thought the "stripes" comment was made when Montes was speaking on the phone to his mother. (23 RT 3982-3984.) Nor was there any evidence (and respondent cites to no place in the record) where Montes "expressed a desire to earn his gang stripes." (See claim at p. RB 117.) As noted, the only evidence about the "stripes" comment was in testimony concerning comments Montes supposedly made the day *after* the crime.

C. SPECIFIC FACTUAL MISSTATEMENTS MADE IN AN EFFORT TO CAST MONTES AS THE ONE MOST CULPABLE FOR MARK WALKER'S DEATH.

Respondent pulls up a number of "facts" supposedly pointing to Montes as the person who shot Walker. Many of these "facts" were either in dispute (and may never have been decided by the jury), or were outright shown by other evidence to be false. Respondent repeatedly relies on these misstatements as a basis for urging that this Court find no prejudice from errors potentially affecting the penalty verdict. The "facts" asserted by respondent rely on a broad array of citations to the trial transcript. It is therefore necessary to examine these record citations in detail because, just as several of respondent's assertions are unsupported, the conclusions on which they rest are similarly unfounded.

1. Claims That Montes, Alone Among The Defendants, Appeared "Jovial."

At several points in its brief (see RB at pp. 117, 167 and 228), respondent characterizes Montes' demeanor after returning to the party as "jovial." In fact, respondent asserts that Montes was the *"only* defendant who seemed jovial after the return to the party" (RB at p. 167, italics added, and RB at p. 228), also stating that "Gallegos and Varela seemed very subdued." (RB at p. 228.) Respondent includes this as a factor which

dispels any prejudice from error at the penalty phase and justifies imposition of a death sentence. (RB at pp 117, 167, and 228.)

For the most part, the record citations given by respondent not only fail to support these claims, in some cases they outright refute them. Following are a list of respondent's supporting citations, contrasted with what the record actually says:

(1) 17 RT 2883-2884 [Sylvia said Montes was no different after the group returned];

(2) 18 RT 3071-3072 [Kevin Fleming said Montes was "really quiet" and stayed in the corner of the balcony talking with some people. Fleming noticed no change in Salvador Varela];

(3) 20 RT 3306-3307 [Kevin Fleming testified that when Salvador Varela returned to the party he came right back up to Fleming and resumed their earlier conversation about getting strippers for George Varela's upcoming birthday party. Salvador seemed no different than when he left; he was still on the same train of thought.] (See also People's Exhibit 77B, 2nd Aug CT at p. 96, 186 [same].);

(4) 21 RT 3587-3591 [Speck's only reference to a "joking" manner was in connection with Montes' comment, purportedly made the next morning after being shown the news article, "can you believe they're trying

to pin this on me?"]; 21 RT 3590-3591 [Speck says that when Montes first arrived at the party he was acting a little hyper and paranoid. In her opinion he was high, possibly on methamphetamine. There is no testimony about Montes' demeanor after he returned to the party];

(5) 22 RT 3691 [According to Chris Eismann, his nephew Salvador Varela did not appear any different when he returned to the party. He just resumed his party];

(6) 23 RT 4060-4065 [Angie Avita testified that it looked like everybody at the party, including Montes, was having a good time.][1].

Respondent also overlooks other testimony describing Montes' demeanor. Specifically, Kevin Fleming thought that Montes was the one person who sat by himself after the van returned because he was the only real quiet one. (20 RT 3337-3338. See also 18 RT 3071, describing Montes as being quiet.) Arthur Arroyo described Montes as being distracted and agitated. (17 RT 2765.)

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[1]. Avita also testified that Gallegos and Hawkins were quiet most of the time. However, Avita said she did not really see or talk to them that much. (23 RT 4066.) Marci Blancarte also described Montes as being happy and somewhat hyper at the party. (23 RT 3942.)

2. Claim That Montes Was Seen With "*The* Gun."

At one point in its brief, arguing against a finding of prejudicial error, respondent claims that Montes was seen with "the" gun (presumably meaning the black 9 millimeter gun determined to be the murder weapon). (RB at p. 167.) The record reflects otherwise[2]. Once again, for the sake of accuracy, Montes is compelled to contrast respondent's record citations with the actual testimony:

(1) 16 RT 2706-2709 [Arthur Arroyo testified that he saw Montes with a small, nickel-plated gun, a .22 or .25 caliber. This gun was a revolver, not an automatic. Montes started to show how he could take it apart and put back together. There were bullets in the gun. He saw Montes with this gun before the group left the party with the Buick];

(2) 22 RT 3898 [Marci Blancarte testified she saw Montes in the bathroom with a small handgun, taking it apart and putting it back together]; 22 RT 3898-3899 [Marci saw Gallegos with a different gun, a larger black and silver gun. This gun was being passed around a group of people that did not include Montes, at approximately 11:15 p.m.];

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[2]. The murder weapon was established as being a black 9 millimeter gun stolen from the Glomb residence by co-defendant Gallegos. (24 RT 4329-4330; 28 RT 5132-5134; 26 RT 4831-4835; 27 RT 4915, 4921; 29 RT 5203; 29 RT 5203-5205, 5346.)

(3) 23 RT 4070-4071 [Angie Avita saw Montes with a "real small" gun. She thought it was black, but was not sure. The only other gun she saw at the party was a larger black gun which Salvador Varela was showing to Arthur Arroyo.[3]

It appears Kim Speck was the only person who testified to seeing Montes with a larger black gun the night Walker was killed. (21 RT 3458-3459, 3514.) However, Speck admitted that she was confused in her recollections about the black gun. (21 RT 3637-3638.) For example, at the preliminary hearing, Speck testified that the only gun she saw Montes with on Saturday night was the small .22. She did not see a black gun at the party. (21 RT 3515-3517.) Speck agreed that her memory was better back when she testified at the preliminary hearing, but said that certain things "came" to her in the intervening period. (21 RT 3517-3518.) Speck later admitted during her trial testimony that, while she was "sure" about seeing Montes with the smaller gun, she could be wrong about seeing him with the larger gun. (21 RT 3569.)

It should be recalled that Gallegos was the one who removed the black 9 millimeter Glock from the Glomb's house, keeping it in his

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[3]. Sylvia Varela also testified that she saw Montes with a small gun, showing it to her brother George. (17 RT 2882-2883.)

possession. (29 RT 5203-5205.) The night Walker was killed, Refugio Garcia said Gallegos was in possession of the 9 millimeter when he came by Refugio's house. (32 RT 5885.) And at the party, George Varela saw a black gun in the possession of Gallegos. (26 RT 4793, 4817-4819.)

3. Claims That Montes Bought Pizza With The Money Taken From Walker.

Another theme respondent relies on is that Montes was the actual killer because he bought pizza at the party. Montes demonstrated the fallacy in this argument in the opening brief, and will not repeat it here. (AOB at pp. 27-28.)

D. RESPONDENT'S ATTEMPTED RELIANCE ON THE EXCLUDED STATEMENT OF SALVADOR VARELA.

Finally, in connection with respondent's argument concerning denial of Montes' severance motion (Argument IV), respondent refers in a footnote to Varela's statement to police that Montes was the one who shot Walker. (See RB at p. 35, fn 17.) Of course this statement cannot be considered as evidence. The very reason Varela's trial was severed is that Varela, and his statement, could not be put to the test of cross-examination.

And in fact there were a number of things about this statement which could have been fruitfully explored by adversarial testing. For example, it was Montes who directed authorities to Varela, likely creating a desire in

Varela to get even. And, as made clear in the opening brief, there were very close ties between the Varelas and Gallegos. For example, Gallegos' brother was married to a Varela sister (25 RT 4389), and Salvador Varela had a child with Gallegos' sister. (17 RT 2864; 26 RT 4390.) Salvador Varela even asked Kim Speck to lie to protect Gallegos, by saying he went in the van with Salvador instead of in the Buick with the other defendants. (21 RT 3466.)

Respondent's reference to this inadmissible evidence should therefore be disregarded by the Court.

JUDICIAL NOTICE / LAW OF THE CASE

In a separate filing, respondent has requested that this Court take judicial notice of the unpublished Court of Appeal opinion in the appeal of Montes' co-defendants (*People v. Varela, et al*, case No. E020144). At various points in its brief, respondent also cites to this opinion. (See e.g., RB at p. 63, fn. 23; p. 89, fn. 28; p. 91, fn. 29.)

Although respondent may not directly say as much, it appears that respondent wishes this Court to apply the "law of the case" doctrine to the unpublished Court of Appeal opinion. This would be improper because this is not the same case. "Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court's decision must be applied throughout all later proceedings *in the same case*, both in the trial court and the court of appeal." (*People v. Jurado* (2006) 38 Cal.4th 72, 94, italics added.)

Furthermore, the court of appeal opinion in the *Varela* case is unpublished, and therefore cannot be considered as authority in any other case. In *People v. Webster* (1991) 54 Cal.3d 411, this Court rejected a similar attempt by the government to base an argument on an earlier Court of Appeal decision in a codefendants' appeal.

> At the outset, the People request that we take 'judicial notice' of the Court of Appeal *unpublished* decision in the joint appeal of codefendants. The People concede the decision has no res judicata or law-of-the-case effect on defendant's appeal. However, they suggest, the Court of Appeal's resolution of certain common appellate issues is deserving of 'some consideration' by this court. The People's request circumvents the rule that, with exceptions not pertinent here, an unpublished opinion 'shall not be cited or relied upon by a court or party in any other action or proceeding.' [Citation.] We therefore deny it.

(*Webster, supra*, 54 Cal.3d at p. 428, fn. 4, italics in original, quoting former Cal. Rules of Court, rule 977(a), (b) - now rule 8.1115, subds. (a) & (b).)

Furthermore, the law of the case doctrine does not apply when there has been an intervening decision which has altered or clarified the controlling rules of law. (*People v. Stanley* (1995) 10 Cal.4th 764, 786-787; *Jurado, supra*, 38 Cal.4th at p. 94.) With regard to several points addressed in Montes' appeal, there have been intervening decisions which have altered or clarified the law addressed in the *Varela* opinion, most importantly with regard to appellate review of *Batson/Wheeler*[4] arguments. (See Argument IX.)

For the foregoing reasons this Court should refuse to give any consideration to the Court of Appeal decision in the co-defendants' appeal.

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[4] *Batson v. Kentucky* (1986) 476_U.S._79 and *People v. Wheeler* (1978) 22 Cal.3d 258.

II[5].

MONTES' *MURGIA* MOTION SEEKING DISCOVERY OF RIVERSIDE COUNTY PROSECUTION STANDARDS FOR CHARGING SPECIAL CIRCUMSTANCES SHOULD HAVE BEEN GRANTED.

A. THIS COURT'S REVIEW OF THE TRIAL COURT'S DENIAL OF MONTES' *MURGIA* MOTION SHOULD BE *DE NOVO*, NOT ABUSE OF DISCRETION.

According to respondent, the trial court "did not abuse its discretion" when it denied Montes' *Murgia* (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286) discovery motion. (RB at p. 26.) Although an abuse of discretion standard has been used by some courts of appeal (see, e.g., *People v. Moya* (1986) 184 Cal.App.3d 1307; *People v. Superior Court* (*Baez*) (2000) 79 Cal.App.4th 1177 [applying abuse of discretion standard of review to an order granting *Murgia* discovery motion]) it appears that Justice White was correct in his dissent in *Moya*, when he noted that the Supreme Court decisions involving *Murgia* motions did not apply an abuse

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[5]. To help with keeping track of issues and arguments, appellant will use the same roman numerals as were found in the opening brief, and for the same reason also used by respondent. The following roman numerals are omitted from the reply brief: I, X, XIX and XXIV.

of discretion standard of review[6]. (*Moya, supra,* 84 Cal.App.3d at p. 1317, White, P.J., dissenting.)

Moreover, as contended by Justice White, given the fundamental constitutional principles involved -- equal protection and the right to a fair trial -- "upon meeting the plausible-justification standard the discovery requested should be available to the appellant as a matter of right, rather than within the discretion of the court." (*Ibid.*)

In a concurring opinion in *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, Justice Rushing presented a cogent discussion on the proper scope of the abuse of discretion standard of review[7].

According to Justice Rushing, the "abuse of discretion" standard has two proper functions. One of them is to "shield rulings on issues that the trial court has presumptively *superior competence* to decide correctly." (*Miyamoto, supra*, 176 Cal.App.4th at p. 1222, Rushing, P.J. concurring,

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[6]. Appellant has found no cases from this Court since *Moya* in which an abuse of discretion standard was used to review a *Murgia* motion. In fact, in *People v. McPeters* (1992) 2 Cal.4th 1148, 1170-1171, this Court seemed to review the trial court's ruling denying discovery of prosecution charging decisions de novo.

[7]. As this issue regarding the applicable standard of review recurs throughout, Montes will address it herein, and refer back to this discussion where applicable later in his reply brief.

italics in original.) An example of this is where the trial court makes a finding of fact where there is conflicting live testimony. This makes sense because the trial court is in a superior position to evaluate the witnesses. Where evidence is presented in documentary form, however, this justification lessens because the evidence can be transmitted to the reviewing court which then has an opportunity to evaluate the evidence equal to that of the trial court. (*Ibid.*)

Here, virtually all of the evidence presented to the court was included in the written pleadings. The only "live" evidence was the tape containing excerpts of the interviews by the police and Mr. Mitchell referenced in the pleadings[8]. Everything else was provided in the form of statistical studies or declarations. The evidence which formed the basis of the trial court's ruling can therefore be evaluated equally as well by this court.

"The second function of a discretionary standard of review may be best characterized as granting the trial court a kind of arbitral power, not unlike that of a baseball umpire, in the name of judicial economy." (*Ibid.*) The justification for applying an abuse of discretion standard of review in

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[8]. This tape has been included in the record, and is labeled as: "People v. Montes Copy Excerpts Exhibits (Pitchess)."

these situations is that "the social cost of questioning it outweighs the private benefit of having a reviewing court substitute its views for those of the trial court. ... Basically these are situations in which the law says that a litigant need only be allowed one shot at a favorable adjudication -- before the trial judge -- and unless that adjudication can be shown to be clearly wrong, it should stand." In this context the deferential abuse of discretion standard encourages parties to "make their best case in the trial court." (*Id.* at p. 1223.)

The issue in this case concerns fundamental constitutional rights, and the decision whether or not to seek the ultimate sentence of death. Certainly it cannot be argued that the social cost of questioning the trial court's ruling outweighs the benefit of having a reviewing court independently consider the issue.

Importantly, "[i]n no case is a discretionary standard a license to commit error." (*Miyamoto, supra*, 176 Cal.App.4th at p. 1223.) In the instant case, the trial court committed error when it denied Montes' *Murgia* motion. Particularly in the context of a capital case, its ruling should not be insulated from a full and proper review by applying the overly-deferential "abuse of discretion" standard.

B. MONTES MADE A SUFFICIENT SHOWING IN SUPPORT OF HIS REQUEST FOR DISCOVERY. THE TRIAL COURT ERRED BY DENYING THE REQUEST.

According to respondent, Montes did not make a sufficient showing of disparity in the capital charging decision to justify the discovery he sought. Instead, respondent claims that "Montes merely provided some inaccurate statistical evidence, countered by the prosecution, that suggested a greater number of black defendants may be subject to the death penalty." (RB at p. 26.)

Actually, the primary evidence of racial disparity presented by Montes had to do with the race of the victim, not the defendant. In fact, Montes's evidence demonstrated a striking disparity in the decision to seek a death sentence in Riverside County since 1978 where the victim of the crime was white. Of the 32 death penalty cases where the defendant was black, 24 (or 75%) involved at least one white victim. But only one of 47 cases (2.1%) where the defendant was white involved at least one black victim. And 14 of 15 (or 93.3%) of cases where the defendant was Hispanic involved at least one white victim. Of the 96 total cases (for which information was available to the defense), 82 (or 85.4%) involved at least one white victim. In contrast, only 8 (or 8.3%) involved at least one black victim. (23 CT 6308, 6319-6322; 24 CT 6631-6632).

In addition, Montes' supplemental pleading, filed March 15, 1996, provided Department of Justice statistics for the years 1992 through 1994. (24 CT 6630-6635.) These figures indicated that the average percentage of white victims of willful homicide in Riverside County for these three years was 39.66 percent. (24 CT 6631-6632.) In contrast, Dr. Bronson's data providing information on the race of the victim for the 96 Riverside capital prosecutions in which the defense had that information showed that of 96 capital prosecutions, 78 (or 81.3 percent) of the crimes involved white victims. These statistics thus demonstrated that the Riverside District Attorney's Office selected cases for capital prosecution where the victim was white at *twice the rate* at which white people were the victims of homicide. (24 CT 6632.) Notably, the supplemental opposition papers file by the district attorney's office in response to Montes' last pleading (regarding the disparity in charging decisions in 1992-1994) did not claim any specific inaccuracy in the figures cited by Montes. (24 CT 6638-6641.) Clearly, the evidentiary showing furnished by Montes provided not only a "plausible justification" but also "some evidence" of invidious discrimination in the capital charging decision based on the race of the victim. The evidence Montes was able to marshall on his own demonstrated that the Riverside District Attorneys Office selected cases for

capital prosecution where the victim was white at *twice the rate* at which white people were victims of homicide. Montes also provided the expert opinion of Dr. Bronson that the available evidence showed "a discriminatory pattern operating in Riverside County." (23 CT 6309.)

Respondent contends that the evidence presented by Montes was insufficient and complains that the compelling evidence of statistical disparity in capital charging decisions in Riverside County did not "tak[e] into account the specific circumstances underlying the crimes or the backgrounds and other factors related to the defendant and victim." (RB at p. 26.) Respondent does not suggest exactly how Montes was to obtain such information without discovery assistance by the prosecutorial agencies. And, in fact, this was precisely the dilemma faced by the defense. As this Court has recognized in the context of a *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) discovery motion, "to make such a showing a condition precedent to production" would make a defendant's rights dependent on circumstances outside his ability to control them.

> The People's argument that the defendants have not shown themselves unable to make a more complete showing is without merit. Defendants accurately brief that the information sought, like that in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, is in the prosecution's exclusive possession. [Citation.] 'Evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved ....'

(*People v. Municipal Court* (*Street*) (1979) 89 Cal.App.3d 739, 747, quoting *People v. Gray* (1967) 254 Cal.App.2d 256, 266.)

In addition, Montes supplied other case-specific evidence that improper factors, including the race and status of the victim, affected the decision to seek a penalty of death in his case. This evidence included reference by investigating police officers to Mark Walker as a "white kid" and a "cop's kid" (23 CT 6452-6453) as well as an outright admission by DDA Mitchell of his belief that the fact that Walker was white was a factor in the offense, even though there was no evidence of this whatsoever. (3 PRT 695.)

In sum, Montes provided an adequate basis (either "some evidence" or a "plausible justification") for the discovery he sought. This Court should either reverse Montes' death sentence, or remand the matter to the superior court with directions to provided the requested discovery, and to conduct further proceedings as might thereafter be had to challenge the decision to seek a sentence of death in this case.

III.

EVIDENCE OF INVIDIOUS DISCRIMINATION AFFECTING THE CAPITAL CHARGING DECISION IN THIS CASE REQUIRES THAT THE DEATH SENTENCE BE SET ASIDE.

The evidence of racial discrimination in capital charging that Montes produced was sufficient, not only to justify the discovery request, but also to establish, in itself, that the race of the victim was a pervasive influence on the prosecution of death cases in Riverside County. For the reasons advanced in his opening brief (AOB at pp. 72-88) this Court should vacate the death sentence. (*McCleskey v. Kemp* (1985) 753 F.2d 877; *Booth v. Maryland* (1987) 482 U.S. 496; *Beck v. Alabama* (1980) 447 U.S. 625.)

IV.

THE PARTIES AGREE THAT THIS COURT MAY CONDUCT AN INDEPENDENT REVIEW OF THE TRIAL COURT'S PITCHESS RULING. THIS REVIEW SHOULD INCLUDE ALL DOCUMENTS EXAMINED BY THE TRIAL COURT.

Respondent does not take issue with Montes' contention that this Court should review the record of the sealed *Pitchess* hearing. (See RB at p. 31.)[9] However, respondent claims, without citation to any authority, that "review is limited to the record as it exists." (RB at p. 32.) Respondent's position on this latter point is without merit.

As explained in his opening brief, Montes is entitled to have an appellate court review what the trial court considered in deciding whether any material in the officers' files was discoverable. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.) It should be recalled, however, that following the *Pitchess* hearing, the trial court returned the records it had reviewed to the Corona Police Department, and it does not appear that any copy of the records was made by the trial court. (See 3 PRT 646.)

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[9]. Montes' position is that the Court *should* conduct an independent review, while respondent agrees that the Court *may* conduct such review.

Appellant does not know if the court made any written or oral notes listing the documents it reviewed.[10]

This Court has recognized that where, as has possibly happened here, "a trial court has failed to make a record of the *Pitchess* documents it reviewed in camera, it is appropriate to remand [a] case 'with directions to hold a hearing to augment the record with the evidence the trial court had considered in chambers when it ruled on the *Pitchess* motion.'" (*People v. Gaines* (2009) 46 Cal.4th 172, 181, quoting *People v. Mooc* (2001) 26 Cal.4th 1216, 1231.)

It would be most expeditious to try and correct any record deficiencies while the current appeal is pending so that all issues which might be affected by the discovery can be fully addressed in this pending appeal[11]. This Court could therefore order an augmented record prepared

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

[11]. As noted in his opening brief (AOB at pp. 93, 95) the points raised in the appeal for which the discovery might be relevant included the *Murgia* discovery motion and the motion to dismiss the death penalty. Any remedy should be tailored to address these issues as well.

prior to its decision in the appeal by directing that the trial court conduct proceedings as needed to create a proper record of what it reviewed in camera. (See *Mooc, supra*, 26 Cal.4th at p. 1231; *People v. Jordan* (2003) 108 Cal.App.4th 349, 367-368.) However, because of the extreme lapse of time since the original *Pitchess* hearing was held in 1995, it seems unlikely the trial court will have an independent recollection of what documents it reviewed. For this reason, the Court could instead order the Corona Police Department to directly provide the personnel files for officers Anderson, Raasvild and Stewart and independently review those files to see if (as of the date of the original *Pitchess* hearing) they contained any information that should have been, but was not, disclosed to the defense[12].

Whichever route this Court chooses to take, Montes is entitled to a record adequate to permit meaningful appellate review of the trial court's ruling on his *Pitchess* motion. (*Griffin v. Illinois* (1956) 351 U.S. 12, 16-20 [due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review]; *People v. Howard* (1992) 1

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[12]. This all supposes that the personnel records for the relevant time period still exist.

Cal.4th 1132, 1165-1166 [state law entitles a defendant to a record sufficient to permit him or her to argue the points raised in the appeal].)

V.

THE TRIAL COURT VIOLATED MONTES' RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW BY REFUSING TO FULLY CONSIDER, AND THEN BY DENYING, MONTES' SEVERANCE MOTIONS.

A. BECAUSE THE COURT REFUSED TO CONSIDER THE SEALED DECLARATIONS MONTES TENDERED IN SUPPORT OF HIS SEVERANCE MOTION, THE COURT'S DECISION DENYING SEVERANCE WAS MANIFESTLY AN ABUSE OF DISCRETION.

In his opening brief, Montes argued that the trial court erred by refusing to even read, let alone consider, the sealed declarations and documents submitted by his counsel in support of his severance requests. (AOB at pp. 102-108.)

Montes further contended that because of this error, the trial court necessarily abused its discretion when it denied his severance motions, because the court did not actually exercise any discretion that this Court can review. "To exercise the power of judicial discretion all material facts and evidence must be both known *and considered*, together with legal principles essential to an informed, intelligent and just decision." (*People v. Davis* (1986) 161 Cal.App.3d 796, 804, italics in original; see also *People v. Lara* (2001) 86 Cal.App.4th 139, 165.) Here, the court intentionally kept itself unaware of the material facts and evidence necessary to a considered ruling

on Montes' discovery motions. The ruling denying those motions was thus a clear abuse of the court's discretion.

1. The Trial Court Should Have Read And Considered the Sealed Declarations Proffered By Montes' As Support For His Severance Motions.

Respondent suggests that this issue be disposed of summarily simply because there appears to be no absolute mandate that in every case a trial court consider materials presented under seal in support of a severance motion. According to respondent, "the trial court simply could not have abused its discretion when it was neither compelled nor authorized by statutory or case authority to do so." (RB at p. 37.) Montes disagrees.

The trial court had an obligation to consider all available evidence relevant to the important severance decision. Certainly there was (and is) no authority prohibiting the court from considering such evidence, and at the time of the trial court's ruling there were at least two published cases from this Court (*People v. Hardy* (1992) 2 Cal.4th 86, 167 and *People v. Odle* (1988) 45 Cal.3d 386, 403) in which the trial courts had accepted *in camera* offers of proof in support of defense motions to sever.

In addition, at the time of the trial court's ruling there was (and still is) clear legal authority providing for consideration of sealed or *in camera* offers of proof in situations where, as here, it is necessary to balance the

accused's right to maintain confidentiality of defense strategy and work product against the need to provide adequate factual support for a requested court order or action.

For example, Evidence Code section 915, subdivision (b) provides that, when ruling on a claim of privilege (which includes a claim of attorney work product under certain circumstances), the court may order the information disclosed in chambers. "Evidence Code section 915 has been construed to authorize *in camera* proceedings to protect privileges other than those specifically enumerated therein." (*Telegram-Tribune, Inc. v. Municipal Court* (1985) 166 Cal.App.3d 1072, 1078.)

"Moreover, if statutes or judicial council rules do not specify a procedure to exercise jurisdiction with which the superior court is vested to hear a particular matter, courts have inherent power, as well as power under Code of Civil Procedure section 187, to adopt any suitable processes. [Citations.] This code section is applicable to criminal proceedings." (*Ibid.*)

Although some of a court's powers are set out by statute, the inherent powers of the courts are derived from the Constitution and are neither confined by, nor dependent on, statutes. (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1247-1248; see also *Telegram-Tribune, Inc. v. Municipal*

Court, supra, 166 Cal.App.3d 1072, 1078 ["*In camera* proceedings to review claims of privilege and confidentiality have both statutory and judicial support ...."].)

It is thus beyond question that a trial court has the inherent power to take *in camera* offers of proof where necessary to safeguard important rights of a litigant. "[A] trial court has inherent discretion to allow documents to be filed under seal in order to protect against revelation of privileged information. [Citation.] The courts have recognized the efficacy of similar procedures to protect the interests of both the accused and law enforcement." (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71-72; see also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 383, fn. 21 ["The court has inherent discretion to conduct *in camera* hearings to determine objections to disclosure based on asserted privileges."].)

> '"One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and to so conduct the same that *the rights of all suitors before them may be safeguarded.* This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs."'

(*People v. Castello,*(1998) 65 Cal.App.4th 1242, quoting *Lorraine v. McComb* (1934) 220 Cal.753, 756, quoting *Ringlander v. Star Co.* (1904) 98 A.D. 101, 104, italics added in *Castillo.*)

Moreover, the decision in *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, decided years before the proceedings at issue herein, and which was cited and discussed at length in Montes' request for an *in camera* review (24 CT 6697-6701) and in his opening brief (AOB 109-111), set forth a procedure which would have been appropriate in the instant case.

Essentially, the trial court should have accepted, and reviewed, the sealed declarations. This initial review would be limited to whether the information contained therein must remain confidential, or if some (or all of it) should be disclosed. Following this determination, the court would proceed to the merits of the motion supported by the *in camera* offer of proof. (*Alhambra, supra*, 205 Cal.App.3d at pp. 1131-1132.) What a court should *not* do is precisely what the trial court in Montes' case did: completely refuse to even review the sealed materials so that it could properly determine the threshold question of confidentiality.

Here, the trial court purposefully kept itself in the dark about the contents of the declarations submitted in support of Montes' severance motions. As a result, the court was entirely unprepared to make an informed decision on whether the material contained therein should remain

confidential, and was also unable to make an informed ruling on the merits of Montes' grounds for seeking severance.

2. Because The Trial Court Refused To Give Full Consideration To The Reasons Supporting Montes' Severance Motions, It Necessarily Abused Its Discretion When It Denied The Motions.

As explained in his opening brief (AOB pp. 117-118), "[t]o exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision." (*People v. Lara* (2001) 86 Cal.App.4th 139, 165-166, citing *People v. Davis* (*1984*) 161 Cal.App.3d 796, 804.) Here, the trial court was intentionally unaware of the important and necessary facts which formed the basis of Montes' requests for severance. For example, it is difficult to see how the trial court could have properly exercised its discretion to deny Montes' request to have his trial severed from his cousin Hawkins, when the trial court's refusal to read the sealed declarations meant it was unaware of the difficulties defense counsel were having in investigating and preparing a penalty phase because of Hawkins family loyalty on Montes' father's side of the family.

Clearly, because of the lack of information, the trial court was unable to fully and properly exercise its discretion, and its ruling denying the motions to sever cannot be upheld on review.

B. EVEN PUTTING ASIDE THE COURT'S REFUSAL TO CONSIDER MONTES' OFFER OF PROOF IN SUPPORT OF HIS SEVERANCE MOTIONS, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED HIS SEVERANCE MOTIONS.

1. Respondent Only Addresses One Of Montes' Two Severance Motions.

To review, Montes presented two different severance requests. The first sought severance from all of his co-defendants, and the second asked that his trial be severed from that of his cousin, Travis Hawkins. These two requests were based on different considerations, and should be considered and addressed separately.

The request for severance from all co-defendants was based on *Aranda/Bruton*[13] grounds; concerns about irreconcilable defenses; concerns relating to the fact that Montes was the only one facing the death penalty; and the likelihood that attorneys for his co-defendants would act as second prosecutors at the trial, in an effort to shift blame from their clients onto Montes. (23 CT 6479-6546; 24 CT 6551-6566.)

The second severance request asked that the court permit Montes to have a trial separate from his cousin and co-defendant, Travis Hawkins. (24 CT 6567-6622.) The basis for this second request was that joinder was

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

having an adverse impact on the ability of Montes' counsel to investigate and prepare a penalty phase defense.

In its pleadings, respondent deals only with the first severance motion (for severance from all his co-defendants). Respondent acknowledges the separate motion for severance from Hawkins, but does not otherwise address this second motion, and particularly does not suggest any reason why the court might properly have denied it. (See RB at pp. 38-39.)

2. The Court Abused It's Discretion By Denying the Two Severance Motions.

According to respondent, the trial court did not abuse its discretion by denying the motion, and the joint trial did not violate Montes's constitutional rights. (RB 38-39.) For the reasons set forth in his opening brief (AOB at pp. 118-119), Montes disagrees, and maintains his position that the trial court's order denying severance was an abuse of discretion.

C. VIEWED FROM THE PERSPECTIVE OF WHAT ACTUALLY OCCURRED AT TRIAL, THE JOINT TRIAL DENIED MONTES HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AND PENALTY DETERMINATION.

As discussed in his opening brief (AOB at pp. 114-125) the joint trial denied Montes' rights to a fair trial and due process of law, in part because witnesses with close ties to his co-defendants lied to protect their friends and relatives. Further, the joint trial prevented Montes from presenting evidence that Gallegos and Walker knew each other, evidence which provided a motive specific to Gallegos for wanting Walker killed so as not to be identified.

Moreover, because Montes was jointly tried with Hawkins, his counsel was unable to obtain and present penalty phase evidence from his father's side of the family. This inability to adequately investigate and present a penalty defense denied Montes' his rights to due process and a fair trial, in addition to denying him the assistance of counsel and a reliable penalty determination.

D. BECAUSE THE ERROR IN DENYING SEVERANCE AFFECTED THE PENALTY DETERMINATION, REVERSAL IS REQUIRED UNLESS THE ERROR CAN BE FOUND HARMLESS BEYOND A REASONABLE DOUBT.

Respondent cites to language from opinions by this Court to the effect that reversal for abuse of discretion in denying a severance motion is judged according to the state law *Watson* "reasonable probability" standard. (RB at p. 33.) However, as explained in Montes' opening brief (AOB at pp. 120-121), because the error in denying severance affected the outcome of his penalty trial, reversal is required unless the error can be found harmless beyond a reasonable doubt. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448 [even state law errors at penalty reversible if it is reasonably possible the error affected the verdict]; *People v. Ashmus* (1991) 54 Cal.3d 932, 990 [state "reasonable possibility" standard utilized for review of errors at penalty phase is the same as federal "harmless beyond a reasonable doubt" standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24].)

In his opening brief, Montes discussed at length why it was reasonably possible that the error in denying severance affected the penalty phase verdict. (AOB at pp. 121-133.) For the reasons discussed therein, reversal of the death sentence is required.

VI.

THE TRIAL COURT SHOULD HAVE PROVIDED AN AMELIORATIVE INSTRUCTION, AS REQUESTED BY MONTES, TO ADDRESS THE FAILURE OF LAW ENFORCEMENT OFFICERS TO PRESERVE A SAMPLE OF MONTES' BLOOD.

A. MONTES PRESENTED SUBSTANTIAL EVIDENCE THAT LAW ENFORCEMENT OFFICERS ACTED IN BAD FAITH IN NOT COLLECTING A BLOOD SAMPLE.

Respondent seeks to downplay the evidence presented by Montes in support of his request for some sort of sanction or ameliorative instruction to rectify the failure of law enforcement to collect and preserve a blood sample which likely would have shown the presence of methamphetamine in his system.

For instance, respondent characterizes Montes' statement to police during interrogation that he had been using methamphetamine as "self serving." (RB at p. 42.) It is difficult to understand how admission to a crime to police officers can be seen as "self serving." Apparently, respondent is suggesting that 20 year-old Montes, who had an IQ of approximately 77, was so legally knowledgeable and sophisticated that he understood that being under the influence of drugs might aid him in a penalty phase proceeding for a crime with which he had not yet even been charged.

In contrast to the unrealistic degree of legal sophistication respondent seeks to impart to Montes, the law enforcement personnel involved in investigation of the case *were* aware of the importance of this evidence to the defense. In fact, according to Detective Stewart, "[t]he only reason you take blood at the time when the murder occurred is to alleviate a defense of incapacitated ability or something like that." (3 RT 381.)

Respondent contends that this evidence is contradicted by "the observations of an experienced and trained detective (Stewart) who concluded that despite his speaking quickly, Montes did not appear to be under the influence." (RB at p. 42.) However, Detective Anderson, who also interviewed Montes, admitted that Montes *had* told him he was using speed on the night of Walker's murder (August 27th)[14]. (3 RT 394-395.)

Respondent also omits the fact that the prosecutor, Mr. Mitchell, had told defense attorney Karla Sandrin that Montes was "flying" at the time he was interviewed by Mitchell and Anderson. (25 CT 6974.) Mr. Mitchell had previously been involved in a death penalty case and was therefore aware of the significance of evidence of a defendant's intoxication at both

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[14]. According to respondent, Stewart admitted that Montes had said he had been using speed the night *before* the murder. (RB at p. 40, fn.20.) In fact, as noted above, Montes said he had been using speed the night *of* the murder.

the guilt and penalty phases. Further, in that previous case, *People v. Bridges* (CR-37250), Mr. Mitchell argued the lack of evidence of the defendant's intoxication at the penalty phase, just as he did in the instant case. (25 CT 6974.)

In addition, Kim Speck, someone with experience in methamphetamine use and its effects, testified that in her opinion Montes seemed to be under the influence. (3 RT 395; 21 RT 3462.)

Respondent also suggests there was no bad faith on the part of the officers in not preserving this evidence because at the time Montes was interrogated they did not know if Montes had killed Walker since Montes denied it and provided assistance in finding co-defendant Varela. (RB at p. 42.) This overlooks the fact that the police had evidence connecting Montes with Walker's kidnapping because his prints had been found on Walker's car. (16 RT 2553; 28 RT 5103.) That is why police had gone to Montes' home and arrested him the day after Walker's murder, and he was in police custody being interrogated. Moreover, the trained police officers and the prosecutor with prior capital trial experience certainly knew that (just as happened in this case) involvement in a felony murder was enough to prosecute Montes for first degree murder, and even to seek and obtain a sentence of death.

B. A DEFENDANT'S DUE PROCESS RIGHTS ARE VIOLATED BY THE BAD FAITH FAILURE OF LAW ENFORCEMENT TO COLLECT AND PRESERVE POTENTIALLY EXCULPATORY EVIDENCE.

Respondent asserts that there is no duty to collect evidence which might be favorable to the defense. (RB at p. 41.) Appellant believes that the High Court's decision in *Arizona v. Youngblood* (1988) 488 U.S. 51 must be read to include a duty to preserve evidence, such as a blood sample, where it possesses an apparent exculpatory value, and the defendant cannot obtain comparable evidence by other reasonably available means. Collection of a blood sample is an obviously necessary step required for preservation of the same, and should be covered under the general "preservation" requirement. (See *Janoushek v. Watkins* (10th Cir. 2008) 265 Fed.Appx. 737 [treating a claim that law enforcement failed to collect a blood sample in the same manner as a failure to preserve evidence argument, and citing *Arizona v. Youngblood, supra,* 488 U.S. 51, 58].)

Moreover, adoption by law enforcement of a "what we don't create can't come back to haunt us" approach should be strongly discouraged. (See *United States v. Brimage* (1st Cir. 1997) 115 F.3d 73, 77.) Detective Stewart's statement that the only reason for law enforcement to take blood is to alleviate an incapacity defense (3 RT 381) is a striking example of an attitude that inhibits truth-finding in an investigative context. Law

enforcement officers should not be permitted to limit the available evidence through their conscious inactions, as was done in the present case.

This Court has recognized that, in some situations at least, the failure to collect evidence for preservation may justify sanctions against the prosecution at trial. (*People v. Frye* (1998) 18 Cal.4th 894, 943, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) Montes submits that the situation in his case is one in which sanctions ought to have been imposed. From the evidence presented it was clear that Montes seemed to be under the influence of some substance at the time he was arrested and interrogated by the police and Mr. Mitchell. Mr. Mitchell and the detectives were aware that evidence of intoxication could be useful to a defense, both as to mental state at the time of the offense, and as a factor in mitigation at a penalty phase trial. There was no way for Montes to obtain a sample of his own blood for subsequent testing.

C. THE TRIAL COURT ERRED BY REFUSING TO GIVE AN AMELIORATIVE INSTRUCTION, AS REQUESTED BY MONTES, TO ADDRESS THE WILLFUL FAILURE TO PRESERVE A BLOOD SAMPLE. THIS ISSUE WAS NOT "FORFEITED".

In an effort to address the damage caused to the defense by law enforcement's failure to preserve a sample of Montes' blood, Montes requested (among other things) that the court give an ameliorative

instruction directing the jury to draw any conflicting inferences regarding the lost evidence in favor of the defense. (25 CT 6857, 6869-6870.) The trial court refused this request. (3 RT 402.)

Respondent contends the issue was "forfeited" as it relates to prosecutorial misconduct at the penalty phase. (RB 43.) Actually, Montes has not presented this issue as a claim of prosecutorial misconduct. His claim all along has been that the trial court erred by refusing to grant his motion for sanctions, including a jury instruction. Montes' motion was not limited to potential harm at the guilt phase. In fact, Montes' motions raised the concern that the failure to obtain a blood test had deprived him of potential mitigating evidence, and that the prosecutor would (as he did) use this lack of evidence of intoxication to argue the inapplicability of that factor in mitigation in the penalty phase. (25 CT 6972-6975.)

Because Montes *did* ask for an ameliorative instruction, his claim that the trial court erred by refusing one was not "forfeited."

VII.

THE JUDGEMENT MUST BE REVERSED BECAUSE MONTES WAS IMPROPERLY REQUIRED TO WEAR A SHOCK BELT THROUGHOUT THE PROCEEDINGS.

A. THERE WAS NO SHOWING OF A MANIFEST NEED FOR RESTRAINTS.

There must be record-based evidence of a "manifest need" before a court may require a defendant to be restrained during trial. (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) At the very outset of its argument on this point respondent appears to concede the lack of such evidence, as the brief proceeds directly to a discussion of harmlessness. (RB at p. 48.) However, at a later point respondent asserts that "it cannot be said that the trial court abused its discretion when it ordered Montes restrained." (RB at p. 49.) Citing *People v. Hawkins* (1995) 10 Cal.4th 920, 944, respondent contends that the order for restraints was supported by Montes' "violent acts in custody" and his "extensive criminal history."

Montes strongly disagrees. As discussed at length in his opening brief (AOB 158-170), the trial court clearly abused its narrow discretion when it ordered Montes shackled with a shock belt during trial. Nothing in the *Hawkins* case cited by respondent alters this conclusion.

The defendant in *Hawkins* had committed three assaults while in pre-trial custody, and his prior offenses included convictions for robbery,

assault with a deadly weapon, battery with serious bodily injury, two counts of possession of a firearm by a felon, and assault with a deadly weapon on a police officer. There was also evidence of uncharged crimes which included two more assaults on police officers, and other incidents of assault, including one with a firearm. (*Id.* at p. 937.)

Here, there was evidence that during the two years of his pretrial incarceration Montes had assaulted one person, co-defendant Gallegos. This took place a year before commencement of trial[15]. (11 RT 1814-1815; 2d Aug. CT, pp. 33-37.) Since that time, Montes and Gallegos had been going to court together for a year (including during jury selection) without any further incident. There had been one other altercation between the co-defendants, where Varela had assaulted Montes[16]. Certainly Varela's prior assault on Montes, in which Montes offered no form of physical resistance, did not warrant restraining *Montes*.

There were also reports submitted regarding two jail house fist-fights which had taken place nearly two years before the trial. In both of these incidents Montes was simply noted to have been present, along with a

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[15]. At one point in his opening brief, the date of the assault was erroneously given as September 8, 1996 (AOB at p. 49.) In fact, the incident date was September 8, 1995.

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

number of inmates. He was never identified as a participant in either altercation.

Nor did the discovery of the two "shanks" justify Montes' courtroom restraint with a shock belt. Montes had never used any such item to assault another inmate during his more than two years of pre-trial incarceration. However, as his counsel pointed out, Montes himself had been stabbed on July 26, 1996, three days after he was found in possession of the altered toothbrush, and several months before the September 11, 1996 discovery of the "shank" (a broken piece of plastic with a handle).[17].

To address concerns raised about discovery of the weapons, the court had already ordered that Montes and the holding cells be thoroughly searched before the defendants were brought into the courtroom. (4 PRT 951-952.) Presumably, even before the court's order, the inmates were searched before going to court. At no time was Montes found trying to smuggle any sort of weapon into the courtroom.

Significantly, and contrary to respondent's assertion (RB at p. 49), Montes did *not* have an "extensive criminal history." Montes had only one

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[17]. In his opening brief, Montes incorrectly gave the date of the incident in which Montes was stabbed as July 23, 1996. (See AOB at p. 151.) In fact, this took place on July 26, 1996, three days after discovery of the altered toothbrush.

prior felony conviction for burglary. He had no prior convictions for assaultive or violent behavior, and had never been sentenced to prison. It is also notable that, unlike the defendant in *Hawkins,* Montes did not have a history of assaulting police officers, a factor raising greater concerns about the possibility that a defendant would misbehave even in the presence of armed bailiffs.

Montes' case is also very different from *People v. Gamache* (2010) 48 Cal.4th 347, in which this Court upheld the decision to shackle the defendant with both leg restraints and a shock belt. The defendant in *Gamache* had, on multiple occasions, developed detailed escape plans. Only one month before the hearing at which the trial judge made the decision to have Mr. Gamache shackled during trial, deputies *twice* intercepted letters Gamache was attempting to smuggle out to his mother seeking her aid in assisting him to escape during the trial. (*Id.* at p. 368.) Gamache had also been designated a "high-security escape risk" by the marshal in charge of courtroom security. (*Id.* at p. 369.)

Following receipt of this evidence, the trial court in *Gamache* decided to order only ankle shackles (in part because Gamache apparently contemplated using the shock belt itself to assist in his escape plans). However, about six weeks after the initial hearing Gamache was found in

possession of a homemade handcuff key and an elastic file fastener which he was apparently trying to shape into a weapon. In addition, because his mother had since threatened to blow up a courthouse, there were concerns that he would have outside assistance from her with any escape attempts. In light of this new information, the trial court concluded that Gamache should wear a shock belt along with the ankle shackles. The court also received assurances from defense counsel that Gamache would be dressed to conceal the belt. (*Id.* at p. 370.)

This Court found that the trial court's orders for restraint were supported by the record which clearly demonstrated that Gamache was a "genuine escape risk." It also noted that the trial judge both times considered the least intrusive method to address the security problems, initially ordering only the leg shackles. "Only after Gamache and his mother had provided additional evidence that he remained an escape risk and that restraints impervious to picking with a homemade key were necessary, did the trial court order the stun belt. Even then, the court remained cognizant of the possibility for prejudice and took steps to ensure that the stun belt, like the shackles, would not be visible to the jury." (*Id.* at p. 370.)

In Montes's case, the court never considered other forms of restraint. Although the prosecutor said, at the outset of the hearing, that he was asking for either a shock belt or a leg brace, it was apparent from the court's comments at the time of its ruling that it was not giving consideration to forms of restraint other than the shock belt.

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

(11 RT 1847.)

For two years Montes attended courtroom proceedings, including two weeks of jury selection. (4 PTRT 951.) Montes never did, or said, anything during these court proceedings justifying imposition of restraints. This fact was recognized by the trial judge when he denied the initial request for restraints: "[THE COURT]: [M]r. Montes has never done anything in this courtroom that has indicated that he intends to act violent. He has not reacted hostilely. He has behaved himself as a gentleman the whole time." (4 PRT 951.)

It must be stressed that, at the time the shock belt was ordered, the trial had already proceeded through *two weeks* of jury selection without any sort of disruption. Nothing whatsoever had occurred during these two

weeks which suddenly justified Montes' restraint. Moreover, the court was given virtually no other new information which supported its change of opinion on shackling. There was no manifest need for restraints in this case, and certainly no manifest need for forcing Montes to wear a shock belt throughout the trial.

B. EVEN IF IT CANNOT BE SAID THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING SOME TYPE OF RESTRAINT, IT NEVERTHELESS WAS ERROR TO ORDER MONTES SHACKLED WITH A SHOCK BELT.

Notably, respondent never addresses the especially significant fact that Montes was required to wear a shock belt as opposed to a less onerous form of restraint. Respondent's reluctance to engage the issue likely stems from its weak position on this point. This is so because "traditional" restraints, such as leg braces, do not create a "remotely comparable level of potential pain, injury, and humiliation" which can affect a defendant's ability to concentrate and participate in the trial proceedings. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 156.) As this Court has recognized, "even when the record in an individual case establishes that it is appropriate to impose some restraint upon the defendant as a security measure, a trial court properly must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purpose." (*People v. Mar* (2002) 28 Cal.4th 1201, 1226.) The discussion in *Mar* made it clear that the

nature of a shock belt, with its potential to deliver a 50,000 volt jolt, should be taken into account by a trial court since the court is required to select the least restrictive restraint necessary to achieve the security purpose. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226.)

Respondent does not cite, or otherwise acknowledge, the decision in *Mar*. Nor does respondent contend that a shock belt was the least restrictive alternative available, apparently conceding that it was not.

In its recent decision in *Gamache, supra* 48 Cal.4th 347, this Court explained that the additional considerations, detailed in *Mar,* that courts should take into account before ordering a defendant shackled with a shock belt were intended for future guidance. This Court therefore declined to address them in *Gamache*, which, as does the instant case, predated *Mar*. Nevertheless, Montes' trial judge was required, by preexisting authority including *People v. Duran* (1976) 16 Cal.3d 282, 291, to select the least obtrusive method of restraint. And these principles "apply fully to the decision whether to require a defendant to wear an electronic security belt...." (*Gamache, supra*, 48 Cal.4th at p. 367.)

The trial court in this case did not articulate any reason for choosing the REACT belt over other forms of restraint, other than its concern that a leg brace was more likely to be seen by jurors. (4 PRT 953-954.) In this

regard the trial court clearly erred, not only because the belt *was* visible, since it was seen by at least one juror (28 CT 7664-7666),[18] but also because shackling Montes with a shock belt capable of delivering a 50,000 volt charge was not the least onerous form of restraint available in this case.

C. EVEN IF THIS COURT FINDS NO ABUSE OF DISCRETION IN ORDERING RESTRAINTS AT THE JOINT GUILT PHASE, ANY CONCERNS WHICH MIGHT HAVE SUPPORTED RESTRAINTS ENDED AT ITS CONCLUSION, AND THE TRIAL COURT THEREFORE ABUSED ITS DISCRETION IN ORDERING MONTES RESTRAINED DURING THE PENALTY PHASE.

As Montes contended in his opening brief (AOB 170-172) even if this Court finds no abuse of discretion by the trial court in ordering Montes restrained with the shock belt at the guilt phase, the same cannot be said for his restraint during the penalty phase of the trial. Co-defendants Gallegos, Hawkins and Varela were no longer present. Gone also were the three attorneys for these defendants. Finally, with the departure of Varela, there was but one jury left in the courtroom. The trial court's order which directed that Montes wear the shock belt "at all future court appearances" was therefore an abuse of discretion. (See 11 RT 1847.)

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[18]. In addition, Cotsirilos had prior experience with the shock box, and explained that the jurors did notice the bulk created by the box. (11 RT 1845.)

According to respondent this claim has been "forfeited" by a failure to object. (RB at p. 49.) But Montes *did* object to being compelled to wear the shock belt; in fact both his attorneys argued forcefully against it at the hearing. Moreover, Montes' objection was specifically grounded on the Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as corresponding State Constitutional guarantees. (11 RT 1845.)

Absence of further objection did not result in a "forfeiture" of the issue, as the court had already made its ruling that Montes would be shackled during the entire trial, and any further objection would have been futile. (*Cf. People v. Hill* (1998) 17 Cal.4th 800, 820 [defendant excused from requirement for objection to prosecutorial misconduct if objection would be futile]; *People v. Boyer* (1989) 48 Cal.3d 247, 270, fn. 13, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [suggesting that renewed objection to evidence may not be required if it would be futile].)

Furthermore, it was the trial judge who was vested with the power, and thus alone had the ability, to control the proceedings. (Sect. 1044.) Here, there was a significant change in the physical courtroom environment after the guilt phase was concluded. Moreover, Montes had never once

done anything in court to indicate that he posed a threat to the people therein, and had always "behaved himself as a gentleman." (4 PRT 951.) The court should therefore have ordered the shock belt removed at the conclusion of the guilt phase so that Montes could face the trial for his life unencumbered by its physical and psychological restraints.

D. RESTRAINT DURING TRIAL WITH A SHOCK BELT TRANSGRESSED MANY OF MONTES' CONSTITUTIONAL RIGHTS.

As explained in his opening brief (AOB at pp. 172-178), Montes' restraint with a shock belt violated his state and federal constitutional rights to due process, fair trial by jury, personal presence during trial, confrontation, compulsory process, assistance of counsel, and against self incrimination and imposition of cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 and 17.)

E. THE ERROR REQUIRES REVERSAL.

1. The Error Is Reversible *Per Se.*

In his opening brief (AOB 178-181), Montes contended that the error required reversal of both the guilt and penalty verdicts without the need for a prejudice evaluation. Recently, however, in *People v. Howard* (2010) 51 Cal.4th 15, this Court rejected the argument that compelled shackling with a

shock belt was structural error. (*Id.* at pp. 24-25, fn. 6.) Although acknowledging what seems to be *Howard's* contrary holding, Montes still asserts that even if improper use of a shock belt at the guilt phase of a capital trial is not structural error, a similar rule should not apply to the penalty phase.

The focus of the issue in *Howard* was whether the shock belt had impaired the defendant during his guilt phase testimony. There was no discussion of how the belt might have created structural error at the penalty phase[19]. Montes submits that there are reasons for treating the error differently at the penalty phase. (See AOB, at pp. 172-175.)

As previously noted, "[i]n a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]" (*Riggins v. Nevada* (1992) 504 U.S. 127, Kennedy, J., concurring.) The REACT belt "provides the option for threatening inmates with electric shock." (11 RT 1830.) By its very nature, the belt, which is designed to create "total psychological supremacy" (*Mar, supra*, 28 Cal.4th at p. 1226), interferes with a defendant's ability to react and interact normally. One would expect

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[19]. The *Howard* defendant did not present a case in mitigation, instead relying entirely on his claim that he did not commit the offense.

that jurors will pay special attention to the defendant during the penalty trial, searching for signs of remorse or some other sympathetic expression that could tip the balance for choosing life over death. The defendant's very demeanor, so crucial to the normative decision each penalty juror must make (cf. *People v. Brassure* (2008) 42 Cal.4th 1037, 1067), can be impaired by the REACT belt in ways impossible to fully assess from a reading of the appellate record[20].

Improperly shackling a penalty phase defendant with a shock belt should therefore be treated as structural error, because it is virtually impossible to ascertain the full extent of its prejudicial effect. (*United States v. Gonzalez-Lopez* (2006) 126 S.Ct. 2557, 2563-2564.) This Court should therefore hold that, in the context of the penalty phase, the error is reversible per se. (Cf. *Riggins v. Nevada*, *supra*, 504 U.S. at p. 137.)

2. The Error Cannot Be Found Harmless Beyond A Reasonable Doubt To The Penalty Determination.

Even if the error is not held to require *per se* reversal of the death sentence, it nevertheless cannot be found harmless beyond a reasonable

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[20]. In fact, as noted in *Mar*, a trainer for use in the REACT belt stated that, during trials, people notice that a defendant wearing the belt will watch whoever has the control monitor. (*Mar, supra*, 28 Cal.4th at p. 1226.) Such behavior could readily be interpreted by jurors as hostility, or disinterest in the rest of the penalty proceedings.

doubt in Montes' case. (*Deck v. Missouri* (2005) U.S. 622, 634; *Brown, supra,* 46 Cal.3d 432, 446-448.)

Prejudice to a defendant from forced shackling can take two forms. First, there may be prejudice specific to the defendant from physical or psychological discomfiture, adversely affecting in-court attentiveness or demeanor. Thus, over 100 years ago, in *People v. Harrington* (1871) 42 Cal. 165, 168, this Court held that "any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense...."

This risk of psychological distress is a particular concern with use of a REACT belt. (*Mar, supra*, 28 Cal.4th at p. 1225, fn. 7 ["... the greatest danger of prejudice [from a stun belt] arises from the potential adverse psychological effect of the device upon the defendant..."].) The very nature of the belt thus creates a risk of prejudice without regard to whether or not it was observed by jurors.

Prejudice may also occur when, as happened in this case, the restraining device is seen by a deliberating juror. (*Deck v. Missouri* (2005) 544 U.S, 622, 633.) Respondent addresses only this second form of

prejudice[21]. Relying on two cases predating *Mar*, *People v. Anderson* (2001) 25 Cal.4th 543 and *People v. Coddington* (2000) 23 Cal.4th 529, 651, neither of which involved a REACT belt, respondent claims that any error in the court's order for shackling with a shock belt is harmless unless the device was seen by a juror. Although Montes agrees that this is one form of prejudice, as pointed out above, it is not the only one.

In any event, it is apparent that both types of prejudice are present in this case, and respondent has not carried its burden of proving beyond a reasonable doubt that neither of them affected the verdicts.

With regard to the first kind of prejudice, which is concerned with how shackling may have affected the defendant, this Court has noted there are worrisome psychological effects on a defendant from having to wear a device "that can deliver a severe electrical shock without warning, and even through inadvertence." (*People v. Mar* (2002) 28 Cal.4th 1201, 1226-1227; see also *People v. Stevens* (2009) 47 Cal.4th 625, 639.) In particular, *Mar* recognized the "crucial nature of the defendant's demeanor" in concluding that the error required reversal even under the state law *Watson* standard.

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[21]. Respondent completely fails to acknowledge the significant fact that the type of restraint at issue in this case was a shock belt. Perhaps for this reason respondent does not address Montes' assertion that the error in ordering him restrained with the belt during the penalty phase cannot be found harmless beyond a doubt. (See AOB pp. 181-189.)

(*Mar, supra*, 28 Cal.4th at p. 1225.) Although *Mar* concerned the defendant's demeanor while testifying, as explained below, a capital defendant's demeanor is crucial to the jury's penalty determination even if the defendant never takes the stand to testify.

In the more recent *Howard* decision, this Court found no prejudice from shackling the defendant with a REACT belt. However, Montes' case presents a very different situation from *Howard*. During sentencing, the defendant in *Howard* gave an extended statement to the trial court on the issue of his mental state and demeanor while testifying, attributing any problems entirely to his use of antipsychotic medication during the trial, and making no mention of the REACT belt. (*Howard, supra*, 51 Cal.4th at p. 23.) Responding to Howard's claims, the trial court expressly stated that Howard had appeared "coherent and responsive, and in no way appeared to be impaired by virtue of any medication or anything else." (*Id.* at p. 24.)

Rejecting Howard's claim on appeal that shackling with the REACT belt was prejudicial error, this Court was clear that the record "affirmatively dispels any notion" of prejudice. (*Id.* at pp. 19-20.) Although Howard had made a "concerted effort" to convince the trial court that his defense had been hampered by his impaired demeanor, he attributed the cause entirely to medication, never once mentioning the shock belt as a cause. "If wearing a

stun belt had affected him, he certainly would have informed the court of that circumstance." (*Id.* at p. 24.) Accordingly, since Howard did not mention the belt, it could be concluded beyond a reasonable doubt that the belt had no psychological effect on him.

Howard thus stands for the unremarkable conclusion that prejudice should not be presumed where there is clear evidence that no prejudice actually occurred. In *Howard,* any concern that the defendant may have been psychologically affected by the shock belt was "put to rest by his own statements to the court about his mental state during trial." (*Id.* at p. 26, fn. 6.)

Unlike *Howard*, Montes' case presents no affirmative record demonstrating the absence of prejudice from the shock belt. Instead there is evidence that, with one exception when his mother testified, Montes' demeanor was noticeably controlled throughout the proceedings. Alternate juror number 3 noticed what he described as Montes' "controlled" demeanor (28 CT 7663), and how Montes hardly ever changed expression. (28 CT 7646.) Montes' controlled demeanor was also pointed out by the prosecutor, who characterized it as a lack of compassion or remorse. Importantly, however, this "controlled" demeanor may just as easily have

been an effort by Montes' to repress his reactions and so lower the risk that he would be subject to an electric shock.

In addition, in *Howard*, this Court noted that there was nothing to indicate that Mr. Howard would have been particularly nervous about the shock belt being activated. In Montes' case, however, there *were* such reasons, since Montes was aware that in one of the two prior cases where the belt had been used in Riverside county, it had been activated accidentally. (11 RT 1834-1835.)

Finally, in *Howard*, the prosecution did not comment on Howard's demeanor during the course of the trial. In the present case, however, during closing argument the prosecutor referred to what he perceived as Montes' lack of emotion while Walker's family members were testifying. (45 RT 7899.) In fact, he pointed to Montes' in-court demeanor as evidence of a lack of remorse that justified a death sentence. (45 RT 7885, 7890, 7899.)

These comments by the prosecutor increased the likelihood the jury not only took notice of, but drew an adverse conclusion from, Montes' controlled demeanor. Such a conclusion would be especially prejudicial to the penalty determination since, for a jury deciding the fate of a capital defendant, "assessments of character and remorse may carry great weight

and, perhaps, be determinative of whether the offender lives or dies." (*Riggins, supra*, 504 U.S. at pp. 143-144, (con. opn. of Kennedy, J.).

Clearly, unlike *Howard*, the record in Montes' case does not affirmatively demonstrate the absence of any prejudicial effect from compelled use of the REACT belt. To the contrary, the record in this case actually establishes the existence of a prejudicial effect.

As noted, respondent addresses only the second form of potential prejudice from shackling a defendant. Skipping over the issue concerning the court's selection of a shock belt to restrain Montes during trial, respondent simply asserts that "Montes presents no evidence that any deliberating juror observed the belt" and concludes that, absent evidence that the restraints were observed by the jurors, any error was harmless. (RB at p. 49.)

Respondent is wrong. In his motion for a new trial Montes presented evidence that the restraining device and the activating box *were* observed by a sitting juror, specifically alternate juror number 3, who sat as a juror in the penalty phase trial. (28 CT 7665.) Respondent apparently overlooks the fact that alternate juror number 3 was substituted in at the commencement of the penalty phase to take alternate number 2's place. (28 CT 7504; 41 RT 7230-7238.)

Alternate juror number 3 told the investigator during a post-trial interview that he not only saw Montes wearing the belt, but also observed a crew-cut bailiff in possession of a box with a button on it.

> [Alt. No. 3]: . . . *it looked like Joseph was wearing some kind of belt.*
>
> [KS]: Uhm.
>
> [Alt. No. 3]: *And it . . . and it looked like uh . . . it . . . it looked like uh . . . the one crew-top guy had a box*, you know. . . .
>
> [KS]: Uhn.
>
> [Alt. No. 3]: . . . *with . . . maybe it was like a button on it or something.*

(28 CT 7664-7666. Italics added.)

The way alternate number 3 described his observation of the belt and the box with the button on it, it is apparent that he realized the connection between the two devices. It should also be recalled that the REACT belt is 6 inches wide, and has a 6-by-2-inch box attached to it, so there is no chance that it was mistaken for the type of belt used to hold up one's pants. (11 RT 1829.)

In his opening brief, Montes explained at length why error affecting the penalty determination in his case cannot be found harmless beyond a reasonable doubt. (See AOB, at pp. 121-130.) This was a close case for

life versus death. It was never proven that Montes personally killed Mark Walker. Montes was young (20 years old) at the time of the crime. Testing revealed that he had an I.Q. of 77, which is borderline for mental retardation. He had one prior burglary conviction, but had no previous convictions for crimes of violence and had never been to prison.

There was evidence Montes had once assaulted co-defendant Gallegos, and during two years of pretrial incarceration was twice found in possession of "shanks," although he had never used them against anyone. But this evidence, even coupled with the circumstances of the crime, did not amount to an "overwhelming" case in aggravation. Such was the conclusion of this Court in *People v. Gonzalez* (2006) 38 Cal.4th 932, 962, in which the defendant was convicted of personally killing two people in a gang-motivated crime. Reversing Gonzalez' death verdict, this Court recognized that "[t]he aggravating evidence of defendant's other crimes (possession of an assault weapon, two assaults on inmates, and possession of a shank in jail), although serious, was not overwhelming."

Finally, the jury in Montes' case obviously did not view this as an open-and-shut case for death, as they deliberated over the course of two days. (28 CT 7553, 7624.)

In sum, it cannot be concluded, beyond a reasonable doubt, that the compelled shackling of Montes with the REACT belt had no effect on the jury's decision in this case. Montes' death sentence must therefore be reversed.

VIII.

THE TRIAL COURT IMPROPERLY EXCLUDED PROSPECTIVE JURORS S.G., C.J. AND O.G. BECAUSE OF THEIR VIEWS ON THE DEATH PENALTY.

In his opening brief Montes explained that the trial court improperly excused jurors S.G., C.J. and O.G., incorrectly finding that they were unwilling or unable to impose the death penalty. This error violated Montes' rights to due process of law and to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the California Constitution (art. I, §§ 7, 15 & 16). (AOB at pp. 190-210.)

There is no significant dispute between Montes and respondent concerning either the applicable law or the underlying facts - only in the conclusion to be reached therefrom. As Montes believes this issue was fully addressed in his opening brief, he asks this Court to find that the three prospective jurors were improperly excused for cause, and to reverse his sentence of death.

IX.

THE PROSECUTION'S RACE-BASED EXERCISE OF PEREMPTORY CHALLENGES VIOLATED THE UNITED STATES AND CALIFORNIA CONSTITUTIONS, AND REVERSAL OF THE JUDGMENT IS REQUIRED.

A. A COMPARATIVE ANALYSIS IS PROPERLY PART OF THIS COURT'S REVIEW OF MONTES' *BATSON/WHEELER* CLAIMS.

Here, and in his opening brief, Montes expressly relies on a comparative juror analysis where sufficient information is available. As to those jurors where a comparative analysis is undertaken, the record is adequate to permit such review.

At the time Montes filed his opening brief, *People v. Lenix* (2008) 44 Cal.4th 602, was still pending decision by this Court. In its subsequent decision in *Lenix*, this Court ruled that, in keeping with federal decisions in this area including *Miller-El v. Dretke* (2005) 545 U.S. 231 and *Snyder v. Louisiana* (2008) 552 U.S. 472, a comparative juror analysis must be conducted for the first time on appeal where, as here, it is relied on by the defendant and the record is sufficient to permit the comparisons. (*Id.* at p. 687.) As it must, respondent reluctantly concedes that, as this is the state of

the law, a comparative juror analysis is properly part of the evaluation of Montes' *Batson/Wheeler* claims[22]. (RB pp. 69-73.)

B. THE PROSECUTOR IMPROPERLY EXCUSED AFRICAN AMERICAN AND HISPANIC PROSPECTIVE JURORS.

1. African-American Jurors.

a. Prospective Juror D.M.

As noted in the opening brief (AOB at pp. 215-216) the prosecutor's reasons for excusing D.M. do not withstand scrutiny. D.M. expressed greater support for the death penalty than white jurors who were not challenged. It is also notable that D.M.'s sister was a prosecutor who had herself handled death penalty cases. Although D.M. tended to support capital punishment (rating himself as a 6 out of 10) he did express a belief that it was seldom invoked against the wealthy. (16 CT 4582; 16 RT 907-

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[22]. Respondent asks this Court to take judicial notice of the Court of Appeal opinion in co-defendant Varela's appeal, which respondent claims "rejected these very same arguments." (RB p. 63, fn. 23.) At the outset of this reply brief Montes explains why judicial notice of this unpublished opinion would be improper. Moreover, as respondent concedes, the Court of Appeal in Varela's case did not engage in its own comparative juror analysis. In fact, the decision in that case predated a number of significant decisions in this area, including, but not limited to, *Miller-El, supra,* 545 U.S. 231; *Johnson v. California* (2005) 545 U.S. 162; and *Snyder v. Louisiana, supra,* 552 U.S. 422; [170 L.Ed 176, 128 S.Ct. 1203] and *Lenix, supra*, 44 Cal.4th 602. This Court's decision is guided by these intervening authorities, and must include the comparative juror analysis missing from the Court of Appeal's decision.

908.) According to the prosecutor, D.M.'s opinion on this point was a concern in this particular case because of Montes' family background. (7 RT 1169.) However, there was no evidence of poverty or deprivation in Montes' family background. To the contrary, the evidence was that Montes' younger years were spent in a fairly middle-class home.

b. Prospective Juror L.W.

Respondent claims that Montes has not provided a sufficient basis for a comparison with other jurors, apparently because the brief did not reiterate word-for-word the discussion about specific jurors and their views on the death penalty just covered in connection with prospective juror D.M.[23] Respondent apparently overlooks this direct reference, and thus argues that this Court should not engage in a comparative analysis for L.W. (RB p. 75.)

Just to make it clear: "Juror No. 2 rated herself as neutral on the death penalty, with a score of 5 (9 CT 2326) and stated in her questionnaire that she had mixed feelings about the death penalty. (9 CT 2326.) Juror No. 8 (7 CT 1758) and Prospective Juror J.B. (14 CT 4010) also scored

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[23]. Montes' opening brief contained the following sentence on this point: "As discussed in connection with Prospective Juror D.M., *ante*, L.W.'s relative neutrality on the death penalty was comparable to the rating of some jurors accepted by the prosecution." (AOB at p. 217.)

themselves as a '5' on the 1-to-10 scale. According to J.B's questionnaire, he did not 'feel that anybody has the right to take another person's life;' but would possibly reconsider if he was '100% sure a person was guilty of a crime worth giving the death penalty.' (14 CT 4010.)" (AOB at p. 216.)

Respondent goes on to state, however, that "whether L.W.'s stated neutrality on the death penalty was comparable to other prospective and seated jurors is inconsequential" because the prosecutor gave other reasons. Among the reasons given by respondent was that the prosecutor said L.W. talked to himself. (RB at p. 75.) Respondent is mistaken. It was prospective juror *D.M., not L.W.,* who the prosecutor believed was talking to himself. (7 RT 1173 ["One other factor I want the Court to consider as to [D.M.], he talks to himself."].)

In his opening brief, Montes explained why the other reasons given by the prosecutor for excusing L.W. did not hold up to scrutiny. With regard to L.W.'s opinions on the O.J. case, even the prosecutor referred to this as "a minor factor." In fact, he brought it up only as a kind of afterthought while he was reviewing the questionnaire. (7 RT 1172.)

Respondent does not even address a primary reason the prosecutor gave for dismissing Prospective Juror L.W., that he was unsure what L.W. had done since his retirement from the Air Force in 1974. (7 RT 1171-

1172.) The prosecutor had an opportunity to question L.W. about his activities since his military retirement, but did not ask any questions in this area.

The likely reason respondent skips over this factor is that it was clearly pretextual, and is enough to demonstrate a discriminatory intent. "As the Supreme Court explained in *Snyder v. Louisiana* [citation] 'the prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent,' even where other, potentially valid explanations are offered." (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1192, quoting *Snyder, supra,* 552 U.S. 472, 485.)

c. Prospective Juror K.P.

In his opening brief, Montes compared the reasons given by the prosecutor for excusing K.P. with other jurors who were not challenged. (AOB at pp. 218-219.) For those reasons, Montes believes that the reasons given by the prosecutor for excusing prospective juror K.P. were pretextual.

d. Prospective Juror W.J.

In his opening brief, Montes compared the reasons given by the prosecutor for excusing W.L. with other jurors who were not challenged. (AOB at pp. 219-221.) For those reasons, Montes believes that the reasons given by the prosecutor for excusing prospective juror K.P. were pretextual.

e. & f. Prospective Jurors I.T. and P.K.

As stated in his opening brief, standing alone, the prosecutor's challenges to I.T. and P.K. are not remarkable. But viewed in the context of other challenges to African American prospective jurors they further support the conclusion that race was a factor in the prosecutor's peremptory challenges. (AOB at pp. 221-223.)

2. Hispanic Prospective Jurors

a. Prospective Juror D.Q.

Respondent correctly notes that prospective juror "D.Q." was improperly designated "D.C." in appellant's opening brief. (RB at p. 80, fn. 27.) Rather than continue the error, Montes will henceforth refer to the juror by the correct designation of "D.Q."

After finding a prima facie case, but before obtaining input from the prosecutor concerning his reasons for excusing any of the Hispanic prospective jurors, the court itself came up with a possible reason for excusing D.Q. This had to do with a prior "bad experience" with police involving an investigation into the reported molestation of her son which was closed when she declined to bring her child to the police station. According to the court, "That could indicate a bias for police, and that would be a reason for use of peremptory challenges." (7 RT 1316.)

As pointed out in Montes' opening brief (AOB at pp. 228-229) the trial court "should not attempt to bolster legally insufficient reasons offered by the prosecution with new or additional reasons drawn from the record." (*People v. Ervin* (2000) 22 Cal.4th 48, 77.) That is precisely what the trial court did here with prospective juror D.Q.

The prosecutor's own primary justification for excusing D.Q. was her attitude and body language which he characterized as "ditzy." (7 RT 1317-1318.) In addition, the prosecutor adopted the reason given by the court having to do with D.Q.'s prior experience with law enforcement. However, as Montes noted in his opening brief, when D.Q was questioned in chambers about her one prior poor experience with a Riverside police officer, the prosecutor did not question her at all. The only questions were by counsel for Montes, having to do with D.Q.'s strong (8 on a scale of 10) support for the death penalty. (6 RT 905-915.)

In reviewing the prosecutor's assertions that the demeanor of a juror is what prompted the challenge, the trial court must evaluate not only "whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (*Snyder, supra,* 552 U.S. at p. 477.)

Here, the court expressed its opinion concerning the demeanor of the prosecutor, finding that he appeared honest when his giving reasons for the challenges at issue. However the court did not make any independent finding that the challenged juror actually exhibited the basis for the strike on the grounds claimed by the prosecutor.

The court gave general approval to the prosecutor's reasons for excusing all of the Hispanic jurors at the conclusion of the *Batson/Wheeler* hearing. At that time the court made a general statement that the prosecutor's reasons for his challenges were "honestly stated" and that there were "appropriate race-neutral reasons for the district attorney to use peremptory challenges on each of them." (7 RT 1322-1323.) With regard to the characterization of D.Q. as "ditzy," however, the court did not expressly state that it had observed D.Q.'s demeanor, nor did it specifically credit the observations described by the prosecutor. Thus, with regard to D.Q., the court may have been relying on its own reasons as a possible reason for excusing D.Q., and not the "ditzy" description offered by the prosecutor.

In the instant case, as in *Snyder, supra*, "... the record does not show that the trial judge actually made a determination concerning [D.Q.]'s demeanor. The trial judge was given two explanations for the strike.

Rather than making a specific finding on the record concerning [D.Q.]'s demeanor, the trial judge simply allowed the challenge without explanation." (*Snyder, supra,* 532 U.S. at p. 479.) As in *Snyder,* the trial judge in Montes' case may have had no recollection about D.Q.'s demeanor, or it may have based its ruling completely on the other justification given for the strike. This Court therefore cannot presume that the trial judge credited the prosecutor's assertions that D.Q. was ditzy, and that this provided a valid reason for his challenge to her.

Here, "the record refuted the explanation that was not based on demeanor..." and the peremptory challenge cannot be upheld on the demeanor-based ground because it might not have figured in the trial court's unexplained ruling. (*Thayler v. Haynes* (2010) ___ U.S. ___; 130 S.Ct. 1171; 175 L.Ed.2d 1003, at p. 1008, citing *Snyder, supra*, 533 U.S. at pp. 479-486.)

b. Prospective Juror L.C.

Prospective juror L.C. was an avid supporter of the death penalty, rating himself as 10 out of 10 in support. (12 CT 3335.) Although the prosecutor (when asked to explain his challenge) stated that he had a "question" about L.C.'s true opinion on the death penalty since L.C. was a church elder in the Seventh Day Adventist Church, the prosecutor did not

take advantage of his opportunity for an in chambers voir dire on this issue, stating that it was "not necessary." (7 RT 1318.) Given L.C.'s strong support for the death penalty, the prosecutor's later reasons that he had "questions" about the sincerity of this position is significantly undermined by his decision to forego an opportunity to question L.C. further.

c. Prospective Juror D.L.

Although the prosecutor stated a concern that D.L. lacked an opinion on the death penalty, two seated jurors, numbers 2 and 8, and prospective juror J.B. also rated themselves as neutral on the death penalty, with a score of 5 out of 10. (9 CT 2326; 7 CT 1758; 14 CT 4010.) And juror No. 2 stated in her questionnaire that she had mixed feelings about the death penalty[24]. (9 CT 2326.) (See AOB at p. 216.) Similarly, D.L's misspelling of two words compares with prosecutive juror D.M. who also had numerous spelling errors in his questionnaire. (See, e.g., 13 CT 3512 ["I thing they are experts in that field and are creditable."].) (See AOB at p. 229.)

According to respondent, "at worst" the challenge to D.L. was based on the prosecutor's "hunch," and asserts that even "arbitrary" exclusion is

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[24]. In his opening brief, Montes did not reiterate the jurors who compared with D.L. on support for the death penalty as the same material was already covered in the discussion of prospective juror D.M.. (AOB at p. 216.)

permissible. (RB at p. 83, citing *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.) Although the *Gutierrez* opinion does use these terms, Montes doubts it is sufficient for a prosecutor to rely merely on unsupported "arbitrary hunches" to meet its burden of justifying the peremptory challenges with a race-neutral explanation. (*Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 97; (*People v. Lewis* (2008) 43 Cal.4th 415.)

Gutierrez predated the United States Supreme Court decisions in *Snyder* and *Miller-El,* and this Court's *Lenix* decision. These cases make it clear that a reviewing court must undertake a comparative juror analysis. Thus, a court must consider the strike of one juror for the bearing it has on another. This changes the picture as far as justifying peremptory challenges on the basis of "hunches." A "hunch" or "arbitrary exclusion" may be acceptable in isolation, and in the absence of any affirmative evidence of racial motivation. But it does not suffice to meet the prosecutor's burden of providing race-neutral reasons for challenging jurors.

"[T]he critical inquiry in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El*, *supra*, 537 U.S. at pp. 338-339.) Permitting the prosecution to rely only on "hunches"

and "arbitrary" reasons would essentially thwart any attempt at a meaningful review of *Batson/Wheeler* claims, since the prosecutor could merely assert that every claim was based on some inchoate "hunch" or was done for an arbitrary, inarticulable, purpose. Clearly, this is not the current state of the law. (See, e.g., *Lewis*, *supra*, 43 Cal.4th at p. 469 ["The credibility of a prosecutor's stated reasons for exercising a peremptory challenge 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" quoting *Miller-El*, *supra*, 537 U.S. at p. 339.].)

In any case, the prosecutor did not say he was relying on a "hunch." He gave his reasons for excusing D.L.. As can be seen, however, those reasons applied equally to white jurors who were not challenged.

d. Prospective Juror G.H.

Prospective juror G.H. was another avid supporter of the death penalty (10 out of 10), and had family involved in law enforcement. (15 CT 4596-4597.) G.H. had previously been qualified to serve as a juror in both criminal and civil cases. He did misspell "manager," but as noted above,

D.M.[25] was not challenged by the prosecutor even though D.M. had misspelled words in his questionnaire, and had not attended college.

A prosecutor must "stand or fall on the plausibility of the reasons he gives" for a exercising a peremptory challenge against a juror. (*Miller-El II, supra*, 545 U.S. at p. 252.) "'A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' [Citation.] The high court cautioned that efforts by a trial or reviewing court to 'substitute' a reason will not satisfy the prosecutor's burden of stating a racially neutral explanation." (*Lenix, supra,* 44 Cal.4th at pp. 624-625, quoting *Miller-El II, supra*, 545 U.S. at p. 252.) Certainly the same must hold true for reasons advanced for the first time on appeal by the government. This Court should pay no heed to any proffered justifications other than those actually provided by the prosecutor in court.

As to a number of the prospective jurors challenged (particularly D.M., L.W., D.Q., L.C., D.L., and G.H.) the prosecutor's proffered justifications for the strikes do not survive scrutiny of the record or a

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[25]. Not the same person as the "D.M." who was the subject of the *Batson* motion.

comparison with white jurors who were not challenged. Accordingly, this Court should find that the judgment must be reversed without regard to any additional showing of prejudice. (*People v. Turner* (1986) 42 Cal.3d 711; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

C. THIS COURT SHOULD NOT REMAND THE CASE FOR FURTHER HEARING AS TO THE PROSECUTOR'S REASONS FOR CHALLENGING JURORS. INSTEAD THE JUDGMENT MUST BE REVERSED.

Should this Court find the record is inadequate to determine whether the prosecutor exercised his challenges for proper, non-race-related reasons, respondent asks that the case be remanded to the trial court for further hearing and determination on that issue. (RB at p. 84.) Respondent relies on *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.) But *Williams* found that remand was appropriate for a first level *Batson* error (because the trial court erroneously believed that exclusion of jurors on the basis of sex was not subject to a *Batson /Wheeler* claim). Further, the *Williams* court noted that the factors to be considered in determining whether a remand would be appropriate include the length of time since the initial voir dire, the likelihood that counsel and the court will recall the circumstances of the case, the likelihood the prosecutor will recall the reasons for the challenges, and the ability of the trial judge to recall and assess the prosecutor's voir dire. (*Ibid.*)

Here, given the passage of time, it would be virtually impossible for any of the parties to recall the circumstances of the case such that the trial court could now make the necessary findings. Remand in this situation would be an exercise in futility.

Respondent does not cite *People v. Johnson* (2006) 38 Cal.4th 1096, in which this Court remanded to permit the trial court to hold a hearing with regard to the defendant's *Batson* claim. But *Johnson*, as *Williams*, involved the first step of *Batson*, whereas the instant case involves the third step. Moreover, the continued viability of the remand ordered in *Johnson* has been called into question by a subsequent decision from the United States Supreme Court, *Snyder v. Louisiana* (2008) 552 U.S. 472, in which the Court declined to order a remand for further hearing on the *Batson* issue, and instead reversed the judgment outright. *Snyder,* as the instant case, involved an evaluation at the third step in the *Batson* analysis. As explained by the *Snyder* Court, there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." (*Id.* at p. 486; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1333, Kennard, J., concurring and dissenting.) Remand for further proceedings is not a plausible option in this case.

XI[26].

MONTES' COUNSEL WAS LIMITED IN HER ABILITY TO EXAMINE SERGEANT BEARD ON HIS QUALIFICATIONS TO TESTIFY AS A GANG EXPERT BY THE PROSECUTION'S FAILURE TO PROVIDE TIMELY DISCLOSURE. THE TRIAL COURT'S REFUSAL TO TAKE SOME KIND OF REMEDIAL ACTION WAS THE FIRST IN A SERIES OF RULINGS WHICH CULMINATED IN IMPROPER ADMISSION OF IRRELEVANT AND PREJUDICIAL "GANG" EVIDENCE.

The court specifically ordered the prosecutor to disclose the identity of his gang expert by September 9th. (3 RT 417.) Despite the court's order, the prosecutor did not inform the defense that Sergeant Beard would be proffered as its expert until almost two months later, on November 4th, the day set for the 402 hearing on the admissibility of gang evidence. (31 RT 5706-5718.) Respondent seemingly does not take issue with the fact that the prosecution's failure to disclose the identity of its "gang expert" until the day of the 402 hearing was a discovery violation. The remaining issues are whether the court should have granted Montes' request for a continuance so that his counsel could prepare to question Beard regarding his qualifications to testify as an expert in this area, and if so, what prejudice did Montes incur.

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[26]. There is no roman numeral "X" in the reply brief.

Montes' opening brief addresses both of these issues. (AOB at pp. 237-240.) Specifically, as to prejudice, it is necessary to evaluate the matter in the context of what happened next. Without allowing the defense adequate time to prepare for examination of Sergeant Beard, the court found him qualified as a gang expert, and the following day permitted him to act as a conduit for highly prejudicial and irrelevant evidence.

As discussed in Argument XII, Sergeant Beard was not in fact qualified to testify as a gang expert. Had the defense been afforded sufficient time to prepare for the 402 hearing, this could have been established before Beard was permitted to testify in front of the jury.

XII.

THE TRIAL COURT ERRED WHEN IT FOUND SERGEANT BEARD QUALIFIED TO TESTIFY AS A GANG EXPERT.

Respondent first suggested the possibility that the "law of the case" doctrine should control the outcome of the issue in Montes' case. (See RB at p. 89.)[27] For the reasons discussed at the outset of this brief (see Section Entitled: "Judicial Notice/Law of Case") the law of the case doctrine is inapplicable to any issue raised in Montes' appeal.

Addressing the merits of the argument, respondent does not argue that Sergeant Beard was qualified to testify as a gang expert, but only contends that the trial court did not manifestly abuse its discretion in permitting Beard to testify as such. (RB pp. 89-90.) Montes disagrees. Beard was clearly lacking in the "special knowledge, skill, experience, training or education" necessary to qualify him as an expert on the subject to which his testimony related. (Evid. Code §801, subd. (a).)

Sergeant Beard was not qualified to testify as a *gang* expert simply because he was a police officer with six years general law enforcement experience. (32 RT 5719.) What little training Beard had received in gangs

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[27]. Respondent also refers to the law of the case doctrine in its next two arguments (XXXI, at RB p. 91, fn. 29 and XIV at RB p. 97, fn. 30.)

(which, in total, was less than one week) did not cover any of the gangs mentioned in this case. (32 RT 5719, 5792-5713, 5720.)

Respondent notes that Beard had personal knowledge about the defendants and "their involvement in gangs." (RB p. 90.) But Beard's personal knowledge did not transform him into a gang expert. Respondent also claims that Beard's testimony helped explain the "behavior and conduct of all the defendants." (RB p. 90.) Once again this has nothing whatsoever to do with the foundational question about Beard's qualifications to testify as a gang expert on such subjects. The need for expert testimony to help explain evidence presented at trial is a different question than the qualifications of the witness to provide such expert testimony. The prejudice from Beard's obvious lack of expert qualification is demonstrated by the fact that his testimony was used by the prosecutor to argue intent and motive, based on Beard's unqualified opinion testimony.

It was very apparent that Beard (who had never testified as a gang expert before) was not an expert on gangs. In fact his lack of knowledge about gangs was really quite striking (for example, he did not know what the acronym "SUR" stood for, and he thought every gang in southern California, including Black and Anglo gangs, wanted to be associated with the Mexican Mafia. (32 RT 5740-5743.) Even Beard was aware of his own

deficiencies in this area, acknowledging as he did that counsel for Gallegos (Mr. Phillips) had more expertise. (32 RT 5743.)

"The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 358, pp. 406-407, citing *Bailey v. Taaffee* (1866) 29 Cal. 422, 424; *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

Here, it is apparent that Beard was not qualified to testify as a gang expert, and the trial court's decision finding him qualified was plainly an abuse of its legal discretion.

XIII.

THE "GANG" EVIDENCE WAS IMPROPERLY ADMITTED AND ITS EFFECT ON THE PENALTY VERDICT CANNOT BE FOUND HARMLESS BEYOND A REASONABLE DOUBT.

A. "GANG" EVIDENCE WAS IMPROPERLY ADMITTED.

Sergeant Beard provided testimony about the various gang affiliations of the defendants and described evidence which supposedly supported gang membership or participation. Among other things Beard (who had received no training in Vario Beaumonte Rifa, which he could not even spell - 32 RT 5792) testified that he believed VBR subscribed to the practice of "jumping in" new gang members. (32 RT 5808). Montes objected to the admission of this evidence and raised it as a claim of error in his opening brief. (AOB at pp. 244-256.)

"The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence." (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167; internal cites and quotation marks omitted.) Gang evidence is may be relevant, and thus admissible, when the reason or motive for the underlying crime is gang related. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) But here the gang evidence was not admissible for such purpose.

In the instant case, there was none of the usual gang motives, such as criminal activity directed against a real or suspected rival; a battle over gang territory; retaliation for a prior attack; intimidation preceded by gang signs and identification; or bolstering ones reputation within the gang. (*People v. Memory* (2010) 182 Cal.App.4th 835, 858-859.) In fact, the only one of the codefendants even identified as an actual member of VBR was Hawkins. Gallegos was identified as an "associate" and neither Montes nor Varela were identified as VBR members. (33 RT 5809, 5819, 5823, 5822.)

Moreover, there were no gang allegations in this case. "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*Memory, supra,* 182 Cal.App.4th at p. 860, emphasis in original, quoting *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

As fully explained in his opening brief (see AOB at pp. 247-253) the "gang" evidence in this case was irrelevant, and thus did not meet the threshold level for admission. Even if some relevance could be discerned, the evidence was entirely cumulative on the issue for which it was admitted, which was to show association between the defendants. (See instruction of the court at 32 RT 5827.) There was no dispute on this issue whatsoever.

Because the gang evidence was cumulative, its prejudicial effect clearly outweighed its probative value, and the trial court erred by admitting this evidence.

As respondent explains, the other evidence in the case still would have shown the connection between the defendants linking them to the crime (RB pp. 95-96). For this reason the gang evidence was unnecessary. Because the gang evidence was irrelevant and was inherently very prejudicial it should not have been admitted.

B. IT CANNOT BE DETERMINED BEYOND A REASONABLE DOUBT THAT ADMISSION OF THIS HIGHLY PREJUDICIAL EVIDENCE DID NOT INFLUENCE THE JURY'S PENALTY DECISION.

Respondent's arguments on prejudice concern the guilt verdict. Montes has never contended that admission of this (or any other) evidence is cause for reversal of the guilt verdict in his case. Respondent also contends that, if error is found, it is to be evaluated under the state's *Watson* standard. (RB p. 95.) This is incorrect. As Montes explained in his introduction to that portion of his brief examining claims of error pertaining to admission of evidence at the guilt phase of the trial (see AOB "Argument" heading X, at pp. 231-233) even though the erroneous admission of this evidence took place at the guilt phase, Montes' claims of

prejudice all pertain to the effect of the evidence at the penalty phase[28]. This is because the jury was specifically instructed at the penalty phase with CALJIC No. 8.85 to "consider all of the evidence which has been received during any part of the trial of this case." (28 CT 7569.)

Moreover, the prosecutor specifically invited the jury to consider evidence presented at the guilt phase in making its penalty determination. (41 RT 7251 - opening argument.) In fact, the prosector told the jury that the guilt phase evidence was the "bulk" of what it should consider in making its penalty decision. (45 RT 7870 - closing argument.) This included the gang evidence.

That this was intended to include the gang evidence was made clear by the prosecutor. Specifically, during discussions about Ms. Koahou's testimony regarding the vandalism of her son's grave memorial, the prosecutor asserted that: "The limitations on the gang evidence that was in issue at the guilt phase isn't something that's at issue here" and expressed his view that "I don't think the jury is limited at this point as to how they consider evidence of what they had in the guilt phase. But I know that it's in issue right now in these proceedings." (42 RT 7432.)

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[28]. Respondent does not take issue with this assertions. (See RB at p. 84.)

The standard for penalty phase error is whether or not there is a reasonable possibility that the jury would have rendered a different verdict had the error or errors not occurred. (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 984.) This "reasonable possibility" test is "the same in substance and effect" as the *Chapman* test applied to federal constitutional error. (*Id.* at p. 965.)

"Legions of cases and other legal authorities have recognized the prejudicial effect of gang evidence upon jurors." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn. 17.) For the reasons set forth in the opening brief, the improper admission of this evidence, which would have been considered by the jury in rendering their penalty decision, cannot be found harmless beyond a reasonable doubt. (See AOB pp. 121-130; 254-256.)

XIV.

IT WAS ERROR FOR THE COURT TO ADMIT IRRELEVANT AND PREJUDICIAL AUTOPSY PHOTOGRAPHS.

This is another area in which the prosecution cites to the Court of Appeal opinion in the co-defendants' appeal. For the reasons discussed at the outset of this brief, no consideration should be given to that unpublished opinion.

As explained in his opening brief the trial court erred by admitting photographs taken during Walker's autopsy since this evidence was not relevant to any issue in dispute, was cumulative to other properly admitted evidence, and was unduly prejudicial. (AOB at pp. 261-265.)

Respondent argues that the photographs were relevant to the issue of whether the killer harbored a specific intent to kill. (RB p. 101.) But this case was prosecuted solely on a felony murder theory which did not require a specific intent to kill. (See 35 RT 6259.) Nor was proof of a specific intent to kill necessary for proof of the felony murder special circumstances.[29]

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[29]. The jury was instructed that it could find the special circumstances true if they determined that each defendant, with reckless indifference to human life and as a major participant, aided and abetted robbery, kidnapping, or kidnapping for robbery. (27 CT 7355.)

In any event, other evidence in the case was more than sufficient to show the nature of the wounds inflicted and the position of Walker's body in the truck of the car.

Finally, the photographs were highly disturbing and, coupled with the (at most) slight probative value and cumulative nature of this evidence, should have been excluded as requested by the defense in accordance with Evidence Code section 352 in addition to federal constitutional due process, fair trial, and Eighth Amendment considerations. (See AOB at pp. 265-267.)

XV.

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING, OVER OBJECTION, HEARSAY TESTIMONY FROM GEORGE VARELA THAT VICTOR DOMINGUEZ TOLD HIM THAT HE WAS "RIDING WITH A 187."

A. `THE EVIDENCE WAS NOT ADMISSIBLE FOR THE NON-HEARSAY PURPOSE OF EXPLAINING GEORGE VARELA'S ACTIONS.

To quickly review, the trial court admitted hearsay testimony from co-defendant Salvador Varela's brother George, that when he dropped Montes off at the Montes' residence, he was approached by Victor Dominguez[30] who told George that he was "riding with a 187." George and Montes then got out of the car, and the three of them (George, Victor and Montes) went into Montes' house. (25 RT 4473.) This evidence was admitted despite multiple objections by Montes, both before the prosecutor gave his opening argument (12 RT 1933) and again at the time the evidence was presented. (25 RT 4472.)

The only reason the trial court admitted this evidence was because it supposedly explained George Varela's actions after hearing it. The

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[30]. Dominguez, it should be recalled, was George's good friend. Although related by blood to both Hawkins and Montes, Victor Dominguez and the rest of his family were much closer to Travis Hawkins. In fact, Victor was caught by police as he was trying to sneak Hawkins out of the area. (23 RT 4168-4169.)

admission of this evidence was clearly error as there was simply nothing about George Varela's actions which either needed explaining, or were in any way elucidated by this evidence.

Respondent's proffered justification for admission of the evidence is primarily centered on its own interpretation of what George's uncommunicated state of mind may have been while he was engaging in these otherwise unremarkable activities. (RB pp. 106-107 ["he [George] went into the house under a new impression that Montes had actually been truthful before, and, when combined with Montes' statement to his father, realized Montes may actually have been the killer."].) But George's subjective beliefs were completely irrelevant and inadmissible.[31] Clearly, this evidence was not admissible for the purpose relied on by the court.

Respondent also seemingly suggests that this evidence may have explained why George did not tell the police about this very statement. This makes no sense. It is also unsupported by other evidence in this case. George did not, as respondent so politely puts it "[choose] not to share the statement with the police at that time." According to at least one of his

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[31]. In the next argument, XVI, respondent concedes that the court erred when it admitted testimony about George's subjective state of mind, as it was improper lay opinion evidence. (RB at p. 109.)

versions of events[32], George saw a cop with gun out behind the Montes house as he left. George jumped the fence as other officers arrived, and ran through backyards to avoid detection. (2nd. Aug CT, p. 77.)

Respondent next urges an alternative ground for upholding admission of this evidence, asserting that the statement "corroborated and placed into proper context Montes' own admissions to George Varela and others about the murder[33]." (RB p. 107.) There are a number of problems with this. Most significantly, it is unknown why Dominguez made this statement[34], or what the basis of his information was. The police had already been to the area looking for Montes (because his fingerprint had been lifted from the Walker vehicle) before George and Montes arrived at the residence. Dominguez knew this, since he told George that the cops had been there earlier. (24 RT 4476.) In all likelihood, Dominguez' statement was prompted by the fact that the police were looking to arrest Montes for

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[32]. It should be recalled that George gave many different versions of his stories at different times to different people. (See AOB at pp. 39-41 for a summary of some of these inconsistencies.)

[33]. Respondent does not explain how this statement corroborated anything, or what the "proper context" is. If the statement was offered to prove the truth of anything, it was clearly hearsay, and inadmissible as such. (Evid. Code § 1200.)

[34]. Since Dominguez himself denied being at the Montes' residence or seeing George at all on Sunday, it is unknown whether Dominguez made the statement at all. (27 RT 4862.)

the crime, and provided no corroboration for anything whatsoever. Because of the extremely speculative nature of this evidence and its questionable source and reliability, the court properly did not admit it as evidence that Montes shot Walker, even though this ground was urged by the prosecutor. (12 RT 1933-1934.)

Respondent claims that any error in admitting the statement was cured by the court's limiting instruction which the jury was "presume[d]" to follow. (RB p. 107.) As can be seen, however, even respondent relies on this evidence for purposes beyond the limited basis of its admission. No doubt the jury did the same. This is precisely why the evidence was so damaging, because it bolstered the prosecutor's later theory in the penalty phase that Montes was the one who shot Walker. This demonstrates that the limiting instruction cannot have cured the harm from the improper admission of the evidence.

In any case, the prejudice to Montes came not at the guilt phase, but at the penalty phase.[35] Montes' jury was expressly told that none of the instructions given at the guilt phase applied at the penalty phase, and was

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[35]. In his opening brief, Montes made it clear that he was arguing prejudice as it pertained to the penalty phase verdict. (AOB at pp. 231-233, 273.) Respondent overlooks this, and argues only that admission of the evidence was "harmless" with regard to the guilt verdict. (RB at p. 108.)

also told to consider *all* of the evidence presented at the guilt phase in reaching its penalty verdict. The limiting instruction thus did nothing to alleviate the prejudice to Montes in the penalty trial.

The instant case should be compared with *People v. Guerra* (2006) 37 Cal.4th 1067, 1115, where the court reminded the jury that, with respect to evidence which was admitted for a limited purpose at the guilt phase, it could consider the evidence only for that limited purpose. No such admonition was given here. Instead, the jury was not only specifically instructed at the penalty phase with CALJIC No. 8.85 to "consider all of the evidence which has been received during any part of the trial of this case" (28 CT 7569), it was also directed to *disregard* the instructions it was given in the guilt phase. (44 RT 7970-7971.)

XVI.

THE ERROR IN ADMITTING EVIDENCE OF GEORGE VARELA'S SUBJECTIVE BELIEF THAT MONTES KILLED WALKER IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A. THE EVIDENCE WAS INADMISSIBLE, AND THE COURT'S ERROR CANNOT BE SAVED BY CLAIMING THAT THE ERRONEOUS LEGAL RULING WAS NEVERTHELESS WITHIN THE SCOPE OF THE COURT'S DISCRETION.

Respondent concedes that admission of George Varela's testimony concerning his subjective belief that Montes killed Walker was improper lay opinion and inadmissible. Respondent still contends that, despite the legal error in admitting this evidence, it does not mean the trial court abused its discretion when it admitted the evidence. (RB at p. 109.) This assertion is plainly absurd. Respondent cites *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) But that case offers no support for this novel assertion because in *Guerra* this Court found no error by the trial court in admitting the evidence. (*Id* at p. 1114.)

In the instant case the court committed legal error when it admitted this testimony. By definition, this error exceeded the bounds of the court's permissible discretion.

> In no case is a discretionary standard a license to commit error. Whether the zone [of a court's autonomy] in a given setting be broad or narrow, it never extends to getting the law wrong. The law may be obscure; it may be uncertain

> in the sense that its application to a given situation is not squarely governed by precedent or statute; but it is not the kind of grey area in which the trial court enjoys the autonomy of an umpire. Indeed it is the job of courts, particularly appellate courts, to make it as black-and-white as they reasonably can, ... The governing law can therefore never be a question entrusted to trial court discretion.

(*Miyamoto, supra*, 176 Cal.App.4th at p. 1223.)

B. THE EVIDENCE WAS PREJUDICIAL TO THE PENALTY DETERMINATION.

In response to Montes' point that this evidence was prejudicial because it may have led the jury to believe he was more culpable for Walker's death, respondent maintains that this evidence was not prejudicial to Montes because "he was the one who shot and killed Walker." (RB p. 109.) Respondent seeks to usurp the jury's function. Perhaps it must be stressed again - the jury was never asked to, and never did, reach a verdict on the issue of who shot and killed Mark Walker. The identity of the shooter was therefore never established in accordance with our fundamental and long-standing rules of jurisprudence, i.e., by a unanimous jury beyond a reasonable doubt.

However, given this error and the multitude of other errors in this case, it is certainly possible that at the penalty phase some of the jurors were led to believe that Montes was the one who killed Walker, and that this was a strong factor in their decision to impose a sentence of death rather than

life in prison without possibility of parole. Where, as here, the state does not prove that the defendant sentenced to death is the one who actually did the shooting, error affecting the penalty determination is particularly likely to warrant reversal of a death sentence. (See *Shurn v. Delo* (8th Cir. 1999) 177 F.3d 663, 667, see also *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [whether or not defendant was the actual shooter is important to a determination of penalty].)

For this reason, admission of evidence which (because of the absence of any limiting instruction) would have been considered by the jury as proof that Montes was the one who killed Walker, cannot be found harmless beyond a reasonable doubt.

XVII.

THE COURT ERRED BY OVERRULING MONTES' OBJECTION AND REFUSING TO STRIKE SPECK'S "BECAUSE I KNEW" STATEMENT.

A. ADMISSION OF THIS STATEMENT VIOLATED MONTES' RIGHT TO CONFRONTATION AND CROSS-EXAMINATION.

1. This Claim Has Not Been "Waived."

According to respondent, Montes' argument that admission of Speck's statement violated his confrontation rights was "waived" because it was not asserted at trial. (RB at p. 114.) But counsel for Montes *did* raise a claim of error on these grounds, and specifically asked the court to either order the statement stricken or to grant a mistrial. The court denied the request. (21 RT 3656-3657.)

It is true that defense counsel did not specifically include this as a ground for the objections raised in the heat of the moment when the prosecutor was attempting to elicit testimony from Speck in this area. But these grounds were subsequently raised in a timely enough fashion to permit the court to take ameliorative action, which it refused to do. Furthermore, when it denied Montes' requests for rectification the court

expressly stated that it did not believe there had been an *Aranda/Bruton*[36] violation.[37] (21 RT 3657.) It follows that including these grounds at the time of the initial objection would have been futile. (*Cf. People v. Hill* (1998) 17 Cal.4th 800, 820 [defendant excused by requirement for objection to prosecutorial misconduct if objection would be futile]; *People v. Boyer* (1989) 48 Cal.3d 247, 270, fn. 13, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [suggesting that renewed objection to evidence may not be required if it would be futile].)

Since Montes did object to this evidence, and the court expressly rejected the *Aranda/Bruton* argument for striking the testimony or ordering a mistrial, this legal basis for Montes' claim of error should not be found waived.

2. Admission Of This Statement Violated Montes' Right to Confront Witnesses.

Respondent argues that there was no violation of *Aranda/Bruton* because there was no joint trial. (RB at p. 114.) Montes disagrees. As this Court has stated, "[t]he *Aranda/Bruton* rule addresses the situation in which

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

[37]. The objection lodged on Montes' behalf specifically included both *Aranda/Bruton* and the right to confront and cross-examine Varela. In dispensing with the objection the court simply referred to *Aranda/Bruton*.

'an out-of-court confession of one defendant ... incriminates not only that defendant but another defendant *jointly charged.*'" (*People v. Brown* (2003) 31 Cal.4th 518, 537, quoting *People v. Fletcher* (1996) 13 Cal.4th 451, 455. Italics in original.) Here, Varela and Montes were jointly charged. (25 CT 7036-7040.) And despite the use of dual juries the evidence was the same for both defendants, except for the testimony relating Varela's statements to police. The *Aranda/Bruton* rule of exclusion should therefore be found applicable to this case.

3. Speck's testimony Was A Clear Violation Of Montes' Confrontation Rights.

Even if this Court concludes the present case does not come within *Aranda/Bruton* because of the use of dual juries, this does not obviate Montes' confrontation objections. Respondent contends that there was no "statement" made by Varela which was admitted, and thus no grounds for cross-examination. However, though there may not have been word-for-word testimony about Varela's statement to Kim Speck, what happened here was nevertheless a back-door way of introducing clearly inadmissible hearsay.

Via questions propounded entirely by the prosecutor, the jury heard evidence that: Sal Varela had discussed the previous nights events with his girlfriend, Speck; that Montes made statements in front of Speck which the

prosecution has continuously characterized as admitting responsibility for the killing; and when Speck heard these statements she did not respond because she "knew." There is no possible way to interpret this evidence as anything other than testimony that Sal Varela told Speck that Montes killed Mark Walker.

This testimony was implied hearsay, admitted through Speck. Because the declarant, Varela, could not be cross-examined about the statement, Speck's testimony was a clear violation of Montes' constitutional rights to confront and cross-examine the witness against him (Varela). (*People v. McNamara* (1982) 94 Cal.509, 514-515 [defendant's conviction reversed due to admission of inadmissible hearsay, specifically testimony by a police officer that he arrested the defendant based on information provided by a non-testifying witness]; *Favre v. Henderson* (5th Cir. 1972) 464 F.2d 359, 362; *Molina v. Florida* (1981) 406 So.2d 57.)

In *Molina*, the district court reversed the defendant's conviction because of the improper admission of hearsay evidence via the testimony of a police officer that he selected the defendant's photograph for inclusion in a photo line-up based on information received from non-testifying co-defendants. As explained by the *Molina* court, "...the inescapable inference from the testimony is that a non-testifying witness has furnished the police

with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated." (*Id.* at p. 58, quoting *Postell v. State* (1981) 398 So.2d 851, 854.) Furthermore, "[t]hat the absent 'witness' [as in this case] happens to be a co-defendant who does not testify at trial is inconsequential." (*Ibid*, quoting *Postell, supra*, at p. 855, n.8.)

In *Favre v. Henderson* a police officer testified that he was led to arrest the defendant based on information he received from two confidential informants. In an earlier decision in the case the district court (in language quoted by the Court of Appeal) explained that, "[w]hile the State Police Officer did not relate the words his informants had used, he clearly conveyed by implication that they had told him something to incriminate Favre." (*Favre, supra*, 464 F.2d at p. 361.) That is essentially what transpired at Montes' trial. Although Speck did not relate the exact words used by Varela to give her his version of events, her "I knew" testimony clearly conveyed that Varela had told her something to incriminate Montes.

And even though Speck never testified to the exact statements made to her, the nature of the statements was readily inferred. (*Ibid.*) Here, as in *Favre*, "[i]nherent in the testimony .... was an assertion by an out-of-court

declarant as to guilt." (*Id.* at p. 362.) Thus, "the testimony, when considered in light of its logical inferences, is hearsay." (*Ibid.*) Montes was never able to confront Varela and cross-examine him about the version of events he gave to Speck. As a result, his constitutional rights to confront and cross-examine the witness against him were transgressed.

It was apparent from the testimony in this case that Varela made a verbal statement to Speck about the previous night's events, since that is what Speck testified to. The only question is whether the jurors in this case would have gleaned the content of those statements from Speck's "I knew" response to the prosecutor's questions. Clearly they would. This is even the use of the hearsay urged by the prosecution. (RB at p. 117 ["Thus [Speck's statement] was relevant to the issue of whether Montes was involved in the crime, even though it was not offered in the form of statements made by Varela and presented to the jury."].)

B. THE STATEMENT WAS INADMISSIBLE LAY OPINION EVIDENCE.

Montes renews this argument for the reasons set forth in his opening brief (AOB at p. 283).

C. THE EVIDENCE WAS INADMISSIBLE PURSUANT TO SECTION 352.

The trial court accepted the prosecutor's justification for admission of the statement for the non-hearsay purpose of explaining Speck's actions after hearing Montes' statement.

> "[O]ne important category of nonhearsay evidence [is] evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with the belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement."

(*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907, quoting Jefferson, California Evidence Benchbook (1978 supp.) § 1.5, p. 21.)

In the instant case, the out-of-court statement was not admissible for this purpose. To be admissible, the actions taken by the witness after hearing the statement must be relevant to an issue actually in dispute. (*Id.* at pp. 906-907.) As explained in Montes' opening brief (AOB at pp. 284-285) this evidence was completely irrelevant for any admissible purpose. The only possible relevance would have been to show Speck's subjective belief that Montes killed Walker, a purpose for which it was utterly inadmissible. For the same reason the testimony was inadmissible for this purpose, it was highly prejudicial. Just as evidence concerning George

Varela's subjective belief was irrelevant for any permissible purpose (supra, and AOB at pp. 275-276 - a point respondent concedes, RB at p. 109), so too was Kim Speck's "I knew" statement.

D. ADMISSION OF THE EVIDENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Lastly, respondent contends that any prejudice from admission of this evidence does not merit reversal because it did not result in a "miscarriage of justice." (RB at p. 117.) This is not the standard for error of constitutional dimension, or for error which affects the outcome of a penalty verdict. Since the error transgressed Montes' Sixth Amendment confrontation rights, the error must be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

Moreover, as explicitly stated by Montes in his opening brief, all claims of error in the admission of evidence in the guilt phase are being raised with regard to their effect on the penalty verdict. (See AOB at pp. 231-233.) Thus, the error must be found harmless beyond a reasonable doubt. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961; *People v. Jones* (2003) 29 Cal.4th 1229, 1264 and fn. 11 [state "reasonable possibility" standard utilized for review of errors at penalty phase is the same as federal "harmless beyond a reasonable doubt" standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24]; *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

Here, the effect of this evidence cannot be found harmless beyond a reasonable doubt. As noted, even respondent suggests that the statement be used as evidence of Montes' culpability: "Thus it [the statement] was relevant to the issue of whether Montes was involved in the crime, even though it was not offered in the form of statements made by Varela and presented to the jury." (RB at p. 117.)

Furthermore, it cannot have escaped the attention of the Montes jury that there was a separate jury empaneled for only Varela, and that the Varela jury heard almost, but not quite all, the evidence the Montes jury did. Putting two-and-two together, it would not have taken much reasoning to conclude that the evidence Varela's separate jury heard had to do with Varela's statements, the contents of which were clearly alluded to by Speck's "I knew" testimony.

In context, Speck's "I knew" statement may as well have been "Varela told me Montes killed Walker." Though this testimony may have been brief, that does not diminish its prejudicial impact, particularly as the penalty determination must have been affected by any evidence suggesting that, of the defendants, Montes was the one who shot Walker. (See *Shurn v. Delo* (8th Cir. 1999) 177 F.3d 663, 667; see also *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [whether or not defendant was the actual shooter is

important to a determination of penalty]; and see discussion of prejudice in the AOB at pp. 121-130.)

XVIII.

MONTES SHOULD HAVE BEEN PERMITTED TO INTRODUCE EVIDENCE THAT GALLEGOS KNEW WALKER AND HAD PLAYED SPORTS WITH HIM.

The trial court precluded Montes from presenting evidence of Gallegos' statement to police that he knew Walker and had played football with him for years. (33 RT 6016-6066.) This evidence was every bit as relevant as the evidence presented that Hawkins and Walker knew each other and had played basketball one month before the crime (13 RT 2085-2086) and for the reasons given in his opening brief, should not have been excluded. (AOB at pp. 287-290.)

Moreover, Montes did not "forfeit" his right to argue prejudice at the penalty phase stemming from the exclusion of this evidence at the guilt phase. Montes made a timely request to present this evidence, and the court excluded it. Given the court's ruling, any further effort would have been futile[38]. (*People v. Antick* (1975) 15 Cal.3d 79, 95, disapproved on another ground in *People v. Castro* (1985) 38 Cal.3d 301, 306-312.) Had the court

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[38]. Respondent essentially concedes futility. (See RB at p. 121, fn. 39 ["Here, because the evidence was irrelevant and inadmissible in the guilt phase, it would have presumably been inadmissible at the penalty phase for the same reason."].)

permitted this evidence at the guilt phase as Montes requested, the jury would have been able to consider it when making the penalty decision.

With regard to its prejudice analysis, respondent notes that Montes could still be sentenced to death even if he were not the actual killer. (RB at p. 121.) While technically that is true, it cannot be denied that a jury would be much less likely to sentence someone to death if they were not convinced that person was the actual killer. This is especially true in a case such as this where the actual killer may have been one of the co-defendants given a life sentence because of his age.

The importance of evidence supporting lingering doubt cannot be overstated. "'[R]esidual doubt is perhaps the most effective strategy to employ at sentencing.'" *(Gay, supra,* 42 Cal.4th 1195, 1227, quoting *Chandler v. U.S.* (11th Cir. 2000) 218 F.3d 1205, 1320, fn. 28.) There is a reasonable possibility that errors which impact this determination will affect a jury's penalty determination. (*Ibid.* ["[T]here is a reasonable possibility the jury would have selected the lesser but still serious penalty of life imprisonment without the possibility of parole had it been allowed to hear and consider the compelling defense of lingering doubt in full."]

Here, the guilt verdict rested entirely on a felony murder theory with no finding as to the identity of the shooter. And though the doubt in

Montes' case concerned the identity of the actual killer rather than outright guilt or innocence, this was a crucial factor for the penalty determination. Thus, *In re Hardy* (2007) 41 Cal.4th 977, even applying *Strickland's* "reasonable probability" standard, this Court reversed a sentence of death where counsel failed to present available evidence which would have cast doubt on the defendant's role as the actual killer, although he was still subject to an LWOP sentence as an aider and abettor. (*Id.* at p.. 1032-1035.)

In *Hardy* the prosecution's theory was that Hardy, not the co-defendant was the actual killer. "[W]e conclude that had the jury been aware that petitioner was likely not the actual killer, but merely participated in the conspiracy to kill for insurance proceeds, there is a reasonable probability the jury would have viewed the balance of aggravating and mitigating circumstances differently and concluded petitioner did not deserve the death penalty." (*Id.* at p. 1034.)

In Montes' case, evidence that Walker knew Gallegos, even if presented at the guilt trial, could have been considered by the jury in support of Montes' lingering doubt arguments at the penalty phase. The wrongful exclusion of this evidence therefore cannot be found harmless beyond a reasonable doubt.

XX[39].

JUROR NUMBER 7 WAS IMPROPERLY REMOVED FROM THE JURY.

A. STANDARD ON REVIEW: GOOD CAUSE TO REMOVE A JUROR MUST APPEAR IN THE RECORD AS A DEMONSTRABLE REALITY.

The trial court's discretion to discharge a juror is "at most limited." (*People v. Collins* (1976) 17 Cal.3d 687, 696.) In *People v. Barnwell* (2007) 41 Cal.4th 1038, this Court explicitly rejected the more deferential "substantial evidence" standard in favor of requiring that a trial court's decision to remove a sitting juror be supported in the record by a "demonstrable reality." This "heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and a to fair trial by an unbiased jury." (*Id.* at p. 1052; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 821.)

The demonstrable reality standard "entails a more comprehensive and less deferential review" than the substantial evidence standard. "It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion...." (*Barnwell, supra*, 41 Cal.4th at pp. 1052-1053, emphasis in original.) Although a reviewing

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[39]. There is no roman numeral "XIX" in the reply brief.

court does not reweigh the evidence, it must nevertheless "... be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at p. 1053.)[40]

B. GOOD CAUSE FOR REMOVING JUROR NUMBER SEVEN DOES NOT APPEAR IN THE RECORD AS A DEMONSTRABLE REALITY.

Juror No. 7 was removed by the court November 13th (the day closing arguments began) on motion of the district attorney, after it was determined that he could not stay on the jury beyond November 25th when his new job began. The court's reason for excusing juror No. 7 was there would be an "atmosphere of time urgency" because of the November 25th starting date, which would "substantially impair" Juror No. 7's ability to fulfill his duties as a juror in the case. As an alternative ruling, the court found misconduct due to Juror No. 7's reading of the term "enzyme"

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[40]. In his opening brief Montes cited a number of federal authorities in support of his view that this Court should utilize a stricter standard, precluding dismissal of a juror whenever there is "any reasonable probability that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." (AOB at p. 294, citing *United States v. Symington* (1999) 195 F.3d 1080, 1087; see also *United States v. Brown* (1987) 823 F.2d 591, 596; *United States v. Thomas* (1996) 116 F.3d 606, 622.) Although appellant acknowledges that this Court is not bound by those decisions, they are nevertheless "'persuasive and entitled to great weight.'" (*People v. Avena* (1996) 13 Cal.4th 394, 431, quoting *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

several weeks earlier, and his supposed "inattentiveness" or "questionable behavior" during the trial. (36 RT 6457-6459.)

Notwithstanding the additional grounds given, it is apparent that the primary reason the court decided to remove juror No. 7 was because of the impending November 25th deadline on which date juror No. 7 needed to begin his new job. On previous occasions the court had made specific rulings that juror No. 7's actions in looking at the flashcard with the term "enzyme" was not misconduct justifying his removal from the jury (29 RT 5281-5282) and also found that the juror had not been inattentive. (32 RT 5762-5763.) It was not until it was learned that juror No. 7 would be starting a new job by November 25th that the court decided to remove him from the jury.

The court's ruling more than three weeks earlier, in which it found that any misconduct by juror No. 7's looking at the word "enzyme" was too minor to justify his removal was just as valid as it had been when that ruling was made. The same is true for its earlier rejection of the prosecutor's claims of inattentiveness.

The court also purported to base its ruling on more recent observations that juror number 7 had not been watching Investigator Clark throughout Clark's testimony, had not been observed taking as many notes

recently, and did not appear to have "friendly exchanges" with his neighboring juror. None of these reasons provided or contributed to the necessary good cause for removal of juror No. 7.

Even if juror No. 7 was not taking as many notes as he had done earlier (although Mr. Cotsirillos, who had a clear view of juror No. 7, did see him taking notes (36 RT 6445)), and even if he wasn't having animated conversations with his fellow jurors in the presence of the judge[41], and even if he did not watch Investigator Clark's testimony with rapt attention, this still falls far short of good cause for removing him from the jury. It should be recalled that other jurors actually fell asleep during the prosecutor's examination of Clark (36 RT 6447) which was apparently so tedious that people applauded when it concluded. (36 RT 6446-6447.) Yet none of the other jurors were challenged or removed for such transgressions.

The court was clearly grasping at any other possible reason to justify the decision it had already reached, which was to discharge juror No. 7 because he needed to start his new job in 12 days[42]. In other words, it does

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[41]. Since juror number 7 knew one of his fellow jurors had complained about him looking at the flashcard, it is not surprising that he was thereafter more reserved in his interactions with them.

[42]. The new information about juror 7's job was brought to the court's attention on November 13th, the day closing arguments commenced. Juror 7 was discharged that same day.

not appear as a demonstrable reality that the trial court actually relied on reasons other than its concerns about "time pressures" and the job start date. Nor would any of the cited reasons have supported its conclusion that juror No. 7 should be removed from the jury. As explained in Montes' opening brief, the cited concerns about inattentiveness and "questionable behavior" did not provide good cause for juror No. 7's removal.

With regard to the time pressure concerns, the court refused to make sufficient inquires to ascertain if its fears were well grounded. The court did ask juror No. 7 if he was asking to be excused, and it received juror No. 7's assurances that he was prepared to remain as a juror and, up to the November 25th date, "would make it work." However the court expressly declined the defense suggestion to question juror No. 7 about whether the impending job start date would have any effect on his deliberations.

"In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality." (*Barnwell, supra*, 41 Cal.4th at p. 1053.) Here, the court expressly declined to make the inquiries necessary to provide a sufficient record supporting its decisions by a demonstrable reality that the impending job would impair juror No. 7's deliberations. (36 RT 6455.) Standing alone, this refusal by the court to make such reasonable inquiries

was an abuse of discretion. (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743 ["...it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error."].)

Moreover, since the court did not conduct a sufficient inquiry it lacked the information necessary to make an informed decision. Failure to conduct an adequate inquiry into allegations of juror misconduct or inability to perform has been held to be reversible error. (See, e.g., *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066 [failure to conduct an adequate inquiry into allegations of juror misconduct was prejudicial where the trial court "did not have the requisite facts upon which to decide whether [the discharged juror] in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the juror's] legitimate disagreement with the other jurors"]; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 [trial court's determination that good cause exists to discharge a juror must be adequately supported and where there is not evidence to show good cause because no inquiry was made, the procedure was inadequate by definition].)

The court's speculative concerns did not provide a sufficient basis for removal of juror No. 7. Time pressures are not uncommon in jury trials. Jurors often have other obligations which run up against the commitment to their jury service. But the mere existence of such time pressures is not grounds for removal of a juror, absent evidence that it would affect the juror's ability to fulfill his or her functions.

Thus, in *People v. Guerra* (2006) 37 Cal.4th 1067 (overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151), this Court found no error in the trial court's decision not to remove a juror (Juror R.) who was facing an impending vacation deadline. On Wednesday, shortly after deliberations had begun, Juror R. informed the court that he intended to start a two-week pre-paid vacation on Friday. When told that this would not, by itself, provide good cause for excusing him from jury service, Juror R. assured the court that he would not allow his vacation plans to affect his deliberations. The court refused to grant the defense request to have Juror R. removed.

The next day, upon further inquiry, Juror R. told the court he had postponed the start of his vacation until Saturday, and if he was not able to go then he would ask to be released from his jury service for financial hardship. Juror R. again indicated that he would not let the impending

vacation affect his deliberations and the court again refused to discharge him.

On Friday the defense asked to have Juror R. removed and an alternate substituted in that day, rather than wait until Tuesday. The jury was informed that if a verdict was not reached by the end of the day juror R. would be excused and deliberations would begin anew on Tuesday with an alternate juror. A death verdict was returned one hour later. This Court found that the trial judge had properly retained juror R., noting that the record contained nothing to suggest that juror R. was unable to fulfill his functions as a juror. (*Id.* at p. 1158.)

In Montes' case the court acted too precipitously when it removed juror No. 7 more than a week before the time he was required to begin his new job. There was far less sense of urgency here than in *Guerra*. There was also no reason to believe that juror No. 7 would feel pressure to conclude the trial because it was never suggested to him that he would have to forego his job if the case was not completed by his start date.

In *People v. Bennett* (2009) 45 Cal.4th 577, this Court found that the trial court had acted properly in refusing to discharge a juror under a situation similar to that in the instant case. In *Bennett*, one of the jurors indicated to the court that she was unhappy about the length of a break in

the proceedings between August 29th and September 3rd, and that she needed to return to work by September 9th.[43] At the request of the defense the court questioned the juror and told her about its concerns that she might be distracted or feel rushed to return a verdict because of the pressure she was feeling to return to work by the 9th. The juror assured the court that she would maintain her focus on her duties as a juror. The court decided not to discharge the juror, and the jury ultimately returned a verdict on September 9th.

On appeal the defendant argued that the trial court erred by refusing to remove the juror. Stating the well-established rule that "[a] juror's inability to perform must appear in the record as a demonstrable reality and bias may not be presumed" (*Bennett, supra*, 45 Cal.4th at p. 621, internal quotes and citations omitted]), this Court found no error. Here, as in *Bennett,* "the juror never indicated at any point that her ability to deliberate would be affected by her concern about the impending [job start date]." (*Ibid.*)

Importantly, "court[s] must not presume the worst" of a juror. (*People v. Franklin* (1976) 56 Cal.App.3d 18, 25-26; see also *People v.*

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[43]. The court had earlier asked the jurors to inform the court if there would be a problem if the case went into the week of September 9th.

Bowers (2001) 87 Cal.App.4th 722, 729.) In the present case there was neither an admission of inability to serve nor plain evidence of that fact. In fact, rather than make the necessary inquiries, the court decided to "presume the worst" and then used this presumption as justification for discharging juror No. 7. This was clearly error.

Completion of the guilt portion of the trial was well within the time frame juror number No. 7 had been given. Because juror No. 7 gave no indication that he would be unable to focus on the case there was no harm in waiting to see if the jury was able to complete at least the guilt phase before removing him from the trial. As for any concern that juror No. 7 would not be able to continue his service into a penalty phase, at the point juror No. 7 was removed there had not yet been a guilt verdict. It was therefore speculative that the case would even go to a penalty phase.

C. BECAUSE OF THE ERROR IN REMOVING JUROR No. 7 THE JUDGMENT MUST BE REVERSED.

Respondent only addresses the propriety of the court's order removing juror No. 7, and does not make any effort to address the remedy should error be found. As he did in his opening brief (AOB 311-312), Montes contends that the error in improperly removing juror No. 7 requires that the verdicts be reversed. First, it is apparent from the proceedings, particularly the prosecutor's ongoing efforts to get juror No. 7 removed

from the jury, that there was something which led the district attorney to believe that juror No. 7 favored the defense. Thus, even if prejudice must be shown, there is sufficient evidence of it in this case. (*People v. Hamilton* (1963) 60 Cal.2d 105, 128.)

But it is also appellant's position that prejudice need not be shown where a sitting juror is improperly removed from a case. As noted in appellant's opening brief, excusing an empaneled juror without good cause deprives a criminal defendant of his right to a fair trial under the Fifth and Fourteenth Amendment Due Process clauses and his Sixth Amendment right to trial by jury. This is so because every criminal defendant is entitled to a verdict by the jury originally empaneled. (*Cf. Crist v. Bretz* (1978) 437 U.S. 28, 35-36; *Downum v. United States* (1963) 372 U.S. 734, 736.)

The right to trial by jury in criminal cases is such a fundamental feature of our justice system that it is protected against state action by the Due Process Clause of the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158.) Interference with this right violates the Eighth and Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (*Cf. Beck v. Alabama* (1980) 447 U.S. 625, 638, 643.)

For these reasons, appellant submits that the improper removal of juror No. 7 requires that the guilt and penalty verdicts be reversed.

XXI.

THE IMPROPER REMOVAL OF ALTERNATE JUROR NUMBER TWO REQUIRES REVERSAL OF THE PENALTY VERDICT.

Respondent relies principally on *People v. Samuels* (2005) 36 Cal.4th 96, for its position that the court did not err when it discharged alternate juror No. 2. *Samuels* was discussed and distinguished in appellant's opening brief. But there are additional reasons for finding that *Samuels* does not provide support for upholding the trial court's order in the instant case. Specifically, *Samuels* applied the lesser "substantial evidence" standard, rather than the "demonstrable reality" standard subsequently approved in *People v. Barnwell, supra*, 41 Cal.4th 1038, 1052. (*Samuels, supra*, 36 Cal.4th at p. 132.) As discussed in the preceding argument, the demonstrable reality standard "entails a more comprehensive and less deferential review" than the substantial evidence standard, and requires that "the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Barnwell, supra*, 41 Cal.4th at p. 1053.) In the present case, the record does not reveal, as a "demonstrable reality," that alternate juror No. 2 was impaired as a juror and was properly removed. As explained in Montes's opening brief, Audrey W., the juror removed in *Samuels,* told the

judge that she would not be able to impose the death penalty even if she thought it was the appropriate punishment. Audrey W. indicated that she lacked the "courage" to impose the penalty even if it was appropriate under all the circumstances, and expressed her concern that she "couldn't act" on her obligation to do so.

Unlike Audrey W., alternate juror No. 2 never expressly stated that she would not vote for death even if convinced it was the appropriate sentence. For similar reasons this case is also distinguishable from *People v. Watson* (2008) 43 Cal.4th 652, where the juror consulted his minister about the death penalty and thereafter stated that he could not under any circumstances vote for the death penalty no matter what the evidence showed.

Here, alternate juror No. 2 told the court that she could not sentence Montes to death, but she did not say why. The lack of information about the reason for her statement is a key difference between this case and *Samuels* and *Watson*. If alternate juror No. 2 had made a statement similar to those in *Samuels* and *Watson*, then her excusal might have been proper. But she did not. It was quite possible that alternate juror No. 2 did not want to impose a death sentence on Montes because she was not convinced that Montes was the one most culpable for the crime. Such a reason would have

been a proper ground, even standing alone, to decide on life over death for Montes. (*People v. Brown* (1985) 40 Cal.3d 512, 541 ["Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider. . . ."].)

As discussed in the preceding section, the court has a duty to make whatever inquiries are necessary to ascertain if the juror should be discharged. (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743 ["...it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error."]; see also *People v. Castorena, supra,* 47 Cal.App.4th 1051, 1066; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856.)

Unlike the instant case, the trial judge in *Samuels* conducted a "meaningful inquiry" which flushed out the reasons for Audrey W.'s request to be relieved from further jury service in the case. Here the basis for alternate number No. 2's unwillingness to sentence Montes to death was not sufficiently explored. As a result, the record does not establish a demonstrable reality that her reasons were based on an absolute inability to impose a death sentence rather than her view, based on evidence presented at the guilt phase, that death was an inappropriate punishment for Montes.

XXII.

THE KIDNAPPING SPECIAL CIRCUMSTANCE IS A LESSER-INCLUDED OFFENSE TO KIDNAP FOR ROBBERY AND MUST BE REVERSED. THE IMPROPER CONSIDERATION OF THIS SPECIAL CIRCUMSTANCE BY THE PENALTY PHASE JURY WAS NOT HARMLESS BEYOND A REASONABLE DOUBT, AND THE DEATH SENTENCE MUST BE REVERSED.

Although respondent does not expressly concede the point, it is apparent that the kidnapping special circumstance is a lesser-included offense of kidnap for robbery, and therefore must be reversed. (*People v. Lewis* (2008) 43 Cal.4th 415, 518.) Because Montes' jury thus considered an invalid special circumstance as a factor in aggravation, his death sentence was unconstitutional, and must be reversed.

In *People v. Melton* (1988) 44 Cal.3d 713, this Court rejected application of section 654 to preclude a penalty phase jury from considering multiple special circumstances based on independent acts committed as part of one indivisible course of conduct. But the instant case does not come within the *Melton* ruling because here one of the circumstance found true was actually a lesser-included offense of another.

In his opening brief appellant noted that he had not found any California cases since *Melton* in which the penalty jury was permitted to consider multiple special circumstances where one was a lesser-included

offense of another (as opposed to the *Melton* scenario of separate felonies committed during one ongoing transaction). Respondent does not point to any such cases, and appellant's further search has not disclosed any.

As discussed in his opening brief, the difference here is important. In fact, *Melton* specifically distinguished cases from other states which involved situations such as appellant's where the special circumstances were simply restatements of the same conduct. According to *Melton*, "[i]n none [of these cases] did the 'overlapping' circumstances at issue focus on separate culpable *acts* of the defendant, they simply restated in different language the single criminal objective from which the murder arose." (*Melton*, 44 Cal.3d at p. 767 (emphasis in original), citing e.g., *State v. Goodman* (1979) 298 N.C. 1; *Provence v. State* (Fla. 1976) 337 So.2d 783, 786.) Accordingly, *Melton,* and subsequent cases cited by respondent[44] which follow it, do not provide support for upholding the penalty verdict in this case.

Here, Montes' penalty phase jury was improperly instructed to consider, as a factor in aggravation, three special circumstances when there

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[44]. *People v. Holt* (1997) 15 Cal.4th 619, 681-682; *People v. Pinholster* (1992) 1 Cal.4th 865, 970.

should only have been two[45]. It should also be recalled that the court refused to give Montes' requested instruction which would have directed the jury not to double-count the conduct underlying the special circumstances[46].

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[45]. The jury was instructed with CALJIC No. 8.84.1, which stated in relevant part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> A. The circumstances of the crime of which the defendant was convicted in the present proceeding **and** the existence of any special circumstances found to be true.

(45 RT 7977, emphasis added.)

[46]. The defense requested the court give the following special instruction (Defense K-P):

> You must not consider as an aggravating factor the existence of any special circumstances if you have already considered the facts of the special circumstances as a circumstance or circumstances of the crime for which Joseph Montes has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.
>
> You may not double-count any "circumstances of the offense" which are also "special circumstances." That is, you may not weigh the special circumstances more than once in your sentencing determination.
>
> Multiple special circumstances which encompass one single course of conduct should be considered by you only once.

(28 CT 7603.)

This improperly inflated the risk that the jury would impose a sentence of death. (*People v. Harris* (1984) 36 Cal.3d 36; accord, *People v. Allen* (1986) 42 Cal.3d 1222.) "'When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.'" (*Brown v. Sanders* (2005) 546 U.S. 212 [126 S.Ct. 884; 163 L.Ed.2d 723], quoting *Stringer v. Black* (1992) 503 U.S. 222.)

It was clearly error that the penalty jury considered an invalid special circumstance. This error requires reversal of the death sentence. "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Sanders, supra*, 546 U.S. at p. 220, emphasis in original.)

Unlike *Sanders*, the jury in Montes' case could not give aggravating weight to the additional special circumstances under the more general "circumstances of the crime" factor. Because the additional special circumstance was not based on independent conduct, it would not have been considered as a "circumstances of the crime" for purposes of aggravation.

An improper factor in aggravation was thus added to the scale, rendering the death judgment unconstitutional. The penalty verdict must therefore be reversed.

XXIII.

THE TRIAL COURT'S ERROR IN REFUSING TO LIMIT CALJIC NO. 2.15 TO THE THEFT-RELATED OFFENSES IS REVERSIBLE PER SE.

A. IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY WITH CALJIC NO. 2.15 WITHOUT LIMITING IT TO THE THEFT OFFENSES.

Montes' jury was instructed with CALJIC 2.15 that, if it found the defendants were in conscious possession of recently stolen property, this fact, together with slight corroboration tending to prove guilt, was sufficient for the jury to find them guilty of *all* the charged crimes and allegations.

In his opening brief (AOB at pp. 330-333) Montes explained why it was error for the court to give CALJIC No. 2.15 without limiting it to the theft offenses. The argument was based largely on this Court's opinion in *People v. Prieto* (2003) 30 Cal.4th 226, which adopted the reasoning of *People v. Barker* (2001) 91 Cal.App.4th 1166.

Respondent requests that this Court revisit its holding in *Prieto*. (RB at p. 137-139.) Montes believes that *Prieto* was correctly decided, and that it should be left undisturbed. And in fact, this Court recently reiterated its view that "the instruction is inappropriate for non-theft-related crimes, and instruction that possession of stolen property may create an inference that a

defendant is guilty of murder, as was done here, is error." (*People v. Gamache* (2010) 48 Cal.4th 347, 375.)

B. THE ERROR REQUIRES REVERSAL OF THE MURDER AND KIDNAPPING CHARGES AND SPECIAL CIRCUMSTANCES.

According to respondent, the jury did not likely interpret the instruction as applying to crimes other than the property offenses. This overlooks the express arguments of the prosecutor urging the jury use the instruction as a means of finding the defendants guilty of *all* of the crimes, including murder. (36 RT 6493-6496.) Given the emphasis placed on this instruction by the prosecutor, it is quite likely that the jury made use of the instruction in reaching its verdicts.

In *Prieto*, this court rejected the defendant's contention that the instruction operated to lower the prosecution's burden of proof, mandating reversal. In the instant case, however, the prosecutor's argument amplified the effect of error. As a result of the prosecution's use of this instruction, the burden of proof for the murder and kidnapping charges and the special circumstances allegations was lightened[47].

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[47]. Appellant also recognizes that this Court has previously held that any error in giving CALJIC No. 2.15 is subject to evaluation under the state's *Watson* standard. (*Gamache, supra*, 48 Cal.4th at p. 376, and cases cited therein). Nevertheless, appellant respectfully disagrees, and so raises the issue to preserve it.

It is a fundamental precept of American jurisprudence that the prosecution bears the burden of proving every fact necessary to constitute the crime charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 685.) The CALJIC No. 2.15 instruction unconstitutionally lightened the prosecution's burden of proof for the murder charge and special circumstance allegations. (See *People v. Tewksbury* (1975) 15 Cal.3d 953, 964; *Mullaney, supra*, 421 U.S. 684, 703-704.)

As an error of federal constitutional magnitude, the error would generally be evaluated in accordance with the "beyond a reasonable doubt" standard of *Chapman*. However, because the instruction in this case created structural error in the trial itself, reversal is required without regard to prejudice.

In *Arizona v. Fulminante* (1991) 499 U.S. 279, the United States Supreme Court distinguished between those constitutional errors it termed "trial errors" (the effects of which could be assessed by application of the "harmless beyond a reasonable doubt" standard of *Chapman*) and those constitutional errors which amounted to "structural defects" affecting the framework in which the trial is conducted. These latter errors require automatic reversal. (*Fulminante, supra*, 499 U.S. 279, 306-312.)

An instruction which erroneously describes the prosecution's burden of proof is among those rare "structural defects" which requires reversal without regard to an analysis of prejudice. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282.) According to the *Sullivan* court:

> ...the essential connection to a "beyond-a-reasonable-doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. (*Id.* at p. 281.)

The instructional error detailed above misdescribed the jury's burden of proof with regard to the offenses of kidnapping and murder, as well as the special circumstances. The error is therefore reversible *per se*.

XXV[48].

THE TRIAL COURT SHOULD HAVE HELD THE REQUESTED 402 HEARING BEFORE ADMITTING VICTIM IMPACT EVIDENCE.

Montes' claim is that the trial court erred by refusing the defense request for a 402 hearing to preview the victim impact testimony the prosecutor intended to elicit at the penalty phase trial. According to respondent, all that was required here was for the prosecutor to make the necessary disclosures concerning evidence in aggravation mandated by penal code section 190.3. (RB pp. 141-142.) But this argument does not address the court's own obligations to exclude inadmissible evidence. Simply because the prosecutor partially complied with his obligation to disclose evidence in aggravation (but see Argument XXXIV re: prosecutor's failure to disclose impeachment evidence) does not mean the trial court properly refused the defense request for an Evidence Code section 402 hearing as a means of ensuring that the victim impact evidence presented was adequately circumscribed.

Victim impact evidence is, by its very nature, highly sensitive and emotional. And though victim impact evidence is generally admissible, as respondent notes, irrelevant or inflammatory evidence must still be

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[48]. There is no roman numeral XXIV in the reply brief.

excluded. (RB 143; *People v. Harris* (2005) 37 Cal.4th 310, 351.) A 402 hearing not only provides the court with an opportunity to preview and weed out inadmissible evidence before it reaches the jury's ears, it also enables the defense to lodge objections without having to object in front of the jury. For these reasons a court should, where requested, hold a hearing to preview proffered victim impact testimony.

There are at least two ways to evaluate the effect of the court's error in refusing to hold the requested hearing. One of them is that the admission of victim impact evidence (over defense objection) should not be reviewed only for abuse of discretion, because the court failed to truly exercise its discretion. As discussed herein and in the opening brief, the victim impact testimony in this case was both excessive and in several respects irrelevant and unduly prejudicial. (Argument XXVII, AOB at pp. 377-416.) Prior to admission of the victim impact evidence Montes objected on numerous grounds to its introduction. Because the trial court refused to adequately preview this evidence, its admission of the evidence should not be reviewed solely for abuse of discretion.

> "[W]here fundamental rights are affected by the exercise of discretion by the trial court, ... such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." To exercise the power of judicial discretion, *all material facts and evidence must be*

> *both known and considered*, together with legal principles essential to an informed, intelligent and just decision.

(*People v. Lara* (2001) 86 Cal.App.4th 139, 165, italics added, quoting *People v. Davis* (1984) 161 Cal.App.3d 796, 804.)

Another way to address the error is for this Court to excuse any perceived "forfeiture" of an issue concerning admission of victim impact evidence for lack of an objection. Thus, at the very least, the refusal of the trial court to hold the requested 402 hearing should act as a bar to respondent's assertion of "forfeiture" raised in connection with the admission of testimony about vandalism of Mark Walker's gravesite. (See RB at p. 146; Argument XXVII, Subd. A, AOB at pp. 377-385 and *infra*.)[49] As Mr. Cotsirillos made clear, the only reason he did not object at the time this evidence came in was because of the emotional state in the courtroom. (42 RT 7429.) Had the trial court adequately previewed the victim impact testimony, the defense could have sought exclusion of this very damaging evidence (or at least registered an objection) without being faced with the catch-22 position in which defense counsel found himself. This Court should therefore rule that the defense request for a 402 hearing, which

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[49]. Although respondent states that "forfeiture" arguments are not being raised in connection with claims of error regarding admission of "certain aspects of victim family members" testimony (RB p. 143, fn. 44), respondent nevertheless raises it with regard to this one area of testimony.

sought to prevent this very dilemma, was itself adequate to preserve the issue for appellate review.

XXVI.

Respondent does not take issue with appellant's "summary of the general principles surrounding admission of victim impact evidence under federal and state law...." (RB at p. 142.)

XXVII.

MONTES' DEATH SENTENCE MUST BE REVERSED BECAUSE THE VICTIM IMPACT EVIDENCE RENDERED THE PENALTY TRIAL UNFAIR AND LED TO AN UNRELIABLE VERDICT.

A. THE TESTIMONY BY JUDITH WALKER KOAHOU DESCRIBING THE DEFACEMENT OF HER SON'S GRAVE.

1. This Issue Was Not Forfeited.

In his opening brief Montes explained at some length why this issue was not forfeited, and for the same reasons reasserts the claim in this reply brief. (See AOB at pp. 381-385.) However, there is one specific area which requires elaboration.

Respondent contends that Montes did not object to testimony concerning vandalism of the grave when the parties went over the written statements. (RB at p. 146.) The record reflects otherwise.

> [MR. COTSIRILLOS]: Your Honor, the bottom of page type-marked 3 at the top, 'If these people are allowed back into society' -- it continues on -- 'they will kill again,' and a characterization of the accused. I believe that continues for *two full paragraphs through page 4. We'd be objecting to those two full paragraphs.*
>
> Is the Court with me? Do I need to read them out loud or --
>
> [THE COURT]: No. I know which ones you're talking about.
>
> Mr. D.A.

[MR. MITCHELL]: I'm not going to be going into these areas to the extent it's written out.

(41 RT 7199-7200.)

Judith Koahou's statement appears in the record as Exhibit "V" to Montes' Motion to Augment the Record filed in this Court on June 14, 2007, and granted on August 15, 2007. The first three sentences of the second paragraph expressly referred to by Mr. Cotsirillos are: "The violence towards our family has not stopped. The family members who are still living in Beaumont vandalized Mark's grave. They broke the bench that was at his grave."

Counsel for Montes explicitly objected to this testimony, and was assured by the prosecutor that he would not be going into those areas. (41 RT 7200.) Although in her testimony Ms. Koahou did not place blame for the defacement on any particular individuals, she nevertheless described not only the fact that it had been done, but also her feelings upon finding the damage. The objection was sufficient to preserve this issue for appeal. (*People v. Morris* (1991) 53 Cal.3d 152, 190.)

Respondent also contends that, had Montes objected to admission of the evidence during Ms. Koahou's testimony, the trial court could have taken some ameliorative action. But since the trial court later stated its belief that the evidence was properly introduced, it clearly would not have

taken any steps to prevent admission of this testimony. (42 RT 7435.) Where, as here, an objection or request for admonition would have been futile, it is excused. (*People v. McDermott* (2002) 28 Cal.4th 946.)

Furthermore, at the conclusion of Ms. Koahou's testimony, counsel for Montes moved for a mistrial, based in part on her testimony about the grave. (42 RT 7429-7430.) At that time the court could have given the jury a curative admonition if it had found the evidence was improperly admitted (which it did not). Defense counsel therefore gave the court "more than ample opportunity" to correct the error, and for this reason the error was not waived (Cf. *People v. Bonin* (1988) 46 Cal.3d 659, 689, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823 [claim of prosecutorial misconduct not waived where defendant did not raise contemporaneous objection, but later moved for a mistrial and to strike evidence improperly elicited].)

Finally, if this Court finds the early objection to this evidence was not sufficiently clear, as discussed above in Argument XXV, the reason for this was trial court's refusal to hold a 402 hearing. Had such a hearing been held, it would have been absolutely clear what evidence the prosecutor intended to present, and would therefore have allowed for more specific objections by the defense.

2. The Evidence Was Improper.

Respondent contends that this evidence was properly admitted as a "circumstance of the offense." (RB p. 147.) Respondent is wrong. There is an obvious distinction between evidence about the condition of the decedent's body, found admissible in *Harris* as a circumstance of the crime, and evidence of the gravesite vandalism committed by others.

In *Harris*, this Court found no error from the admission of testimony by the victim's family members who viewed the victim's body at the mortuary, because the condition of the body at that time was a circumstance of the crime relevant to the penalty determination. (*Harris, supra*, 37 Cal.4th at p. 352.)

However, this Court also ruled that testimony concerning the mishap in which the lid to the victim's coffin was inadvertently opened during the funeral was "too remote from any act by defendant to be relevant to his moral culpability." The same conclusion must be reached here. The callous acts of vandalism by other, unknown, persons was far too remote from any action by Montes to be relevant to his moral culpability.

As this Court has recognized, "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. *This holding only*

encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards* (1991) 54 Cal.3d 787, 835, emphasis added.) Ms. Koahou's testimony about the vandalism to her son's gravesite perpetrated by person or persons unknown was not evidence which logically showed harm caused by *Montes*. Instead, it is the sort of evidence that "invites an irrational, purely subjective response." (*Id* at p. 836.)

3. It Is Reasonably Possible That This Highly Inflammatory Evidence Was Prejudicial To The Jury's Penalty Determination.

Respondent contends that the evidence was not prejudicial. But even respondent's argument demonstrates how emotionally charged and inflammatory this evidence was. Respondent points to Ms. Koahou's testimony that, because of the vandalism, she had great difficulty when she visited her son's grave. It is impossible to believe that Ms. Koahou's words describing the effect of seeing this vandalism did not resonate deeply with the jurors. Moreover, this testimony came near the conclusion of her testimony, which was the final prosecution penalty phase evidence. It would therefore be more likely to have stood out in the jurors' minds.

Respondent further contends that no prejudice to the penalty determination resulted because of the "paucity of factors in mitigation." (RB at p. 148.) Montes strongly disagrees.

As Montes continues to stress, one significant factor in mitigation was doubt about whether Montes was the one who shot Mark Walker and should therefore be held most accountable for the murder. Additional factors in mitigation included Montes' relatively young age (20 years old) and low I.Q. (43 RT 7673-7674.) Moreover, the evidence in aggravation specifically relating to Montes was not overwhelming. Montes had only one prior felony conviction (for burglary) and had never been to prison before. The only other evidence of assaultive behavior was the attack on his co-defendant Gallegos.

As discussed in the opening brief (AOB at pp. 121-130), a death sentence in this case was far from a forgone conclusion, and there is a reasonable possibility that the effect of the improperly admitted victim impact evidence influenced the jury's penalty decision.

B. CIRCUMSTANCES OF THE OFFENSE.

Montes believes this issue has been fully addressed in his opening brief. (AOB at pp. 388-393.)

C. REFERENCES TO THE LENGTH OF THE PROCEEDINGS AND SUBSEQUENT APPELLATE PROCEEDINGS.

Respondent focuses only on that part of Montes' argument concerning improper comments leading the jury to believe that another actor (such as the Governor or an appellate court) would bear ultimate

responsibility for deciding whether Montes would be put to death, thereby diminishing the jury's sense of responsibility for its penalty decision. (See AOB at pp. 396-397 and RB pp. 150-151.) In this regard, respondent discusses only Scott Walker's comments about the how the length and delays in the proceedings exacerbated his grief. But as to this aspect of the witness' comments, Montes is referring more particularly to Walker's comments that "... after this is over, still got everything down the road too." (42 RT 7401.)

Montes acknowledges that this comment did not specifically direct the jury's attention to the Governor's powers of commutation, or directly advise the jury of the right to an appeal. But they could be fairly understood as an improper reference to subsequent review of the conviction and sentence, and as such could have diminished the jury's sense of responsibility for its penalty decision.

Respondent does not separately address Montes' other contention raised in connection with Scott Walker's statement concerning the ongoing length of the judicial proceedings and the numerous court dates, i.e., that it improperly penalized Montes for the exercise of his constitutional right to trial and the proceedings leading up to it.

"[A] capital-sentencing scheme cannot allow the jury to draw an adverse inference from constitutionally protected conduct such as a request for trial by jury...." (*United States v. Whitten* (2nd Cir. 2010) 610 F.3d 168, 194.) Here, the witness' victim impact evidence included references to how his suffering had been exacerbated by the judicial process. In essence this was as much as saying that the family's suffering was increased because Montes did not simply plead guilty at the outset, but instead insisted on exercising his constitutionally protected trial rights. This turned Montes' completely permissible exercise of his rights into a factor in aggravation.

D. THE CONCLUDING REMARKS OF MS. KOAHOU DREW IMPROPER COMPARISONS BETWEEN HER SON AND MONTES.

Although respondent seemingly complains that Montes has not cited to controlling state authority as support for his argument on this point[50] (RB at p. 152) respondent has not cited any contrary authority. Since this appears to be an open issue in this state, it is proper for this Court to consider persuasive authorities from other jurisdictions. (5-50 Calif. Practice and Procedure §50.13 (2010).)

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[50]. The opening brief cites to a number of cases from other jurisdictions in support of Montes' argument on this point. (See AOB at pp. 399-403.)

Respondent takes issue with Montes' assertion that the statement by Ms. Koahou appeared to have been intentionally orchestrated to invite comparison between her son's life and that of Montes. Although it is true that the record contains no discussions between the prosecutor and the Walker family about how to present the victim impact evidence, this conclusion is a fair one to draw from the nature of Ms. Koahou's comments.

Specifically, Ms. Koahou made references to the fact that her son went to a private school, and then went to a public school, and that the family went through divorce. At the time of her testimony the defense had yet to present its penalty phase evidence which focused, in part, on Montes' learning problems and how they became more acute after his family was forced to remove him from the special education program he was getting in the private school, plus the significant impact on Montes from his parents' divorce. Since Ms. Koahou's comments were not made in response to this evidence, but preceded it, and since the prosecution had been given notice of what evidence the defense intended to present, it does not require a giant leap of logic to conclude that the prosecutor previewed this evidence with the Walker family, and that Ms. Koahou's testimony was influenced by what the defense intended to submit.

Thus, for the reasons discussed in his opening brief, Montes urges this Court to find that the concluding statements by Ms. Koahou, which were clearly designed to invite comparisons between her son and Montes, were improper and prejudicial. (See AOB pp. 399-403.)

E. THE VIDEOTAPE ADMITTED IN THIS CASE PRESENTED A HIGHLY EMOTIONAL APPEAL TO THE JURORS' SYMPATHIES. IT EXCEEDED THE BOUNDS OF PERMISSIBLE VICTIM IMPACT EVIDENCE, AND DENIED MONTES HIS RIGHT TO A FUNDAMENTALLY FAIR PENALTY TRIAL AND RELIABLE PENALTY VERDICT.

As this Court has repeatedly stated: "'[c]ourts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 784, quoting *People v. Prince* (2007) 40 Cal.4th 1179, 1289.)

The videotape montage presented to the jury in Montes' case was extremely prejudicial. "Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of this offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the [jury] portrayed events that occurred" before the crime had been committed and "bore no

direct relation to the effect of the crime on the victims' family members." (*Kelly v. California* (2008) 555 U.S. ____; 172 L.Ed 2d 445, 129 S.Ct 564, 567 (separate statement of Stevens, J. on denial of cert.; see also *Id.* at p. 568, statement of Breyer, J., dissenting from cert. denial, noting that the "*purely emotional*" impact of such videos may call due process protections into play.)

As explained by Justice Stevens in his statement respecting denial of the petitions for certiorari in *Kelly* and *Zamudio* (*People v. Zamudio* (2008) 43 Cal.4th 327) where there is enhancement of victim impact evidence with music and videotapes, the risk of unfair prejudice "becomes overwhelming," inviting a penalty verdict based on "sentiment, rather than reasoned judgment." (*Ibid.*) Videotapes such as the one shown to the jury in Montes' case "[i]n their form, length, and scope [] vastly exceed the 'quick glimpse'" contemplated by the majority of the Supreme Court when it overruled *Booth* in the *Payne*[51] decision. (*Ibid.*)

Nor did the videotape in this case simply depict events, either before or after the crime. (*Compare People v. Brady* (2010) 50 Cal.4th 547.) The tape in this case was prepared by the family specifically for the penalty phase, and was enhanced by background music and included a visual

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[51]*Payne v. Tennessee* (1991) 501 U.S. 808

element (the quick scene of the prone body) which enhanced its already emotionally evocative content.

Importantly, the videotape was set to music. "Music rarely if ever has informational content that can contribute to a capital jury's sober and rational decision making. Its purpose and effect, generally, is to evoke an emotional response from the jury. Such emotional evocation, while suitable for a memorial tribute to the victim, is wholly inappropriate at the penalty phase of a capital trial, where the purpose is not to honor the victim but to decide whether the defendant should receive a sentence of death." (*People v. Verdugo* (2010) 50 Cal.4th 263, 313, Moreno, J., concurring.) Moreover, music accompanying a victim impact video is more likely to be prejudicial than music admitted on its own. (*Id.* at p. 314, Moreno, J., concurring.)

The videotape admitted in Montes' case clearly runs afoul of this Court's prior delineations of the limits of permissible victim impact evidence as described in earlier decisions such as *Dykes* and *Prince*. (*Dykes, supra*, 46 Cal.4th 731, 784; *Prince, supra,* 40 Cal.4th 1179, 1289.) At ten-and-a-half minutes, the videotape lasted more than "a few moments." Even recognizing that Mark Walker was but sixteen when he was killed, the videotape placed undue emphasis on his very early childhood and infant years. It was accompanied by music which, though perhaps not as

emotional as the original soundtrack, was still unnecessary and added a further element of sadness and emotionality to the already heartrending presentation. In addition, the videotape contained a very jolting image of a prone body, immediately following a photograph of Walker in his football uniform.

Ending as it did, with a photo of the gravesite which had later been vandalized, the overall effect of this particular videotape crossed a line, including that line which has been gradually expanded by this Court in every decision where the defense challenges the nature and extent of victim impact evidence. In total, this videotape invited a purely irrational, subjective response. (*Dykes, supra*, 46 Cal.4th 784; *Edwards, supra*, 54 Cal.3d at p. 836.) And it achieved its purpose, as demonstrated by the emotional state of the jurors at its conclusion. (See (42 RT 7428-7429, 7434.)

Even standing alone, admission of this videotape was error which transgressed Montes' constitutional rights, and impermissibly tainted the jury's penalty decision in his case.

F. THE VICTIM IMPACT EVIDENCE WAS EXCESSIVE.

Four family members testified about Mark Walker and the effect his murder had on them. Together this testimony comprised about 115 pages.

By comparison, in *People v. Taylor* (2010) 48 Cal.4th 574, 646, the victim impact evidence comprised but 30 pages out of 400 pages of reporter's transcript of the prosecution's case in aggravation. And in *People v. Mills* (2010) 48 Cal. 4th 158, 212, the combined testimony of three penalty phase victim impact witnesses was only twenty pages. Montes's jury was also shown the ten-and-a-half minute videotape. As explained in his opening brief (AOB at pp. 412-414) this evidence presented much more than the "brief glimpse" countenanced by *Payne*. In both its nature and its scope it was excessive and unduly prejudicial.

G. THE CUMULATIVE EFFECT OF THE VICTIM IMPACT EVIDENCE RENDERED THE PENALTY TRIAL FUNDAMENTALLY UNFAIR AND DENIED MONTES HIS RIGHT TO A RELIABLE PENALTY VERDICT.

Of course, this Court must do more than examine each piece of evidence in isolation from the rest. (See *Taylor v. Kentucky* (1978) 436 U.S. 478.) To fully appreciate the effect of the victim impact evidence presented to Montes' jury the cumulative effect of this evidence must be considered. This includes all the objectionable aspects discussed elsewhere in this argument, including Ms. Koahou's story about the vandalism of her son's gravesite and the effect this had on her. The impact of this evidence, which so strongly appealed to the jurors' emotions, undermined the jury' ability to

render a penalty decision predicated on a reasoned response rather than an emotional reaction.

"'It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* (1977) 430 U.S. 349, 358. Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." (*Zant v. Stephens* (1983) 462 U.S. 862, 885.)

Where, as here, unduly prejudicial victim impact evidence is introduced that renders the penalty trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment requires that the penalty verdict be reversed. (*Edwards, supra*, 54 Cal.3d at p. 835.) For similar reasons, the death sentence is arbitrary and capricious in violation of the Eighth Amendment, and similarly requires that the judgment of death be set aside.

XXVIII.

MONTES MOTION FOR A MISTRIAL BASED ON ADMISSION OF THE VICTIM IMPACT EVIDENCE SHOULD HAVE BEEN GRANTED.

For the reasons discussed in his opening brief (AOB at pp. 417-418) the trial court erred when it denied Montes' motion for a mistrial because the cumulative effect from admission of the victim impact evidence denied Montes his right to a fundamentally fair penalty trial and a reliable penalty determination. (U.S. Const. 5th, 6th, 8th, and 14th Amends..)

XXIX.

THE TRIAL COURT IMPROPERLY REFUSED TO GIVE MONTES' REQUESTED INSTRUCTION ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE.

A. THE ISSUE HAS BEEN NEITHER "WAIVED" NOR "FORFEITED."

At the outset of its argument, respondent claims that the issues Montes raises with regard to the trial court's refusal to give his requested instruction are forfeited or waived to the extent he did not object on such basis below. (RB at p. 162.) Montes disagrees that his specific claims of federal and state constitutional error were in any way forfeited or waived, since he was the one who requested the instruction.

In the context of jury instructions, a claim of error that the court improperly *gave* an instruction is still cognizable in the appeal where the instruction affected the defendant's "substantial rights." (*People v. Smithey* (1999) 20 Cal.4th 936, 982-982, fn. 12; Pen. Code sect. 1259.) Certainly actually requesting a specific instruction is enough to preserve a later claim of error that the trial court improperly denied the request. Respondent has cited no cases which would require an additional objection in these circumstances.

B. THE COURT SHOULD HAVE GIVEN THE REQUESTED INSTRUCTION.

Montes accepts that this Court seems to have decided this issue in other cases adversely to the position he has espoused. Nevertheless, for the reasons given in his opening brief, Montes reasserts his claim that the requested instruction, or some modified version instructing the jury as to the proper use of victim impact evidence, ought to have been given. The error in refusing such an instruction requires reversal of Montes' death sentence. (AOB at pp. 421-435.)

XXX.

THERE IS NO DISPUTE ABOUT THE GENERAL LEGAL PRINCIPLES FOR EVALUATING PROSECUTORIAL MISCONDUCT CLAIMS

Respondent does not take issue with the "general principles about prosecutorial misconduct" (RB at p. 164) as set forth in this portion of the opening brief. (See AOB at pp. 436-441.)

XXXI.

THE PROSECUTOR'S MISCONDUCT IN VOUCHING FOR KIM SPECK'S TESTIMONY WAS PREJUDICIAL.

In closing argument (responding to Montes' contention that Speck's testimony had been influenced by the assistance Mitchell gave Speck with her court cases) the prosecutor asserted that Speck would have gotten the same deal with or without his help. As respondent acknowledges (RB at p. 165) the trial court found this argument to be improper. (38 RT 6758.)

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) "Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions to not render the trial fundamentally unfair." (*People v. Doolin* (2009) 45 Cal.4th 390, 444.)

Here, the prosecutor's comments transgressed Montes' due process rights and was "deceptive and reprehensible" because it introduced speculative facts which were not in evidence. In essence, what the prosecutor did was voice his own opinion that Speck's testimony had not been affected by the assistance he had provided to her. In this way the

prosecutor improperly vouched for the veracity of Speck's trial testimony. (See AOB at pp. 443-444.)

Because there was misconduct, this Court must decide whether there is a reasonable possibility that the error affected the penalty outcome. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019 ["To be prejudicial, [misconduct] must bear a reasonable possibility of influencing the penalty verdict. [Citations.] In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. [Citations.]."

Here, it is reasonably possible the jury construed the prosecutor's argument as voicing his personal support for the veracity of Kim Speck's trial testimony. In fact, there is no other reasonable interpretation to be given these comments. The trial court itself recognized this possibility as it not only sustained the defense objection, but later sought (unsuccessfully) to ameliorate the effect of the misconduct with a jury instruction.

Respondent argues there is no reasonable possibility[52] that this misconduct infected the trial with unfairness rendering the *conviction* a

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[52]. Respondent uses the term "reasonable likelihood" instead of "reasonable possibility." However, these terms express the same standard. (See discussion in Argument XXXVI, subdivision A, *infra*.)

denial of due process. (RB at p. 166.) To clarify, however, Montes' focus all along has been on how this misconduct affected the penalty, not the guilt, verdict. (AOB at pp 445-446.)

In fact, there was a reasonably possibility that the misconduct influenced the penalty verdict. A primary aspect of Montes' penalty phase defense was the doubt about who actually shot and killed Mark Walker. Whether or not a defendant was the actual shooter is certainly important to a determination of penalty. (*People v. Gay* (2008) 42 Cal.4th 1195, 1227.) Accordingly, where, as here, the state does not prove that the defendant sentenced to death is the one who did the shooting, error affecting the penalty determination is particularly likely to warrant reversal of a death sentence.

One specific area of significance in which Speck's testimony differed at trial from what she had testified to at the preliminary hearing concerned the black gun that presumably was the murder weapon. Speck was consistent in her testimony about seeing Montes with the small silver .22 derringer.[53] At trial, however, Kim Speck initially testified that she also saw Montes in the bathroom with a larger black gun, showing it to Arroyo,

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[53]. Speck saw Montes with a small silver gun before the group left with the Buick. He was showing someone how easy it was to take apart. (21 RT 3458, 3513, 3517; 22 RT 3898, 3931.)

and said that he had this gun before the group left with the van. (21 RT 3458-3459, 3514.) Speck was the only person who testified to seeing Montes in possession of the black gun. (See discussion of facts regarding the black gun at the outset of this brief.)

Speck's testimony at the preliminary hearing differed markedly in this respect from her trial testimony. At the preliminary hearing, Speck testified that the only gun she saw Montes with on Saturday night was the small .22. She did not see a black gun at the party. (21 RT 3515-3517.) This significant discrepancy cannot be attributed to Speck forgetting details due to the passage of time. Instead, Speck (while testifying on direct examination) claimed to have now "remembered" seeing Montes with a black gun. Although Speck agreed that her memory was better back when she testified at the preliminary hearing, she said that certain things "came" to her in the intervening twenty-two month period. Apparently, this included another gun. (21 RT 3517-3518.)

During cross-examination Speck eventually admitted that, while she was "sure" about seeing Montes with the smaller gun, she could be wrong about seeing him with the larger gun.[54] (21 RT 3569.) Although Speck's

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[54]. During cross-examination Speck admitted that she was confused in her recollections about this second gun. (21 RT 3637-3638.) For example, at the preliminary hearing Speck testified that she saw Montes and

testimony did not stand up well to cross-examination, it still provided the prosecution with its only evidence that Montes was seen with the likely murder weapon before Walker was shot.

As explained above, it is reasonably possible that the jury construed the prosecutor's comments about Speck getting the same deal with or without his help as vouching for the truthfulness of her trial testimony. This improperly bolstered Speck's trial version of events regarding the gun, even though there were significant differences between her trial and preliminary hearing testimony on this important point.

In arguing against the possibility of specific prejudice to the penalty verdict in this case, respondent reels off a variety of assertions in support of its position that Montes was most culpable for the murder. As discussed at the outset of this reply brief, many of respondent's theories and assertions find no support in the record. And in fact, respondent's record citations for certain key assertions, such as the claim that Montes was seen with "the gun," are unsupported and misconstrue the record. (See discussion at outset of reply brief.)

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other people, including Hawkins, Gallegos and Varela, in the bathroom and that the larger gun was the focus of attention. (21 RT 3606-3607.) At that time she recalled that the gun in the bathroom was silver. (21 RT 3515-3516.) In an earlier statement Speck told Clark, Anderson and Mitchell that the gun in the bathroom had a colored handle on it. (21 RT 3629.)

Finally, as explained in Montes' opening brief, the admonition eventually given by the court at the end of argument did not cure the harm because it was both too remote and too generic. (AOB at p. 445.) This general admonition that "the arguments of the attorneys, as already stated, are not evidence" did not tell the jurors to disregard the improper comment or any fact implied from it. It is therefore reasonably possible that the misconduct affected the jury's penalty decision.

XXXII.

THE PROSECUTION MUST BE HELD ACCOUNTABLE FOR FAILING TO PREVENT ITS WITNESS FROM MENTIONING INFORMATION THE TRIAL COURT HAD FOUND INADMISSIBLE.

A. THE ISSUE WAS NOT FORFEITED.

Montes sought and obtained an *in limine* ruling from the court prohibiting witnesses from mentioning that Montes' cell was located in the maximum security area of the jail. (41 RT 7217.) Notwithstanding the court's clear directive on this point, one of the prosecution's witness testified during direct examination that Montes' cell was in the maximum security area. (41 RT 7302.)

Respondent claims the issue was forfeited because counsel for Montes did not seek an admonition. (RB at p. 169.) Montes disagrees. As respondent acknowledges, a request for an admonition is not required unless it could have cured the harm. Respondent does not suggest what sort of admonition could have unrung this particular bell. Moreover, any effort to cure the harm would only have drawn further attention to the evidence, and could not have erased it from the jurors' minds. (See *People v. Bentley* (1955) 131 Cal.App.2d 687, 690 ["mere direction that the testimony should be disregarded was no antidote" for the jury's receipt of the prejudicial information].)

The whole purpose for seeking an in limine ruling was to prevent this situation from occurring. As a proper objection was made to this evidence, and no admonition could have cured the harm once the witness had testified, the objection was sufficiently preserved and must be addressed on the merits.

B. THE PROSECUTOR WAS UNDER AN OBLIGATION TO INSTRUCT HIS WITNESSES NOT TO MENTION THIS EVIDENCE.

Respondent agrees that a prosecutor has an obligation to guard against his witness testifying to inadmissible information in front of the jury. Respondent nevertheless contends that the error in this case should not be placed at the feet of the prosecutor. (RB at p. 170.) This was the prosecution's witness, however. And as this Court explained in *People v. Leonard* (2007) 40 Cal.4th 1370, 1406, "[a] prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement."

In *Leonard*, the prosecutor had no reason to anticipate that his witness would refer to defendant as the "thrill killer" in his testimony. In the instant case, however, the prosecutor knew his witness would be

testifying about the location of Montes' cell and the location of the cell had been the subject of the defense *in limine* motion. The prosecutor therefore had a reason to anticipate that this particular witness might testify that the cell was located in the maximum security area (which he did). Because the prosecutor asked a question likely to elicit the excluded information, he committed misconduct even though he may not have intended to elicit that reference. (*Leonard, supra*, 40 Cal.4th. at p. 1406.) Under these circumstances, the prosecutor had an obligation to admonish the witness not to mention the location of Montes' cell. From the fact that the witness testified to this inadmissible information it can be readily inferred that the prosecutor failed to properly admonish his witness.

Further, it is irrelevant whether the prosecutor deliberately failed to admonish his witness and then intentionally elicited the objectionable testimony. The injury to appellant from the prosecutor's failure to control his witness was the same even if it was done inadvertently. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

C. IT IS REASONABLY POSSIBLE THAT THE EVIDENCE AFFECTED THE JURY'S DECISION TO SENTENCE MONTES TO DEATH.

As the error took place at the penalty phase, it is harmful if it is reasonably possible that it affected the jury's decision to impose a death verdict. (*People v. Brown* (1988) 46 Cal.3 432, 446-448; *Chapman, supra*, 386 U.S. at p. 24.) For the reasons given in Montes' AOB (see AOB at pp. 451-452) there is a reasonable possibility that the testimony contributed to the penalty verdict, particularly given the prosecutor's closing argument which emphasized that a death sentence would help protect other inmates and jail staff. (See 45 RT 7890-7895.)

XXXIII.

THE PROSECUTOR COMMITTED MISCONDUCT DURING HIS EXAMINATION OF DEFENSE PENALTY PHASE WITNESSES.

A. IT WAS MISCONDUCT FOR THE PROSECUTOR TO ASK DR. DELIS QUESTIONS ABOUT WHETHER HE HAD ADMINISTERED OTHER TESTS TO MONTES WHEN HE KNEW THE ANSWER TO THE QUESTION WAS "NO."

Respondent finds Montes' claim of error on this point unclear. To clarify - it was determined at a 402 hearing that Dr. Delis administered only *two* tests to Montes, the Wechsler Adult Intelligence Scale and the Hiscock Memory Test. (43 RT 7591-7593.) At the conclusion of the 402 hearing the prosecutor declared himself satisfied with the legitimacy of Dr. Delis' tests, stating "Looks like it was a valid test that he administered." (43 RT 7609.) Prompted by questions D.D.A. Mitchell asked during the 402 hearing, the defense raised concerns that Mitchell was implying that defense counsel had essentially "prepped" Montes with other tests before he was tested by Dr. Delis. Mitchell assured the court he would not get into that area. (43 RT 7609.)

Despite these assurances, Mitchell asked Dr. Delis several questions in front of the jury about whether Delis had given Montes additional tests. Mitchell also asked whether Delis had been asked "not to consider certain other tests that you gave Mr. Montes." (43 RT 7690-7691.) These

questions (all of which had objections sustained), especially the last one, implied that Dr. Delis had given Montes other tests that the jury was not aware of.

Since the prosecutor knew the answer to his questions would be "no," it seems clear that the purpose of asking them was to insinuate to the jury - by virtue of the questions themselves - that other testing had been performed and was being kept from them. This was improper. (*Cf. People v. Wagner* (1975) 13 Cal.3d 612, 619 ["the prosecutor must act in good faith and with the belief that the acts or conduct specified actually took place."].)

It is true the main concern voiced by counsel for Montes at the conclusion of the 402 hearing was that the prosecutor seemed to be implying the defense had gone over the tests with Montes before they were administered to try and "prep" him. This was one possible inference which could be drawn from Mitchell's questions. But beyond that it was still improper for the prosecutor to ask Dr. Delis questions for the purpose of insinuating facts (that Delis had administered other tests) he knew he could not prove.

Respondent notes that the questions were intended "to undermine the reliability of the tests and the expert's opinion." (RB at p. 174.) That is

exactly the problem, since the method used by the prosecutor to do this was to ask bad faith questions to which he knew the answer would be "no." "The impropriety of the prosecutor's conduct in this case was not cured by the fact that his questions elicited negative answers." (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

Respondent also argues that it was "entirely permissible to inquire whether the mental health expert reviewed or administered additional tests that would support his opinion and ultimate conclusion." (RB at p. 175.) Respondent overlooks the fact that the prosecution asked those questions during the 402 hearing -- and learned that Dr. Delis had *not* administered any other tests. Since respondent knew the answers to his questions would be "no" it was misconduct for him to ask them again in front of the jury.

As to prejudice, the improper questions were designed to undermine key mitigation evidence concerning Montes' low intellectual functioning. It is reasonably possible that the jury construed these questions in the manner intended by the prosecutor, thereby minimizing the strength of the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153 [court decides whether there is "a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner"].) In a case as closely balanced as this one (see AOB pp. 121-130) it is also reasonably possible

that any error which detracted from this important evidence in mitigation affected the jury's decision to return a verdict of death.

B. THE PROSECUTOR ASKED IMPROPER QUESTIONS ABOUT MONTES' ALLEGED GANG INVOLVEMENT.

Montes restricted his direct penalty phase evidence to his childhood until the age of twelve, and did not present any character evidence (good or bad). Despite this limitation, during cross-examination the prosecutor asked a number of defense penalty witnesses about supposed gang activities after Montes moved in with his father. As explained in the opening brief (AOB 470-475), these questions were improper because they were beyond the scope of direct examination; placed inadmissible character evidence before the jury; were an improper effort to introduce evidence in contravention of section 190.3; and referred to "facts" outside the record.

In the first part of its response, respondent mixes in assertions that the error was waived for failure to object, and claims that the objections which were made sufficed to keep the improper information from the jury. With regard to preservation of the error for review, Montes addressed this in his opening brief. (AOB at pp. 469-470.)

Despite Montes' objections, irrelevant and prejudicial information was placed before the jury by improper questions insinuating gang activities, as well as by some of the answers elicited. According to

respondent, the prosecutor asked Manuel and Gregory Limones only whether Montes had been "involved with the wrong crowd." (RB at p. 176.) In fact, the prosecutor asked Manuel Limones specifically about gangs. "[MR. MITCHELL]: When was it he [Joseph] started becoming involved in a *gang* in Colton?" (42 RT 7544, italics added.) In a follow up question the prosecutor asked Limones whether he "saw what he [Joseph] was getting into..." in Beaumont while living with his father. (42 RT 7555.)

And, as respondent acknowledges, the prosecutor also asked questions of Yolanda Mendoza and John Garcia about information they may have had concerning gang involvement by Montes. (44 RT 7719; 44 RT 7732-7734.) With regard to John Garcia, the prosecutor asked numerous questions about possible gang involvement. Montes initially made objections to these question, which were overruled. After his objections were overruled, the prosecutor continued to ask questions, specifically about gangs and Montes' "gang" tattoos. Mr. Garcia also confirmed that Montes' mother had asked him to speak to Montes "about his being involved with the wrong kind of people or being in gangs and that he should change his life." (44 RT 7732-7734.)

As discussed in his opening brief, this misconduct cannot be found harmless beyond a reasonable doubt. Contending otherwise, respondent

quotes at length from this Court's decision in *People v. Ramirez* (1990) 50 Cal.3d 1158, which found misconduct in a similar kind of situation where the prosecutor elicited evidence beyond the scope of proper cross-examination. Despite finding error, the *Ramirez* decision found that penalty reversal was not required because the evidence elicited was innocuous in comparison with properly admitted evidence of prior criminality.

Montes' case presents quite a different picture from that in *Ramirez*, however. Ramirez was convicted of personally murdering a woman, with special circumstances of rape and sodomy. Ramirez had also been previously convicted of forcible rape. Montes' prior criminal conviction consisted of a residential burglary for which he was not sentenced to prison. In Montes' case, therefore, the prejudicial effect of the gang allusions was not nearly as innocuous as in *Ramirez*.

Moreover, Montes' jury was told to disregard the instructions it was given in the guilt phase. This would have included the court's instruction that "gang membership was admitted for the limited purpose of showing, if believed, that there existed an association between two or more of the defendants at the time of the alleged crimes. It cannot be considered for any other purpose." (32 RT 5827.) The jury was therefore left free to

consider the implication of gang membership for improper and prejudicial purposes in its penalty determination.

For the reasons discussed in his opening brief (AOB at pp. 475- 477) this error cannot be found harmless beyond a reasonable doubt.

C. IT WAS MISCONDUCT FOR THE PROSECUTOR TO ASK DEFENSE PENALTY PHASE WITNESSES QUESTIONS WHICH ASSUMED MONTES PERSONALLY KILLED MARK WALKER.

The questions posed by the prosecutor to Montes' penalty phase witness which assumed, as fact, that Montes had killed Mark Walker essentially expressed to the jury Mitchell's personal belief that Montes was, of the multiple defendants, the one who shot and killed Mark Walker. Mitchell did not ask how the witnesses felt about Montes' *conviction* for murder, premised on a felony-murder theory. They were phrased as: "The *fact* that he killed" Mark Walker. (e.g. 44 RT 7745-7746).

As explained in his opening brief (AOB at pp. 480-485) these questions were improper, and conveyed that the prosecutor had personal information or belief that Montes was the one who pulled the trigger. This perception was reinforced by the prosecutor's penalty closing argument, which sought to cast Montes as the most blameworthy of the defendants (despite the contrary position taken in the guilt phase in which the prosecutor portrayed all defendants as equally blameworthy). (Volume 4 of

Reporter's Transcript of Pretrial Proceedings, hereinafter "PRT" at pp. 799, 893; 36 RT 6519-6520.) Further, as phrased, the questions elicited answers such as "I don't know" and "no comment" which made it appear as though the witnesses agreed with the premise of the question, that Montes had personally killed Walker. (*United States v. Fumai* (1952) 7 C.M.R. 151, 155; *People v. Weaver* (1980) 90 Ill.App.3d 299, 303.)

Far from being "frivolous" this misconduct provides a compelling reason for reversing the death sentence in this case. (*People v. Gay, supra*, 42 Cal.4th 1195, 1227 [whether or not defendant was the actual shooter is important to a determination of penalty].)[55]

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[55]. Respondent again makes unsupported assertions that Montes was seen in possession of the murder weapon. (RB at p. 179.) As explained at the outset of this reply brief, the record does not support any such conclusion.

XXXIV.

THE PROSECUTOR'S MISCONDUCT IN FAILING TO PROVIDE NOTICE TO THE DEFENSE OF HIGHLY INFLAMMATORY IMPEACHMENT EVIDENCE HE PLANNED TO USE WHEN QUESTIONING MONTES' WIFE CANNOT BE FOUND HARMLESS TO THE PENALTY DETERMINATION BEYOND A REASONABLE DOUBT.

To review, during his cross-examination of Diana Montes (called as the defense's final penalty phase witness), the prosecutor posed two successive questions to Diana:

> [MR. MITCHELL]: In fact, you yourself are willing to commit violent acts to try and help him get off, aren't you?"
> .....
>
> [MR. MITCHELL]: Do you recall writing a letter to your husband in which you asked him to get you the names of the people involved in the prosecution so you could give them to somebody?"

Montes' first objection to this line of questioning was overruled. The prosecutor then approached Diana with a letter in hand, showed it to her, and asked if that was her handwriting. After Montes' counsel asked to be shown the letter before the witness was questioned further, the court interrupted the examination and called a brief recess. (44 RT 7756-7757.)

During the recess Montes moved for a mistrial. His motion was denied. It was agreed there would be no further questioning about the undisclosed letter. In response to defense counsel's request that the court

admonish the jury not to infer anything from the questions posed by Mr. Mitchell, the court simply told the jury to disregard the last question, which was "Was this your handwriting?" (44 RT 7761-7767.)

Respondent seemingly agrees that it was improper for the prosecutor to withhold this letter from defense counsel when he clearly intended to use it in his examination of Diana Montes. (RB p. 183.) Respondent thus focuses its argument on whether it is reasonably possible the error affected the judgment. (RB 183.)

As explained in his opening brief, the most crucial points of which are reviewed herein, in the circumstances of this case it cannot be determined beyond a reasonable doubt that this error had no effect on the jury's decision to impose a penalty of death instead of life without possibility of parole. (*People v. Gamache* (2010) 48 Cal.4th 347, 399, fn. 22 [state standard for evaluating error at the penalty phase of a capital trial is effectively identical to *Chapman v. California* standard for federal constitutional error].)

Respondent seeks to downplay the effect of the letter, arguing that it was never actually "used" by the prosecutor, and that the prosecutor did not question the witness about its contents. (RB p. 184.) To the contrary, the letter was very effectively "used" by DDA Mitchell. Mitchell did more

than refer to some hypothetical "letter." He brought a letter into court and employed it during his cross-examination of Diana Montes. After "asking" Diana about her willingness to commit violent acts to help her husband, Mitchell immediately followed up with his question whether she had written a letter asking Montes for witness names so they could be "given to somebody[56]." Mitchell then showed Diana the letter, asking if this was her handwriting.

Mitchell clearly "used" the letter to plant into the jury's minds the idea that Montes and his wife had conspired to harm witnesses in the case. He also questioned Diana about its contents. No more damage could have been done had the actual letter been introduced into evidence.

The only curative admonition given by the court was that the jury disregard the prosecutor's last question, which was "is this your handwriting?" In no way did this admonition cure the harm to the penalty phase defense caused by the prosecutor's misconduct.

Respondent also contends that there is no reasonable possibility the error affected the outcome of the penalty determination. Part of respondent's argument makes no sense, seemingly focusing on how a

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[56]. Given the tenor of the questions, with words like "violence," the only reasonable conclusion was that this was an effort at witness intimidation.

defense decision to forego calling Diana would not have detracted from the penalty phase evidence. In fact, this helps explain why the error *was* harmful. As explained by Montes' trial counsel, their knowledge of the letter would have affected their tactical decision about what witnesses to call. (44 RT 7761.) Had the defense known of the letter they could have made an informed decision whether to call Diana as a witness. And even had they decided to call her, the defense would have been better equipped to plan her testimony. They could even have elected to present the letter themselves, thus retaining some control over the manner of its presentation.

But speculating about whether Diana Montes would have been called to testify does not address the prejudice that actually occurred here, which was enormous. Because the defense did not know about the letter, they called Diana Montes as their final penalty phase witness. The intent had obviously been to leave the jury with some resonating positive reasons for sparing Montes' life -- the love of his wife and child. Instead, the jurors were left with the impression that Montes and Diana had conspired to harm witnesses in the case. In this way the misconduct not only deprived Montes of compelling mitigation evidence, but actually introduced highly prejudicial material which was not otherwise admissible as evidence in aggravation.

As explained in his opening brief (AOB at pp. 492-494) the prosecutor's concealment of the letter resulted in "trial by ambush," denying Montes his rights to due process of law and a fair penalty trial.

Respondent argues that the jury already had evidence about Montes' assault on Gallegos and possession of weapons in the jail, and thus the error was not prejudicial. But the harmful inferences from the letter went far beyond this evidence, suggesting that Montes posed a risk to persons outside the custodial setting. Particularly in a closely balanced penalty case such as this (see AOB at pp. 121-130) there is a reasonable possibility that this very significant misconduct had an effect on the penalty decision.

XXXV.

MONTES' MOTION FOR A MISTRIAL, BASED ON THE FAILURE OF THE PROSECUTION TO PROVIDE DISCOVERY OF THE LETTER USED IN EXAMINATION OF DIANA MONTES, SHOULD HAVE BEEN GRANTED.

As discussed in the preceding argument, and in his opening brief (AOB at pp. 495-504) the prosecutor's use, in front of the jury, of the letter it had improperly failed to disclose to defense counsel was misconduct. The exact contents of the letter were never made known, but the clear import of the prosecutor's remarks to Diana Montes was that the content of the letter concerned the possibility of soliciting violent acts directed at people involved in the case. Although the letter had not come from Montes himself, the extremely prejudicial implications certainly tainted Montes as well as his wife.

Coming as it did at the very end of the defense case, the harm to the penalty phase defense could not have been (and was not) eliminated by any instructions or additional evidence. The trial court therefore abused its discretion when it denied the motion, and this error cannot be found harmless beyond a reasonable doubt.

XXXVI.

MULTIPLE INSTANCES OF MISCONDUCT DURING THE PROSECUTION'S CLOSING PENALTY PHASE ARGUMENT REQUIRE THAT THE DEATH SENTENCE BE REVERSED.

A. STANDARD OF REVIEW.

"In evaluating a claim of prosecutorial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019. Accord, *People v. Monterroso* (2004) 34 Cal.4th 743; *People v. Valdez* (2004) 32 Cal.4th 73, 132-133.)

Once established, misconduct requires reversal of a death sentence if there is a reasonable possibility it influenced the penalty verdict. (*People v. Monterroso* (2004) 34 Cal.4th 743, 785.)

Sometimes this Court has phrased the test slightly differently, instead referring to a "reasonable likelihood" standard: "When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable likelihood the jury construed or applied the ... remarks in an objectionable fashion." (*Brady, supra*, 50 Cal.4th at p. 584.)

At first glance, the language used in *Brady* would seem to be at odds with not only prior opinions, but also constitutional and long-standing rules

that all errors at the penalty phase are evaluated with regard to whether there was a *reasonable possibility* that the error affected the outcome. (E.g., *People v. Brown* (1988) 46 Cal.3d 432, 446-448; *Chapman, supra*, 386 U.S. at p. 24.)

There is no reason why harm caused by prosecutorial misconduct should be treated differently from any other error occurring at the penalty phase of a capital trial. Moreover, this Court also used the "reasonable likelihood" term in *Brady* in referring to the standard for evaluating error at the penalty phase. (*Brady, supra*, 50 Cal.4th at p. 578.) It is thus clear that the two phrases are meant to refer to the same "reasonable possibility" standard.

B. ALL CLAIMS OF MISCONDUCT SHOULD BE ADDRESSED ON THEIR MERITS.

As he did in his opening brief (AOB at pp. 507-508) Montes asks this Court to address his claims of misconduct on the merits, even where no timely objection was interposed (see subsections C-E, *infra).*

C. IMPROPER APPEALS TO PASSION AND PREJUDICE.

1. Asking Jurors To Put Themselves in the Victim's Position and Imagine Details of the Murder from His Perspective.

Although Montes continues to acknowledge that this Court has not found prejudicial error in other cases[57], as explained in his opening brief, Montes believes the argument in this case was so excessive that it would have improperly inflamed the jury to return a sentence of death.

In addition to the authorities cited in his opening brief, other decisions from a sister state (Missouri) have found argument of this sort to be improper, and so inflammatory that reversal of a death sentence was required. In *State v. Storey* (Mo. 1995) 901 S.W.2d 521, the prosecutor argued:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And then-and then, to have your head yanked back by its hair and to feel the blade of the knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

(*Id.* at p. 901.)

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[57]. E.g. *People v. Slaughter* (2000) 27 Cal.4th 1187, 1211; *People v. Rundle* (2008) 43 Cal.4th 76, 194.

The *Storey* Court found the above argument to be "grossly improper" and the prejudice from these comments "undeniable." (*Ibid.*) As such, they were among the reasons Storey's death sentence was reversed.

The Missouri Supreme Court held to this reasoning in *State v. Rhodes* (Mo. 1999) 988 S.W.2d 521. Faced with another prosecutorial argument which asked the jury to try and imagine what the victim went through, the *Rhodes* Court found the error required reversal of the death sentence because "the improper personification denied appellant a fair trial on the issue of punishment." (*Id.* at pp. 594-595.)

The prosecutor's arguments in the instant case are no less egregious than what the prosecution argued in *Storey* and *Rhodes*. Montes therefore urges this Court to reconsider its decisions in previous cases and find that the argument in Montes case was both improper and prejudicial to the penalty verdict in his case.

2. Asking the Jury to Show Montes the Same Mercy He Showed Walker.

For the same reasons given in his opening brief (AOB at pp. 514-517) Montes urges this Court to find that the prosecutor committed prejudicial misconduct by asking the jury to show Montes the same mercy Montes showed Walker and his family.

3. Improperly Appealing to the Juror's Own Personal Fears and Emotions, and Implying the Jurors Were Themselves Victims of the Crime.

Respondent selects but one small passage from what was quoted in Montes' opening brief in support of his argument on this point (see AOB pp. 518-519) and then argues that it is "simply inaccurate" to suggest this passage wrongly cast the jurors as victims. (RB at p. 189.) Montes stands by his assertions and urges this Court to consider the prosecutor's argument in total. Among the points raised during that argument are clear references to the jurors as victims of the offense. For example, the prosecutor argued:

> [MR. MITCHELL]: What you have witnessed yourselves, what you have judged yourselves in this case is such an experience that will forever have an effect on you. Which of you will not dwell on Mark Walker's fate as you send your children out on a Saturday night? Which of you will not consider that just in the back of your minds?
>
> ....
>
> Crimes like what you heard about and judged in this case, they not only effect [sic] us as human beings, they make us cry. They make us hurt. They make us sympathize. They leave their mark on us. They cut so deep they scar our souls.
>
> What you learned in this case, what you've seen in this case, what you heard in this case will forever be inside of you that cold, dark hole, that empty hole that will ache and hurt from the experience of this trial.

(45 RT 7862-7863.)

Fairly read, these comments were intended to, and did, bring the jurors themselves within the circle of victims in this case, along with Mark Walker and his family. Together with other portions of the argument they were a blatant appeal to passion and prejudice at the most visceral of levels, invoking the jurors' fears for their own children, and pointing out how the jurors' lives would be forever changed by the experience of the trial. This argument deprived Montes of a fundamentally fair penalty trial, and were "reprehensible" insofar as they urged the jury to impose a death sentence based on improper considerations. It is reasonably possible that casting the jurors as victims of the offense, and playing to their own fears about their families, affected the decision to impose a sentence of death.

4. Arguing that the Legal System Affords Montes More Rights Than Were Given to Walker.

For the reasons set forth in his opening brief (AOB at pp. 521-522) Montes reiterates his claim that the prosecutor's argument comparing Montes' trial rights with the lack of such rights given to Walker when he was killed was misconduct.

D. THE EXTREME TENOR OF THE PROSECUTOR'S PENALTY PHASE ARGUMENT IMPROPERLY APPEALED TO THE JURORS' PASSIONS AND PREJUDICES, DEHUMANIZING MONTES.

A prosecutor may make vigorous arguments, and even use epithets warranted by the evidence, provided the argument is not "inflammatory and principally aimed at arousing the passion or prejudice of the jury." (*People v. Sanders* (1995) 11 Cal.4th 475, 527.) The prosecutor's argument in the present case did not simply include one or two brief epithets, it was rife with them. The argument in this case was both inflammatory and principally aimed at arousing the passion and prejudices of the jury, and therefore crossed the line between permissible and impermissible argument.

Special attention should be given to the prosecutor's several references to Montes as being less than human. Respondent has not cited, and Montes has not found, any case where this Court has condoned this type of argument, which goes beyond "mere" name calling. The jury was required to make a decision about whether another human being should be sentenced to die. By characterizing Montes as less than human, indeed, someone who "[fell] outside the definition of what it means to be a human being" (45 RT 7882-7883), the prosecutor diminished the jury's sense of responsibility for the life-or-death decision facing them.

E. THE PROSECUTOR IMPROPERLY SUGGESTED THAT THE JURY SHOULD CONSIDER THE EFFECT OF THE CRIME ON MONTES' OWN FAMILY, THEREBY COMMITTING *BOYD* ERROR.

Respondent's reply to this argument does not directly address it. Respondent focuses on how the prosecutor's argument was, or was not, a comment on lack of remorse. (RB at p. 194.) The point Montes is trying to make, however, is that the prosecutor argued that the jury should consider how Montes' family (and particularly those relatives who provided evidence in mitigation on Montes' behalf) had been themselves victimized by Montes' actions. Specifically, the prosecutor argued: "As you consider this as a possible mitigating factor, what you heard from the relatives, consider this: Consider what he has done to those people. Consider that they have been victimized by his conduct, by his crime...." (45 RT 7897.)

As explained in his opening brief (AOB at pp. 526-527), the testimony concerning Montes' character and background, which was admitted as evidence in mitigation under factor (k), should not have been twisted around for use as evidence in aggravation as was done by the prosecutor. As this Court explained in *People v. Boyd* (1985) 38 Cal.3d 762, 775-776, once Montes introduced factor (k) mitigation evidence, the prosecutor was free to produce evidence in rebuttal. But since factor (k) evidence can be only mitigating, it was improper for the prosecutor to

contort it into something which instead was more apt to support a death sentence.

F. ARGUMENT URGING THE JURY TO ACT AS THE "CONSCIENCE OF THE COMMUNITY."

Recognizing, as he did in his opening brief, that this Court has found no error from similar argument (AOB at p. 529), Montes nevertheless requests that this Court reconsider and find such remarks to be improper.

G. IT WAS IMPROPER FOR THE PROSECUTOR TO ARGUE THAT A DEATH SENTENCE SHOULD BE IMPOSED BECAUSE OF "FUTURE DANGEROUSNESS" AND THAT THE JURY BORE RESPONSIBILITY FOR PROTECTING OTHER PEOPLE FROM POSSIBLE FUTURE HARM.

As with subdivision, F, *supra*, Montes has raised this issue primarily to preserve it, but nevertheless requests that this Court reconsider its earlier decisions finding no error from similar arguments.

H. THE IMPROPER ARGUMENTS BY THE PROSECUTOR REQUIRE THAT MONTES' DEATH SENTENCE BE REVERSED.

In individual aspects, and together as a whole, the closing penalty phase argument of the prosecutor rendered the penalty trial unfair, in violation of Montes' right to due process of law, and denied Montes his 8th Amendment guarantee of a reliable penalty determination. Misconduct should also be found under state law because the prosecutor used

reprehensible methods to incite the jury to chose death on the basis of passion rather than as the product of a reasoned moral decision.

XXXVII.

THE PROSECUTOR IMPROPERLY TOLD THE JURY THAT LACK OF REMORSE COULD BE CONSIDERED AS A FACTOR IN AGGRAVATION.

A. THE PROSECUTOR SPECIFICALLY ASSERTED THAT LACK OF REMORSE WAS A FACTOR IN AGGRAVATION.

Respondent acknowledges that post-crime lack of remorse is not a statutory factor in aggravation, and that it is improper for a prosecutor to urge this nonstatutory factor in support of a death sentence. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Respondent goes on to say that comments about lack of remorse are not improper when they only serve to draw the jury's attention to the absence of the mitigating factor of remorse. (RB at p. 200.)

It is true that, according to this Court's decisions, a prosecutor may comment that the defense has not shown evidence of remorse. (*People v. Vieira* (2005) 35 Cal.4th 264, 295-296.) But that is not what happened here. Instead, the prosecutor in this case specifically told the jury that lack of remorse was a factor in aggravation: "This is an aggravating factor, ladies and gentlemen. His complete and utter overt lack of remorse." (45 RT 7885; see also 45 RT 7890, referring to "other aggravating factors, ... such as his overt lack of remorse....") The prosecutor in the instant case made an express assertion that the jury should consider lack of remorse as a

factor in aggravation. In making these arguments he included references to purported post-crime lack of remorse, including references to Montes' demeanor in court. (45 RT 7884-7885, 7899, 7890.) This was improper.

B. THE CLAIM SHOULD BE ADDRESSED ON THE MERITS.

In his opening brief (AOB at pp. 540-541) Montes set forth a number of reasons why this claim should be addressed on its merits.

C. THE PROSECUTOR MADE SEVERAL ASSERTIONS CONCERNING MONTES' SUPPOSED POST-CRIME LACK OF REMORSE, AND WRONGLY ARGUED THAT THIS LACK OF REMORSE WAS A FACTOR IN AGGRAVATION.

As noted, the prosecutor specifically argued in his closing argument that lack of remorse was a factor in aggravation. (45 RT 7885, 7890.)

Respondent relies on language from *People v. Avena* (1996) 13 Cal.4th 394, 439-400, in which this Court found no error in a prosecutor suggesting that the evidence properly admitted in aggravation demonstrated bad character, justifying a death sentence. The *Avena* decision stated that *"Boyd* concerns the *admission* of aggravating *evidence*, not the scope of permissible argument." (*Id.* at p. 439, italics in original.)

In the instant case, the prosecutor made specific reference to Montes' in-court demeanor as evidence of lack of remorse. (45 RT 7899.) As discussed in Argument XXXVIII, *infra*, this was essentially improper

introduction of evidence in aggravation. Thus, there was error here even if one looks only at admission of evidence in aggravation.

In any event, Montes contends that a reading of *Boyd* should not be so limited as to preclude a finding of misconduct in his case. The basis for the *Boyd* decision was that the statutory scheme of listed aggravating and mitigating factors created by the 1978 death penalty initiative "necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination." (*Boyd, supra*, 38 Cal.3d 762, 773.) There would be no reason to prohibit introduction of evidence of a matter not within the listed statutory factors, but nevertheless permit the prosecution to erroneously tell the jury that it can consider other evidence as a factor in aggravation when there is no such factor.

Finally, the *Avena* decision went on to explain that a prosecutor is permitted to argue reasonable inferences from properly admitted evidence *that is relevant to any of the statutory factors in aggravation.* (*Id.* at p. 439-440.) Post-crime lack of remorse is not a listed factor in aggravation. Here, the prosecutor improperly told the jury that it was. *Avena* therefore does not provide authority for approving the prosecutor's erroneous assertions.

What took place in Montes' case went beyond argument. The prosecutor affirmatively misstated the law. This is always misconduct.

(*People v. Hill* (1998) 17 Cal.4th 800, 829.) *Boyd* should not be read so narrowly as to insulate blatant misstatements of the law in which the prosecutor expands the statutory factors in aggravation the jury may consider.

In *People v. Zambrano* (2007) 41 Cal.4th 1082, 1175, this Court found no misconduct because the prosecutor did not state or imply that the defendant's failure to express post-crime remorse was a factor in aggravation; he only argued that the mitigating factor of remorse was not present. But in Montes' case the prosecutor did precisely what is forbidden. He expressly argued that lack of remorse was a factor in aggravation, and in arguing lack of remorse he included Montes' post-crime behavior, up to and including his alleged behavior during trial.

In contrast to other cases in which this Court has considered a similar claim of error, the prosecutor unambiguously told the jury that lack of remorse (including purported lack of remorse up to and including the trial) was a factor in aggravation, when it is not. This was clearly misconduct, which cannot be found harmless beyond a reasonable doubt. (See, e.g., *infra*, subdivision H.)

D. *DOYLE* ERROR.

Montes reasserts his claim that the prosecutor's argument about his lack of expressed remorse was an improper reference to Montes' invocation of his Fifth Amendment right to remain silent. (See AOB at pp. 544-548). As respondent points out, in *People v. Crittenden,* (1994) 9 Cal.4th 83, this Court rejected the argument that prosecution references to a defendant's lack of remorse were error under *Doyle v. Ohio* (1976) 426 U.S. 610, 618. For the reasons set forth in his opening brief, Montes urges this Court to revisit its earlier holding and rule that, at least under the circumstances in Montes' case, it is a due process violation for a prosecutor to comment on a defendant's post-arrest silence, including failure to express remorse.

The reasons underlying the Court's decision in *Doyle* apply to this case. Montes was arrested the day following the offense. In keeping with proper law enforcement standards, he would have been read his *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) rights at that time. And, as noted in his opening brief, once counsel was appointed Montes would have been advised not to discuss the case with *anyone*, including family members. Having been told that he had the right to remain silent, it is patently unfair for the prosecution to have used his assertion of that right against him at the penalty phase.

In *Doyle*, the Supreme Court "held that *Miranda* warnings contain an implied promise, rooted in the Constitution, that 'silence will carry no penalty.'" (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 295, quoting *Doyle, supra*, 426 U.S. at p. 618.) This is so because, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." (*Doyle, supra*, 426 U.S. at p. 617.) Although *Doyle* involved a prosecutor's impeachment of a testifying defendant, its rationale is not limited to the use of silence as impeachment. What is prohibited is the State's use of a defendant's exercise of his right to silence after he had been advised that he has such rights, and implicitly promised that exercise of the right to silence will not be penalized. (*Wainwright v. Greenfield, supra*, 474 U.S. at p. 292.)

Here, Montes was advised by State authorities that he had the right to remain silent. At the penalty phase of his trial the State was permitted to make use of his silence as evidence that he was without remorse. This argument was made in specific reference to Montes' behavior up until, and including, the trial itself. The impermissible references extended to comments made about the defense penalty phase witnesses, since the

prosecutor argued that there was no evidence Montes had expressed remorse to these people. It did not relate solely to Montes' purported actions between the time of the offense and his arrest. This was a clear violation of the implicit promise that silence could not be used against Montes at trial. It was therefore a violation of his right to due process of law. (*Doyle, supra*, 426 U.S. at p. 618.)

E. *GRIFFIN* ERROR.

In *Crittenden*, this Court ruled that a prosecutor may comment on a defendant's lack of remorse so long as he or she does not refer to the defendant's failure to testify. (*People v. Crittenden* (1994) 9 Cal.4th 83.) The comments made by the prosecutor concerning Montes' purported lack of remorse are distinguishable in both content and context from those found acceptable by this Court in *Crittenden*.

In *Crittenden*, the prosecutor's reference to lack of remorse came during cross-exam of defendant's sister who was asked if he had ever expressed remorse in letters he had written to her. The prosecutor's references in his closing argument were confined to the defendant's actions following the killings, made in the context of the prosecutor's review of the circumstances of the crime and the defendant's actions afterward. (*Id* at p. 147.) This Court found that the comments were legitimate references to the

fact that, in communication with numerous individuals, defendant never expressed regret about the murders. (*Ibid.*)

Here, the prosecutor's comments about Montes' purported lack of remorse were much broader. For one thing, there was no evidence that Montes had spoken with all of the family members who testified on his behalf at the penalty phase. More importantly, the prosecutor's remarks about lack of remorse were not confined to Montes' actions around the time of the crime, but included his characterized references to Montes' in-court behavior which, he claimed, showed a continuing lack of remorse[58]. By specifically arguing that Montes' behavior during trial was evidence of a lack of remorse, the prosecutor drew the jury's attention to the fact that Montes did not take the stand at the penalty phase to express remorse, thereby violating the principles established in *Griffin*.

"The Fifth Amendment prohibits a prosecutor from commenting, directly or indirectly, on a defendant's decision not to testify on his own behalf." (*People v. Taylor* (2010) 48 Cal.4th 574, 632, citing *Griffin, supra*, 380 U.S. at p. 613.) Here, though the prosecutor's remarks were not a

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[58]. Recall that Montes was shackled throughout the proceedings with a shock belt.

direct comment on Montes' decision not to take the stand at the penalty phase, they amounted to an indirect comment to the same effect.

F. VIOLATION OF EIGHTH AMENDMENT.

For the reasons given in his opening brief (AOB at pp. 552-553) Montes reasserts his claim that the prosecutor's assertion that his purported post-crime lack of remorse could be considered as a factor in aggravation violated his right to a reliable penalty determination in violation to the Eighth Amendment. Post-crime lack of remorse is not a factor in aggravation. (*Boyd, supra,* 38 Cal.3d at pp. 774.) The prosecutor in this case specifically, and impermissibly, argued that it was. (45 RT 7884-7885, 7889-7890.) In making his argument the prosecutor included references to Montes' in-court demeanor. This interjected an impermissible factor into the sentencing process. The resulting death sentence is unreliable, and must be reversed.

G. DUE PROCESS VIOLATION .

Montes renews the arguments he raised in his opening brief (AOB at p. 554) that the erroneous argument about lack of remorse violated his right to due process of law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

H. THE ERROR, HOWEVER IT IS VIEWED, CANNOT BE FOUND HARMLESS BEYOND A REASONABLE DOUBT.

In his opening brief (AOB at pp. 555-556, Argument XXXVII, subdivision (H), Montes explained why the prosecutor's improper argument about his purported post-crime lack of remorse could not be found harmless beyond a reasonable doubt in the circumstances of this case. Although respondent's brief contains a subdivision H, it appears this was intended to be its Argument XXXVIII, which addresses the prosecutor's references to Montes' in-court demeanor[59]. Respondent thus offers no answer to Montes' assertions that the error cannot be found harmless.

As explained in his opening brief, the prosecutor in this case did more than simply contend that Montes' alleged actions at the time of the crime and in its immediate aftermath demonstrated a lack of remorse which could be considered as a circumstance of the offense. Instead, he argued that Montes' failure to express remorse to family members, and his demeanor in court, demonstrated an ongoing lack of remorse for his actions. He also expressly told the jury that lack of remorse was a factor in aggravation. Because the court refused to instruct the jury (as requested by the defense) that they could only consider the listed statutory factors in aggravation (see Argument XL, *infra*) following the prosecutor's argument,

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[59]. In a footnote at p. 204 of its brief, respondent states that "[r]eferences to Montes's in-court demeanor are separately addressed in Argument XXXVIII. Respondent's brief contains no Argument XXXVIII.

the jury would have considered the absence of remorse expressed during the trial itself as a factor justifying a death sentence.

In this way the jury was led to believe that lack of an *expressed* remorse up until, and continuing throughout the trial, was a factor in aggravation to be used as justification for imposing a sentence of death. This was a deceptive tactic. It was reprehensible because it urged a sentence of death based on an improper factor in aggravation.

As explained at length in the opening brief (AOB at pp. 121-130) this was a close case with regard to penalty. There were significant mitigating factors, and the factors in aggravation were not overwhelming. Accordingly, in this case the prejudice from the prosecutor's improper argument cannot be found harmless beyond a reasonable doubt.

XXXVIII[60].

AS A SEPARATE CLAIM OF ERROR, THE PROSECTOR IMPROPERLY URGED THE JURY TO CONSIDER MONTES' IN-COURT DEMEANOR AS EVIDENCE OF LACK OF REMORSE OR COMPASSION.

Respondent claims that the prosecutor's *only* references to Montes' in-court demeanor related to the fact that Montes seemed upset when his mother spoke about the divorce. (RB at p. 212.) This is not accurate. The prosecutor's remark about Montes appearing upset during his mother's testimony was made in order to juxtapose Montes' supposed lack of emotion during the victim impact evidence presented by the prosecution.

> [THE PROSECUTOR]: The only time he cried when his mother talked about his parents spitting up. You saw the video of Mark Walker's family. You saw the testimony, you heard the testimony of Mark Walker's family. No tear was shed except when you bring up something that is a bad memory for him.

(45 RT 7899.)

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[60]. The prosecutor's references to Montes' in-court demeanor are addressed in the opening brief as a separate claim of error. (See AOB at pp. 557-566.) In a footnote at p. 204 of its brief, respondent states that "[r]eferences to Montes's in-court demeanor are separately addressed in Argument XXXVIII." However, there is no separate Argument XXXVIII in the brief. Instead, respondent lumps it into its discussion on lack of remorse, addressing it only in its error discussion in Argument XXXVII, subdivision H.

Respondent points out that the record does not indicate whether the jurors were watching Montes during the trial. (RB p. 212.) This does not ameliorate the error; instead it illustrates it. If the jurors were not watching Montes, they would be relying on the prosecutor's characterizations rather than their own observations. As a result the prosecutor improperly referred to facts not in evidence, offering his own views as truth for the jury's consideration.

This error transgressed Montes' rights to have the jury decide the question presented to them on the basis of evidence introduced as proof at trial (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485) and subject to cross-examination. (*California v. Green* (1970) 399 U.S. 149, 158; *People v. Bolton* (1979) 23 Cal.3d 208, 215, fn. 4.) The references to Montes' in-court demeanor were patently improper, and were thus both deceptive and reprehensible.

Further, as Montes has pointed out previously, there were case-specific reasons why his courtroom demeanor was not a proper gauge of his actual feelings. Most notably, he was forced to wear a shock belt during the entire trial. The domination obtained by the shock belt depends on its ability to create fear in the users. "Manufacturers of the stun belt emphasize that the belt relies on the continuous fear of what might happen if the belt is

activated for its effectiveness." (*Wrinkles v. State* (2001) 749 N.E.2d 1179, 1194, citing Amnesty International, Stopping the Torture Trade 29 (2001).) This Court has accordingly recognized that requiring a defendant to wear a shock belt may adversely affect his demeanor in the presence of the jury. (*People v. Mar, supra*, 28 Cal.4th at p. 1205.)

Respondent makes some vague and inaccurate arguments concerning prejudice from this misconduct. Specifically, respondent contends the error was "harmless in light of the 'ample evidence' that showed Montes to lack credibility." (RB at p. 212.) Since Montes did not testify at trial, and no statement of his was introduced into evidence, Montes' credibility was simply not an issue for consideration.

Further, respondent refers to a "demonstrated propensity to engage in violent acts after the crime and while in prison[61]." In fact, Montes engaged in one violent act - an assault on his co-defendant Gallegos (the person actually seen in possession of the murder weapon on the night Mark Walker was killed). This one incident does not rise to the level of a "propensity to engage in violent acts after the crime." In addition, Montes had never been to prison before his conviction for this offense.

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[61]. Montes had never been to prison.

Finally, as addressed throughout this brief, the evidence respondent relies on in its efforts to cast Montes in the worst possible light is often not supported by the record. (See discussion at outset of this reply brief, supra.) Consequently, respondent's arguments that the error could not reasonably have affected the penalty outcome must be rejected.

XXXIX.

THE CUMULATIVE EFFECT OF THE PROSECUTORIAL MISCONDUCT REQUIRES THAT MONTES' DEATH SENTENCE BE REVERSED.

As is the case with Argument XXXVIII, respondent's brief does not address this as a separate claim, but instead subsumes it under Argument XXXVII (addressing argument about lack of remorse). In respondent's brief, this argument is designated as Subdivision "I" of XXXVIII, rather than XXXIX (the argument heading in the Appellant's Opening Brief).

For all the reasons discussed above and in his opening brief (AOB at pp. 436-449 and 505-567), this Court should find that the cumulative effect of the misconduct deprived Montes of his rights to due process of law, a fair jury trial and a fair, reliable and nonarbitrary penalty determination. (U.S. Const. Amends. 5th, 6th, 8th, and 14th.) Accordingly, his death sentence should be reversed.

PENALTY PHASE INSTRUCTION ISSUES

XL.

THE TRIAL COURT SHOULD HAVE GIVEN MONTES' REQUESTED INSTRUCTION DIRECTING THE JURY THAT IT COULD ONLY CONSIDER THE LISTED STATUTORY FACTORS AS AGGRAVATING CIRCUMSTANCES.

Montes' special instruction "P-T," a supplement to CALJIC No. 8.85, would have informed the jurors that they could only consider the listed statutory factors in aggravation. (28 CT 7594.) The proposed instruction was a correct statement of the law, and in previous cases this Court has opined that it is an appropriate instruction to be given when requested. (*People v. Williams* (1988) 45 Cal.3d 1268, 1324; *People v. Sulley* (1991) 53 Cal.3d 1195, 1242; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275, fn. 14.)

The issue here is essentially whether CALJIC No. 8.85 is ambiguous and thus subject to an erroneous interpretation. To determine whether there was error in the trial court's refusal to give the requested clarifying instruction the inquiry first focuses on whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyd v. California* (1990) 494 U.S. 370, 380; see also *People v.*

Carrington (2009) 47 Cal.4th 145, 192; *People v. Berryman* (1993) 6 Cal.4th 1048, 1100; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

"Reasonable likelihood" is synonymous with "reasonable possibility." (*Stricker v. Greene* (1999) 527 U.S. 263, 299, (Souter, J., concurring and dissenting); *United States v. Bagley* (1985) 473 U.S. 667, 679, fn. 9 (opinion of Blackmun, J.); *Ventura v. Attorney General, Fla.* (2005) 419 F.3d 1269, 1279, fn. 4.) Thus, in evaluating whether there was error the state must bear the burden of proving beyond a reasonable doubt that the jurors did not apply the instruction to permit consideration of aggravating evidence other than the specifically enumerated factors. (*Ibid.*)

The instruction is not to be judged in isolation, but must be viewed in the context of the instructions and the trial record as a whole. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.)

Respondent cites to *People v. Berryman* (1993) 6 Cal.4th 1048, 1100, as support for its position that there was no error in refusing to give a similar instruction. However, *Berryman* took into account questions and comments by the prosecutor before reaching the conclusion that there was "no reasonable likelihood that the jury would have construed or applied the standard instruction" in a manner which would have permitted it to consider

non-statutory factors. In that respect, Montes' case differs significantly from *Berryman*.

As explained in the opening brief (AOB at pp. 571-573), there were several compelling reasons for giving the requested instruction in this case. For these same reasons, the refusal in giving the instruction cannot be found harmless beyond a reasonable doubt.

Specifically, in Montes' case the jury was expressly told that it should consider *all* the evidence from both phases of the trial in reaching its penalty decision. Since the jury was not limited to the penalty phase evidence, they were free to consider the gang evidence presented at the penalty phase, even though this was not a proper factor in aggravation. And to be sure that the jury did keep this gang evidence in mind during its penalty deliberations, the prosecutor repeatedly asked improper questions seeking to elicit testimony about Montes' alleged gang involvement.

Respondent seemingly complains that Montes did not specifically argue that the instruction should be given out of concern that the jury would consider the gang evidence admitted in the guilt phase. (RB p. 215.) But respondent cites no authority suggesting that the defendant must articulate every possible argument in support of an instruction he has requested in order to raise those grounds in discussing prejudice on appeal.

Respondent also claims that gang evidence was properly considered as evidence under factor (a), the circumstances of the crime because of its theory, new on appeal, that "Montes killed Walker primarily to earn respect and entry into the gang." (RB at p. 215.) There was no evidence of this in the record, and it was not the theory of the prosecution at trial. Nowhere in either its opening or closing arguments did the prosecutor argue that Walker was killed so that Montes could gain entry into a gang.

Respondent points to no other point in the proceedings where that theory was advanced by the prosecutor. Rather, the prosecutor's theory was that Walker was carjacked to get the use of his car, and possibly to take his money, and killed to prevent him from identifying his assailants. (See, e.g., 12 RT 1944-1946; 12 RT 1958; 44 RT 7873, 7883-7884 ["Consider what is going through Joseph Monte's mind as he ripped that young life away from this earth. If I let him live, I'll go to jail. He will report me and my gang banging friends. We got our ride. We got a bonus of $200.00. You can't let him live. We'll get caught. He knows us. That is what is going through his mind."].)

According to respondent, the prosecutor "did not present extraneous, non-statutory factors." (RB at p. 214.) This assertion completely overlooks (as does respondent's argument on this point) the prosecutor's clear

statement that Montes' post-crime lack of remorse was a factor in aggravation. (See AOB, Argument XXXVII and 45 RT 7865, 7884-7885, 7890, 7899.)

Moreover, the prosecutor specifically invited the jury to consider evidence presented at the guilt phase in making its penalty determination. (41 RT 7251 - opening argument.) In fact, the prosector told the jury that the guilt phase evidence was the "bulk" of what it should consider in making its penalty decision. (45 RT 7870 - closing argument.) This included the gang evidence.

The prosecutor made it clear that this was intended to include the gang evidence during discussions about Ms. Koahou's testimony regarding the vandalism of her son's grave memorial. The prosecutor asserted: "The limitations on the gang evidence that was in issue at the guilt phase isn't something that's at issue here" and expressed his view that "I don't think the jury is limited at this point as to how they consider evidence of what they had in the guilt phase. But I know that it's in issue right now in these proceedings." (42 RT 7432.)

During closing penalty phase arguments, when discussing the "circumstances of the crime" factor, the prosecutor told the jury that this was "a very broad concept. It's a large umbrella that covers enormous

amount of facts and enormous amount of emotions...." (44 RT 7871.) "It also includes what his attitude was towards the crime." (44 RT 7871.)

The standard of prejudice for instructional error at the penalty phase is whether or not there is a reasonable possibility that error affected the outcome. (*People v. Rowland* (1992) 4 Cal.4th 238, 282.) This "reasonable possibility" test is "the same in substance and effect" as the *Chapman* test applied to federal constitutional error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) Here, it is reasonably possible that the error affected the outcome of the penalty trial.

XLI.

BECAUSE THE PROSECUTOR IMPROPERLY ARGUED THAT POST-CRIME LACK OF REMORSE COULD BE CONSIDERED AS A FACTOR IN AGGRAVATION, THE TRIAL COURT HAD THE RESPONSIBILITY TO GIVE A PRECLUSIVE INSTRUCTION TO CORRECT THIS ERROR.

According to respondent, "Montes concedes he never objected to these comments and cannot now challenge them on appeal." (RB at p. 216.) Although it is true Montes acknowledged that he never objected to these comments, he has never conceded that they cannot be challenged on appeal. (See AOB at p. 540.) Moreover, this argument is premised on the trial court's inherent powers and duties to instruct the jury on the principles of law necessary to the jury's understanding of the case. By its very nature, a contention that the court failed in this duty is not subject to "waiver." (See RB at p. 216.)

This Court has held that lack of remorse can be considered by the penalty jury as a "circumstance of the crime" provided it is just that -- a circumstance of the crime. Clearly, however, a defendant's asserted lack of remorse long afterwards is not a "circumstance of the crime" and cannot be considered as a factor in aggravation. In Montes' case, the prosecutor crossed this line when he included arguments that Montes had never expressed remorse for his actions, and that his in-court demeanor was

evidence of a lack of remorse -- and then specifically argued that lack of remorse could be considered by the jury as a factor in aggravation. (See AOB Argument XXXVII, AOB at pp. 537-538.)

Under these circumstances a trial court's responsibility to instruct the jury on the law necessary for its understanding of the case (*People v. Breverman* (1998) 19 Cal.4th 142, 154; and see *People v. Green* (1980) 27 Cal.3d 1, 68) should be held to require a preclusive instruction to correct the prosecutor's legal misstatements in argument. No such instruction was given here. As a result the jury would have erroneously believed that lack of remorse - even lack of remorse years after the crime - could be considered as a factor in aggravation. As the error cannot be found harmless beyond a reasonable doubt, (see AOB, Argument V, subsection H.2) the death sentence must be reversed.

XLII.

THE TRIAL COURT'S ERROR IN REFUSING TO GIVE MONTES' REQUESTED INSTRUCTION WHICH WOULD HAVE TOLD THE JURORS NOT TO "DOUBLE COUNT" CIRCUMSTANCES OF THE CRIME AND FELONY SPECIAL CIRCUMSTANCES OR MULTIPLE SPECIAL CIRCUMSTANCES ENCOMPASSING ONE COURSE OF CONDUCT CANNOT BE FOUND HARMLESS BEYOND A REASONABLE DOUBT.

Montes' requested instruction contained two separate admonitions against "double counting." The first would have instructed the jury not to count as aggravating circumstances any "circumstances of the crime" which were also "special circumstances." The second admonition would have directed the jury not to consider as an aggravating factor multiple special circumstances which encompassed only one course of action. (28 CT 7603.)

Respondent acknowledges that where, as here, a defendant has requested that the court give an instruction against "double counting," it is error for the trial court to refuse it. Instead, respondent argues that the error in refusing Montes' "double counting" instruction can be found harmless beyond a reasonable doubt because, in the absence of prosecutorial argument urging the jury to double-count, it was unlikely the jury would have done so. (RB at p. 219.) Montes disagrees.

As pointed out in his opening brief (AOB at pp. 580-583), the instant case is unique in that several felony offenses were alleged which did not directly parallel the felony special circumstances. (RB at p. 230.) Robbery, kidnapping and carjacking were the felonies relied on as the basis for the felony-murder theory of first degree murder. (27 CT 7352.) The separately-alleged substantive felony offenses were kidnap during a carjacking and carjacking. Finally, the special circumstances alleged were robbery, kidnap for robbery and kidnapping.

Essentially, the jury was variously presented with five different felony-based allegations arising from one course of conduct. As a result there was a significant risk that the jury would count, as circumstances of the crime, kidnap during a carjacking and carjacking, and then again count those same "circumstances" as the "special circumstances" of robbery, kidnap for robbery and kidnapping. Thus, even without any argument by the prosecutor, it was reasonably possible that the jury would improperly make multiple use of the same aggravating factor.

It is also apparent that the kidnapping special circumstance is a lesser-included offense of kidnap for robbery, and therefore must be reversed. (*People v. Lewis* (2008) 43 Cal.4th 415, 518.) Montes' proposed instruction would have told the jury that "multiple special circumstances

should be considered by you only once." (28 CA 7603.) In the absence of Montes' requested instruction the jurors were guided only by CALJIC No. 8.85[62], telling them to consider the existence of "any special circumstances found to be true." (44 RT 7977.) Following this instruction the jury would have considered three special circumstances as factors in aggravation instead of two.

Earlier in his reply brief, in Argument XXII, Montes discussed this Court's decision in *People v. Melton* (44 Cal.3d 713), which rejected application of section 654 to preclude a penalty phase jury from considering multiple special circumstances based on independent acts committed as part of one indivisible course of conduct. But the instant case does not come within the *Melton* ruling because here one of the circumstance found true was actually a lesser-included offense of another[63].

This difference is important. *Melton* specifically distinguished cases from other states, such as *State v. Goodman, supra*, 298 N.C. 1 and *Provence v. State, supra*, 337 So.2d 783, 786 in which the special

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[62]. The opening brief erroneously cites to CALJIC No. 8.84.1 as the source of this instructional language. In fact, the language comes from CALJIC No. 8.85.

[63]. As noted earlier **(See Argument XXII, at pp. ____)** Montes has not found any cases which address this situation where one of the special circumstances alleged and found true was a lesser-included offense of another.

circumstances were simply restatements of the same conduct. According to *Melton*, "[i]n none [of these cases] did the 'overlapping' circumstances at issue focus on separate culpable *acts* of the defendant, they simply restated in different language the single criminal objective from which the murder arose." (*Melton*, 44 Cal.3d at p. 767 (emphasis in original).

Here, Montes' penalty phase jury was instructed to consider, as a factor in aggravation, three special circumstances when there should only have been two[64]. This improperly inflated the risk that the jury would impose a sentence of death. (*People v. Harris*, *supra*, 36 Cal.3d at p. 67; accord, *People v. Allen, supra*, 42 Cal.3d at p. 1273.) "'When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.'" (*Brown v.*

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[64]. The jury was instructed with CALJIC No. 8.84.1, which stated in relevant part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> A. The circumstances of the crime of which the defendant was convicted in the present proceeding **and** the existence of any special circumstances found to be true.

(45 RT 7977, emphasis added.)

Sanders, *supra*, 546 U.S. at p. 221, quoting *Stringer v. Black*, *supra*, 503 U.S. at p. 232.)

Respondent asserts that the claim should be rejected because this Court has found that CALJIC No. 8.84.1 is not erroneous or misleading. (RB at p. 219.) But Montes is not arguing that the trial court erred by giving CALJIC No. 8.84.1. He is contending that the court erred when it *refused* to give an instruction requested by the defense which would have specifically directed the jury not to double-count the alleged felonies. Such an instruction was necessary in this case because of the way the felonies had been pled. Even if CALJIC No. 8.84.1 is not erroneous on its face, it has no affirmative effect in *preventing* the double-counting which would have occurred here.

It was clearly error that the penalty jury considered an invalid special circumstance. This error requires reversal of the death sentence. "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Sanders, supra*, 546 U.S. at p. 220, emphasis in original.)

Unlike *Sanders*, the jury in Montes' case could not give aggravating weight to the additional special circumstances under the more general "circumstances of the crime" factor. Because the additional special circumstance was not based on independent conduct, it would not have been considered as a "circumstances of the crime" for purposes of aggravation. An improper factor in aggravation was thus added to the scale, rendering the death judgment unconstitutional. The penalty verdict must therefore be reversed.

XLIII.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE PENALTY PHASE JURY THAT MONTES WAS ENTITLED TO THE INDIVIDUAL JUDGMENT OF EACH JUROR.

Respondent correctly notes that the trial court instructed the jurors at the guilt phase with CALJIC No. 17.40. What respondent does not clearly address is the fact that the penalty phase jury was expressly told to *disregard* all instructions given in the guilt phase. (44 RT 7970-7971.) The trial court also refused to give Montes' requested instruction "P-X" based, in part, on CALJIC 17.40.

Respondent argues there was no error from the lack of instruction on the need for an individual decision by each juror. According to respondent, an instruction directing the jury that Montes was entitled to the individual judgment of each juror was merely duplicative of CALJIC Nos. 8.84.1[65] and

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[65]. CALJIC 8.84.1:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice

8.88[66] which were given at the

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against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

[66]. As given in this case, CALJIC No. 8.88 provided:

It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the

penalty phase. (RB at p. 220.)

Respondent has a curious conception of "duplication." In fact, neither of these instructions said anything at all about the individual opinion of each juror. Neither told the jurors that the defense (and the prosecution) were entitled to the individual opinion of each juror, or that they must individually decide each question involved in the penalty phase decision. Nor did any of the other penalty phase instructions tell the jurors that it was up to each one of them to decide whether any particular evidence was mitigating, or that there was no need for unanimous agreement on the existence of a mitigating factor before it could be considered as such by any individual juror.

> aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

In *People v. Hawthorne* (1992) 4 Cal.4th 43, this Court found no prejudice from the trial court's failure to re-instruct the penalty jury with CALJIC No. 17.40. (*Id.* at pp. 74-75.) In the present case the asserted error is more than a simple omission in repeating the instruction, since Montes' jury was expressly told to *disregard* all guilt phase instructions, which would have included CALJIC No. 17.40. (44 RT 7970-7971.)

Moreover, unlike *Hawthorne*, the trial court here refused a defense-requested instruction tailored specifically for the penalty phase. This proposed instruction would have properly explained to the jurors that they must "individually decide *each* question involved in the penalty decision." It also expressly informed the jurors that any "individual juror may consider evidence as a mitigating factor even if none of the other jurors consider that evidence to be mitigating," and that "[t]here is no need for you as jurors to unanimously agree on the presence of a mitigating factor before considering it. (Defense No. P-X, 28 CT 7591.)

In *Hawthorne*, this Court found that CALJIC Nos. 8.84.1 and 8.84.2 sufficiently addressed the defendant's concerns. In the present case, the jurors were instructed in a similar, but not identical, fashion. But nothing in the given instructions explained that the jurors did not have to agree about whether particular evidence was mitigating. The instructions only told the

jurors that they were free to assign whatever moral or sympathetic value each of them deemed appropriate to the "various factors" they were "permitted to consider." (44 RT 7986.)

The instruction Montes requested specifically addressed the possibility that the jurors would believe they all had to agree on whether certain factors were aggravating or mitigating before weighing them. This concern was not addressed by the instructions informing the jurors that they were free to assign whatever value they chose to a circumstance once that determination had been made, or that they should make an individual weighing determination using those factors. The trial court therefore erred by refusing this requested instruction.

For the reasons set forth in his opening brief (AOB at pp. 585-589), it cannot be determined beyond a reasonable doubt that this error did not affect the penalty decision.

XLIV.

ALTERNATE JUROR NUMBER THREE'S MISCONDUCT IN SEEKING EXTRINSIC INPUT CONCERNING CHURCH VIEWS ON CAPITAL PUNISHMENT REQUIRES THAT MONTES' DEATH SENTENCE BE REVERSED.

The parties agree that the only appellate issues are whether the uncontested facts establish juror misconduct, and if so, whether the misconduct was prejudicial. (RB at p. 223.) Respondent does not contest Montes' assertion that juror number 3's actions, which disregarded the trial court's express admonition not to converse with anyone else on any subject concerning the trial, was misconduct[67]. Instead, respondent focuses its argument on whether or not this misconduct was prejudicial. (See RB at pp. 223-226.)

This court independently reviews the record when evaluating prejudice. The "substantial evidence" standard applies only to review of trial court findings concerning historical fact and credibility determinations. Here, the facts are uncontroverted, and the review of whether Montes suffered prejudice because of the juror misconduct should be subject to

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[67]. In fact, this Court has noted that a juror's discussion with his minister may, standing alone, constitute juror misconduct. (*People v. Watson* (2008) 43 Cal.4th 652, 697, fn. 10.)

independent review by this Court. (*People v. Gamache* (2010) 48 Cal.4th 347, 396.)

Although at the outset of its argument respondent correctly states that appellate review of whether a juror's uncontested actions constitute misconduct is a legal decision subject to independent review (RB at p. 223), in the closing sentence of its argument on this point, respondent contends that the trial court's ruling denying Montes' new trial motion should be upheld because it is supported by "substantial evidence." (RB at p. 226.)

Respondent cites *People v. Tafoya* (2007) 42 Cal.4th 147, 192 in support. The *Tafoya* opinion, however, does no more than simply state the rule that *factual findings* made by the trial court will be upheld if supported by substantial evidence. Here, respondent acknowledges that the facts are uncontested. (RB p. 223.) Nor does respondent contend that these actions did not amount to misconduct. The only remaining issue is whether alternate juror No. 3's actions was prejudicial to the penalty determination, which is subject to this Court's independent determination. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Moreover, since this case involves intentional juror misconduct, there is a presumption of prejudice. (*Gamache, supra*, 48 Cal.4th 347, 397.) This Court has required that the prosecution rebut this presumption

by demonstrating that there is no "substantial likelihood" that the juror was improperly influenced to the defendant's detriment[68]. (*Ibid.*)

As explained by Justice Mosk in his concurring opinion in *Nelser, supra*, 16 Cal.4th at p. 592, the proper phrasing of the standard would be this:

> 'When juror misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record. The verdict will be set aside unless there appears no substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias unless the extraneous material, judged objectively, is not inherently and substantially likely to have influenced the juror. Second, looking to the nature of the misconduct and the surrounding circumstances, we will also find bias unless it is not substantially likely the juror was actually biased against the defendant.'

Even if this Court were to find that alternate juror number 3's actions in consulting an outside source in contravention of the trial court's orders were not misconduct, it still involved the introduction of extrinsic information into alternate juror number 3's penalty determination. Because the error thus affected the penalty decision and also transgressed Montes' federal constitutional rights, this Court must determine whether there is a

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[68]. However, in his opening brief Montes explained why the standard should be whether there is a "reasonable possibility" the misconduct affected the penalty verdict. (See AOB at pp. 614-616.)

reasonable possibility that the error affected the penalty judgment. (*People v. Gamache* (2010) 48 Cal.4th 347, 399 and fn. 22.)

For the reasons discussed in his opening brief (AOB at pp. 603-616) alternate Juror number 3's actions transgressed Montes' constitutional rights, and require reversal of the death sentence.

XLV.

CONSIDERATION OF THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE COMPELS THE CONCLUSION THAT MONTES' DEATH SENTENCE MUST BE REVERSED.

As in the opening brief (AOB at pp. 617-618), Montes asserts that the cumulative effect of the many errors in his case, including those at the guilt phase which had an impact on the penalty decision, denied him due process of law and requires that the death sentence imposed in his case be reversed. (AOB at pp. 617-618.)

For those same reasons, his Eighth Amendment right to a fair and reliable capital penalty trial (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584 also requires reversal of the death sentence.

SENTENCING ERRORS

XLVI.

MONTES' DEATH SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT IN CONTRAVENTION OF THE FEDERAL AND STATE CONSTITUTIONS.

According to respondent, Montes has a "skewered version" of what the evidence at trial established. (RB at p. 228.) However, as Montes has continually pointed out, there has been no jury finding that he personally shot Mark Walker. Respondent cannot substitute itself for the jury in this case. All we know for sure is that, as instructed, the jury could have found Montes guilty of murder and sentenced him to death if they found that he aided and abetted the carjacking, and did so with reckless disregard for human life. The jury verdicts below establish no greater level of culpability than this, and it is entirely appropriate to examine the proportionality of Montes' sentence in this light.

In fact, it is respondent who offers a "skewered view" of the evidence. Much of respondent's argument on this point is based on rank speculation and very questionable "facts." For example, respondent asserts that Montes personally committed the murder, "so he could become a member of the gang." (RB p. 228.) This novel theory is one developed by

respondent during the appeal. There were no facts to support it, and it was not the theory advanced by the prosecutor[69].

Respondent does not even name the "gang" Montes was supposedly trying to join. Assuming respondent meant Vario Beaumonte Rifa ("VBR"), prosecution witness Beard identified only Hawkins and Miguel Garcia as members of that gang. (See AOB at p. 246; 32 RT 5809, 5819-5820, 5822-5824.) There was no evidence that Montes had any aspirations of joining VBR. In fact, Montes was identified as already being a member of a different gang from Colton. (32 RT 5803-5805, 5810, 5814.)

Respondent also picks out certain "factual details" in support of its position. Specifically, respondent asserts that Montes returned to the party in a "very jovial" mood; that he used Walker's money to buy pizza; that he "bragged" to George Varela about the shooting, and showed him a spot of blood on his sleeve. (RB at p. 228.) But these details were not necessarily found true; some are unsupported by the record; and others were substantially undermined by conflicting evidence presented at trial. (See discussion at the outset of this reply brief, and AOB at pp. 27-29; 46.)

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[69]. The prosecutor's trial theory was that Walker was killed to prevent him from identifying his assailants. (See, e.g., 45 RT 7883-7884 [arguing that Montes' mindset was "You can't let him live. We'll get caught. He knows us. That is what is going through his mind."].)

Respondent also describes the "paucity" of mitigating factors. In fact, there were several significant mitigating factors in this case. Significantly, there is a doubt about whether Montes committed the actual murder. Moreover, at the time of the crime, Montes was 20 years old. Testing following his arrest disclosed an IQ of approximately 77, placing him at a borderline mentally retarded level[70]. Montes' youth and borderline mental retardation strongly militate in favor of a life sentence. In addition, Montes' criminal history was not especially significant. He had one prior felony conviction for burglary, but had never been to prison. Prior to his arrest for this offense he had no prior convictions for crimes of violence.

The death penalty should be reserved for "the worst of the worst." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2543 (dis. opn. of Souter, J.).) Joseph Montes is not "the worst of the worst." His death sentence should be set aside.

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[70]. Testing conducted during his earlier childhood indicated an I.Q. of 68 to 70. (42 RT 7533-7534.)

XLVII.

MONTES RENEWS HIS REQUEST FOR MODIFICATION TO A LIFE WITHOUT POSSIBILITY OF PAROLE SENTENCE.

In his opening brief Montes asked that, should this Court find any error mandating reversal of his death sentence, that it modify the sentence to life without possibility of parole rather than remanding for a new penalty determination in the trial court. Although he acknowledges (as he did in the opening brief, AOB at p. 628) that modification is not required, this Court nevertheless has the power to do so if it chooses. (Pen. Code Sects. 1181, subd. (7) and 1260.) For the reasons given in his opening brief (AOB pp. 627-629), Montes renews his request for modification.

XLVIII.

SINCE CAR JACKING IS A NECESSARILY LESSER-INCLUDED OFFENSE OF KIDNAP FOR CARJACKING, COUNT III MUST BE REVERSED.

For the reasons given in Montes AOB (p. 630) respondent agrees that the conviction for count III and the attendant enhancement must be reversed. (RB pp. 229-230[71].)

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[71]. Respondent mistakenly cites to page 646 of the AOB rather than page 630.

XLIX.

SENTENCE ON COUNT II MUST BE STAYED.

For the reasons given in Montes AOB (pp. 631-632) respondent agrees that sentence on count two should be stayed. (RB at p. 230.)

L.

RECURRING CHALLENGES TO CALIFORNIA'S DEATH PENALTY.

Respondent broadly asserts that Montes' five arguments (LI-LV) are forfeited "to the extent Montes did not raise any of them in the trial court." (RB p. 231.) However Montes did raise a number of objections to California's Death Penalty scheme, and as a result they have not been forfeited. (See specific discussion under each argument heading, *infra.*)

Moreover the instructional issues, which affected Montes' substantial rights, do not require an objection. (Sect. 1259.)

Finally, these arguments do not involve any contested issue of fact, and are pure issues of law concerning the validity of the state's death penalty scheme. Accordingly, they may be considered by this Court even if they were not raised below. (E.g., *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th 554, 561.)

LI.

PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

In his pleading entitled "Notice of Motion and Motion to Strike the Special Circumstance Allegations" (24 CT 6756-6762) Montes specifically argued that section 190.2 is overbroad because the special circumstances that make a person eligible for the death penalty do not adequately narrow the category of death eligible defendants as required by the Eighth and Fourteenth Amendments.

Montes relies on the argument in his Opening Brief for the substance of this claim.

LII.

PENAL CODE § 190.3(a) AS APPLIED IS ARBITRARY AND CAPRICIOUS.

In his opening brief, Montes argued that section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even those squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Montes raised this issue in the trial court, and specifically objected to the court instructing the jury that it could consider factor (a)'s "circumstances of the crime" as a factor in aggravation. (28 CT 7516-7519.)

LIII.

CALIFORNIA'S DEATH PENALTY SCHEME DOES NOT PROVIDE ADEQUATE SAFEGUARDS.

There were several sub-parts to this argument. Subdivision A contended that Montes was improperly denied his constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of a death sentence. Montes adequately preserved this issue via his request that the jury be instructed that to impose a sentence of death it must first find any aggravating factor true beyond a reasonable doubt, and that any finding with respect to an aggravating factor must be unanimous. (28 CT 7516.) Montes also requested that the jury be instructed that any reasonable doubt with respect to the appropriate penalty required imposition of a life without parole sentence. (28 CT 7532.)

With respect to subdivision G, arguing constitutional error from the lack of an instruction that statutory mitigators were relevant solely as potential mitigators, Montes made several requests for modifications in the jury instructions. Specifically, Montes requested that the court modify CALJIC No. 8.85 to omit the words "whether or not" and replace them with the word "if." (28 CT 7526-7527.) He also requested an instruction (Defense No. L-P) telling the jurors that factors other than (a), (b) and (c) could only be considered as mitigating (28 CT 7602), and another instruction informing the

jury that they could only consider the *listed* factors in aggravation as a basis for imposing death sentence. (See Montes' requested special instruction "P-T," 28 CT 7594.) The court refused these modifications. (44 RT 7817-7820, 7824.)

In making the request for the modifications, Mr. Cotsirillos expressed a particular concern with regard to the jury's consideration, under factor (k), of evidence regarding Montes' low IQ. Counsel believed that, unless instructed otherwise, there was a danger some jurors might view Montes as more dangerous because of his low IQ. There was also a risk that because of this evidence jurors might view Montes as "damaged goods" not worthy of saving. (44 RT 7817-7818.) The requested instructions would have prevented this.

LIV.

CALIFORNIA'S DEATH PENALTY SCHEME VIOLATES EQUAL PROTECTION.

For the reasons given in his opening brief (see AOB at pp. 673-676) Montes maintains that California's death penalty law violates equal protection.

LV.

CALIFORNIA'S DEATH PENALTY LAW VIOLATES INTERNATIONAL LAW.

For the reasons given in his opening brief (AOB at pp. 677-679) this Court should find that California's the death penalty law, in both theory and practice, violates international law.

CONCLUSION

Montes has pointed to many errors which took place during his trial. Some of these errors, such as the wrongful discharge of jurors, require that both the guilt and penalty verdicts be set aside. A greater number affected the outcome of the penalty verdict, even if they had no effect on the guilt determination. For all of the reasons discussed in both his opening and reply briefs, Montes respectfully asks this Court to reverse the judgment in his case.

Dated:

Respectfully submitted,

SHARON FLEMING
Attorney for Joseph Montes

WORD COUNT CERTIFICATE

I, Sharon Fleming, appointed counsel for appellant, hereby certify, pursuant to rule 33(b) of the California Rules of Court, that I prepared the attached brief, and that the word count is 48,296 words (not including the cover or the tables). Because this brief exceeds rule 8.630, which limits opening briefs in capital cases to 47,600 words, appellant is filing a request to file an oversized brief. I certify that I prepared this document in WordPerfect, and that this is the word count WordPerfect generated for this document.

Dated:

SHARON FLEMING
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the county of Santa Cruz, California.

I am over the age of eighteen years and not a party to the within cause; my business address is P.O. Box 157 Ben Lomond, California 9506.0. On April __, 2011, I served the within Appellant's Reply Brief and supporting documents on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Cruz addressed as follows:

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For the Honorable
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April __, 2011, at Santa Cruz, California.

SHARON FLEMING

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

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

APPELLANT'S AMENDED WORD COUNT CERTIFICATE

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By appointment of the
California Supreme Court

WORD COUNT CERTIFICATE

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Dated: April 9, 2011

SHARON FLEMING
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the county of Santa Cruz, California.

I am over the age of eighteen years and not a party to the within cause; my business address is P.O. Box 157 Ben Lomond, California 9506.0. On April 9, 2011, I served the within Amended Word count Certificate and supporting documents on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Cruz addressed as follows:

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Sharon Fleming

SHARON FLEMING