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Supreme Court of California
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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHNNY MORALES,

Defendant and Appellant.

CAPITAL CASE

Case No. S137307

San Bernardino County Superior Court Case No. FVA015456
The Honorable Ingrid A. Uhler, Judge

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STATEMENT OF THE CASE

On June 27, 2002, the San Bernardino County District Attorney filed an information charging Johnny Morales with one count of murder (Pen. Code, § 187, subd. (a);[1] count 1), three counts of home invasion robbery (§ 211; counts 2, 4, 7), and two counts of first degree residential burglary (§ 459; counts 3, 5).[2] The information alleged three felony-murder special circumstances—i.e., the murder was committed while Morales was engaged in robbery, attempted rape, and burglary (§ 190.2, subd. (a)(17)). The information further alleged, as to the murder and one of the robbery counts, that Morales personally and intentionally discharged a firearm, a rifle, which proximately caused great bodily injury and death (§ 12022.53, subds. (c), (d); counts 1, 2). As to all charges, the information alleged Morales personally used a firearm, a rifle (§§ 12022.5, subd. (a), 12022.53, subd. (b); counts 1-5, 7).[3] Finally, for the three robbery counts, the information alleged Morales voluntarily acted in concert with two or more other persons and entered an inhabited dwelling house (§ 213, subd. (a)(1)(A); counts 2, 4, 7). (3CT 663-668.)

Jury selection began on July 12, 2004. (8CT 2155; 3RT 235.) The jury was sworn on August 24, 2004. (27CT 7596; 7RT 1263.) On August 25, 2004, the trial court granted Morales's section 995 motion to dismiss the attempted rape special circumstance allegation. (27CT 7597; 7RT 1335, 1340-1341.) The case was submitted to the jury to begin deliberations on September 22, 2004. (27CT 7750; 13RT 2760.)

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] The information also charged Xiomara Escobar with one count of being an accessory after the fact (§ 32; count 6). (3CT 663, 667.)

[3] The firearm enhancement allegation in count 7 was stricken on September 22, 2004. (27CT 7750; 13RT 2734-2735.)

On September 24, 2004, the jury found Morales guilty of first degree murder and found all firearm enhancements and both special circumstances to be true. (27CT 7755-7761, 7784-7785; 13RT 2778-2779.) The jury also found Morales guilty of robbery and burglary as charged in counts 2 through 5, and found all related enhancements to be true. (27CT 7762-7773, 7785; 13RT 2779-2783.) The jury found Morales not guilty of the robbery charged in count 7. (27CT 7774, 7785; 13RT 2783.)

The penalty phase began on October 27, 2004. (28CT 7991-7992; 13RT 2907.) Deliberations started on November 4, 2004. (28CT 8041.) On November 5, 2004, the jury determined the appropriate penalty for Morales was death. (28CT 8043, 8045; 14RT 3225.)

On August 12, 2005, the trial court denied Morales's motions for new trial, a reduction of penalty, and disclosure of juror identifying information. (29CT 8254-8255; 14RT 3274-3286.) At sentencing on September 12, 2005, the trial court denied Morales's supplemental motion to prohibit the death penalty, and sentenced Morales to death on count 1. (29CT 8275, 8277; 14RT 3292-3295, 3303.)

In addition, the court imposed 10 years (the midterm of six years plus four years for the firearm enhancement) for count 4 and a concurrent eight-year term for count 5 (a midterm of four years for the crime and four years for the enhancement). (29CT 8276; 14RT 3301-3302.) The court then imposed, but stayed, sentences of 10 years for count 2 and 8 years for count 3. (29CT 8276; 14RT 3302.)

As to count 1, the court imposed 25 years to life for the section 12022.53, subdivision (d) enhancement, to run consecutive to the term for count 4. (29CT 8277; 14RT 3303.) The court imposed but stayed additional sentences on the other enhancements attached to count 1. (29CT 8276, 8277; 14RT 3303.) The court also imposed but stayed a second term

of 25 years to life for the section 12022.53, subdivision (d) enhancement on count 2. (29CT 8277; 14RT 3302.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. OVERVIEW

Morales and up to five other men invaded two homes on the same property and held the families at gunpoint while they ransacked the homes in search of money and drugs. The victims in the first home—a man, woman, and child—were held at gunpoint by two men while Morales and the remaining men went to the second home. In the second home, the men found Elia Torres Lopez[4] and her four young children. The family was held at gunpoint in a bedroom while Morales and the other men searched the house. Morales then dragged Elia into the kitchen, possibly with one of the other men, while the remaining one or two men stayed in the bedroom with the children. A few minutes later, the children heard a gunshot. The men in both houses fled the scene and the children found their mother dead in the kitchen from a gunshot wound to the heart.

During the police investigation, officers arranged a pretext phone call between Morales and his mother. On the recorded phone call, Morales gave details of the robberies and confessed to shooting Elia in the heart after she recognized him and said his name out loud. Morales also confessed to his brother and girlfriend, who both testified at trial.

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[4] Because Elia shares the same last name with her sister, Maria Soraya Lopez, who testified at the penalty phase, and another victim/witness in the case, Mayra Lopez, all of the women will be referred to by their first names. Similarly, other witnesses who share the same last name will be referred to by their first names to avoid confusion.

II. GUILT PHASE

A. June 9, 2001 Murder, Burglaries, and Robberies

Carlos Gutierrez lived with his girlfriend, Mayra Lopez, and his six-year-old son in the smaller of two houses located on a property in Bloomington. (8RT 1435-1436, 1452-1454, 1458-1460, 1523-1524; 9RT 1787.) Occupying the main house were Mario Izaguirre, his wife Elia, and Elia's four children—Brianda (11), Jennifer (9), Joe (7), and Crystal (4 months). (7RT 1358; 8RT 1436-1437, 1459-1460, 1524-1525, 1630; 9RT 1708, 1739, 1779.)

Around 7:00 p.m. on June 9, 2001, Elia and her four children went to the grocery store. (8RT 1631-1633; 9RT 1709-1711, 1780-1782; 10RT 2001-2002.) Three or four Hispanic men followed them around the store leering, laughing, and throwing kisses to Elia. (8RT 1633-1634; 9RT 1678, 1782-1783; 10RT 2002-2003.) One of the men had long curly hair pulled back into a ponytail and another was wearing a beanie hat. (8RT 1633-1634; 9RT 1678-1679, 1782.)

After completing their purchase, Elia and her children drove home. (8RT 1635; 9RT 1712, 1783-1784.) They were followed at least part of the way by a green car. (9RT 1712-1713, 1784-1786, 1839.)

At home, the children helped Elia unload the groceries from the truck. (8RT 1636-1637; 9RT 1681; 9RT 1714, 1787-1788, 1805, 1840-1843; 10RT 2004.) Then Joe went to Elia's bedroom to watch television while Brianda changed Crystal's diaper and Jennifer helped Elia put the groceries away in the kitchen. (8RT 1637; 9RT 1681-1683, 1715, 1788, 1806-1807, 1843-1845; 10RT 2004.)

Around 8:00 p.m., Gutierrez, Mayra, and their son were watching television in their living room when a group of armed men entered through the sliding glass door. (8RT 1437-1438, 1454-1455, 1460-1461, 1526-

1527, 1546-1547, 1575, 1583.) Gutierrez and Mayra saw two men, but believed there were probably four or five men total based on the voices and noises they heard. (8RT 1438, 1441, 1546, 1547-1548, 1578-1579.)

Morales, who was armed with a rifle with a banana clip, was the first man who entered Gutierrez's home. (8RT 1438-1439, 1514.) Morales pointed the rifle at Gutierrez and told him to get down on the ground. (8RT 1439-1440, 1514.) Gutierrez immediately got on the ground with his son. (8RT 1440.) A second person, armed with a shotgun, came into the house right behind Morales and ordered Mayra to the ground. (8RT 1440, 1473, 1527-1528, 1546-1547, 1576.) Both Morales and the second man were Hispanic and spoke in Spanish. (8RT 1438-1440, 1442, 1528, 1547.) The second man had long curly hair pulled up in a ponytail with the sides of his hair cut short. (8RT 1440, 1580.)

Morales and the second man both told Gutierrez to give them all the money in the house. (8RT 1440-1441, 1548-1549.) Gutierrez had one gun pointed at his back, another gun pointed at the back of his head, and a foot on his back, so he told the men to look in the house for whatever they could find. (8RT 1442.) A gun was also pointed at Mayra. (8RT 1584-1585.)

Gutierrez and Mayra heard the men search the house for about 5 or 10 minutes. (8RT 1442-1443, 1548-1549, 1579.) Approximately $800 in cash and jewelry were taken from their home. (8RT 1452.)

At some point, Morales asked Gutierrez if he knew whether the man of the main house was home. (8RT 1444, 1451, 1549, 1588.) Gutierrez responded that if the car was not outside, he was not home. (8RT 1444.) Some of the men then left Gutierrez's house while two men remained holding the family at gunpoint. (8RT 1443-1446, 1549-1550, 1589.)

By this time, Brianda had finished changing Crystal and started walking back toward the kitchen to show her mom that Crystal was blowing bubbles, but she stopped in the hallway when she saw Morales and

four or five other Hispanic men with rifles and guns coming into the kitchen from outside. (9RT 1789, 1844-1846.) At least three or four of the men were inside the kitchen. (9RT 1717, 1789.) One of the men had a ponytail and another was bald; all of the men were armed. (9RT 1716, 1789.) Brianda saw two rifles, two guns, and a knife. (9RT 1790.)

One man picked Jennifer up using the back of her overalls and dropped her on the ground. (9RT 1715-1718.) The men then pointed a handgun at her. (9RT 1717-1718, 1790-1791.) The men also put Elia down on the floor and pointed a rifle at her. (9RT 1718, 1790.)

A man with a rifle then told Jennifer to go into a room, so she got up and started walking out of the kitchen. (9RT 1736-1737, 1790-1791.) Jennifer saw Brianda in the hallway holding Crystal and told her to go in the room. (9RT 1737-1738, 1790.) The man with the rifle also told Brianda to go into the bedroom. (9RT 1791, 1858.)

About the same time, Joe left Elia's bedroom to see if he could help put away groceries in the kitchen. (9RT 1684.) When Joe walked out of the bedroom, Brianda was coming toward him and told him to turn around. (8RT 1640; 9RT 1684, 1738.) Joe asked her why, but then he saw Jennifer and the man behind her with long curly hair in a ponytail carrying a shotgun. (8RT 1640-1641; 9RT 1685, 1719, 1738.)

The man with the long curly hair got all the children into Elia's bedroom and ordered them to lie down. (8RT 1641-1642, 1669-1670; 9RT 1687, 1719, 1738, 1791-1792, 1809, 1860-1861.) The rest of the men also came into Elia's bedroom, including the man wearing the beanie and the bald man, who were both at the grocery store earlier. (8RT 1643, 1645; 9RT 1692, 1720, 1792.) The man with the beanie was armed with a handgun and the bald man had a knife. (8RT 1643.)

Elia stood at the door to the bedroom while one of the men held her hands behind her back. (8RT 1646; 9RT 1792, 1810.) Joe and Brianda both saw Elia pushed onto her knees. (8RT 1648; 9RT 1695, 1862-1863.)

Morales asked if there was any money in the bedroom and Elia said she did not have any money. (8RT 1648-1649; 9RT 1793-1795.) Joe also told the men he did not know where any money was. (8RT 1643-1644.)

The men searched the closet, drawers, and bed area, making a big mess and throwing the mattress around. (8RT 1644-1645, 1670-1671; 9RT 1796, 1798, 1817-1818, 1864.) Morales had Brianda open up a locked black case, which he threw after finding it empty. (9RT 1692-1693, 1797-1798, 1820, 1834, 1864.) The men took jewelry from Elia's hands and her necklace. (8RT 1647; 9RT 1803.)

At some point, Joe saw the man who was restraining Elia pull down her shirt and the man with the long curly hair touch her chest. (8RT 1647-1648; 9RT 1693-1695.) Morales and possibly one of the other men dragged Elia to the kitchen by her hair, while the other men stayed in the bedroom with the children and continued searching. (8RT 1648, 1649; 9RT 1695-1696, 1720-1721, 1796, 1798-1799, 1811, 1829, 1834, 1866, 1868.)

Jennifer heard Elia yelling and screaming in the kitchen followed by a gunshot. (9RT 1721-1722.) Joe also heard a loud gunshot that sounded like it came from the kitchen. (8RT 1649-1650; 9RT 1697.) By this time, the men had all left the bedroom. (8RT 1650; 9RT 1698, 1800-1801.)

Gutierrez and Mayra also heard the gunshot from their house. (8RT 1443, 1446, 1550, 1589-1590.) One of the men holding them at gunpoint told the other man to go see what happened. (8RT 1446, 1551, 1591.) He returned quickly and both men ran away. (8RT 1446-1447, 1551, 1591.) After the men left, Gutierrez and his family stayed in their house, scared and crying. (8RT 1447, 1551, 1600.)

The children stayed quiet in Elia's bedroom for about five minutes and then Brianda went to the kitchen. (8RT 1650; 9RT 1698, 1722, 1801, 1869.) Brianda found Elia lying next to the stove surrounded by blood and without her shorts or underwear. (9RT 1801-1802, 1821.) She came back to the bedroom crying. (8RT 1651; 9RT 1699.) Then Brianda took the phone from the bedroom and all of the children went to the kitchen together and saw their mom dead on the floor with a gunshot wound. (8RT 1652; 9RT 1699, 1723.)

Brianda ran out of the house screaming, crying, and saying that her mother had been killed, with Jennifer and Joe following behind her. (8RT 1447-1448, 1551-1552, 1592, 1600-1601, 1652-1653; 9RT 1699-1700, 1802, 1870.) Gutierrez and Mayra ran outside to meet them. (8RT 1448, 1455, 1551, 1600-1601; 9RT 1802, 1870.)

Gutierrez and Mayra entered the kitchen and saw Elia on the ground, face up, naked from the waist down, with a chest wound and a lot of blood around her. (8RT 1448-1449, 1455-1458, 1461-1463, 1465-1466, 1552-1553, 1601; 9RT 1802, 1870.) Gutierrez could not find a pulse. (8RT 1449, 1463.) Mayra took a towel from the bathroom to cover Elia's naked lower body. (8RT 1450, 1463, 1552, 1553, 1601-1603, 1653.)

Brianda gave Gutierrez the phone and he called 911. (8RT 1449-1450, 1601, 1653; 9RT 1703, 1802, 1871-1872.) While he was doing that, he and Mayra gathered Elia's children and took them to their house. (8RT 1449-1450, 1554, 1653-1654; 9RT 1746, 1803, 1872-1873.)

B. Initial Investigation

Around 9:57 p.m., Deputy Cesar Alban arrived at Elia's house after receiving a call about a home invasion robbery. (10RT 1959.) One or two deputies were already there. (10RT 1959.)

Deputy Alban walked into the house and saw Elia's body lying in the kitchen. (10RT 1959.) After he cleared the residence and secured the

scene, Deputy Alban went to see the surviving victims—Gutierrez, Mayra, Brianda, Jennifer, Joe, and Crystal—in the second house. (8RT 1554; 10RT 1959-1960, 1983.)

Deputy Alban tried to obtain information about the suspects and how they got away so he could relay that information to arriving deputies. (10RT 1960.) Jennifer mentioned a small, green vehicle, similar to a Mustang, that she saw following them home from the market. (10RT 1961.) Brianda told Deputy Alban about the men coming into the house, taking them to a room, and holding them at gunpoint. (10RT 1961.) Gutierrez reported that the people that came into his home were armed with a rifle with a banana clip and a shotgun. (10RT 1962.) Deputy Alban put that information out over the radio. (10RT 1962.)

Deputy Alban stayed with the victims for a few hours until investigators arrived at the scene and made sure the area was safe to take the victims to the station. (10RT 1962-1963.) He tried to calm the children who were crying for their mother. (10RT 1963.)

Meanwhile, Sergeant Brad Toms responded to Elia's house around 10:40 p.m. (9RT 1750-1752.) He was assigned to be the case agent and conduct the crime scene investigation. (9RT 1753.)

Sergeant Toms processed numerous shoe impressions and other evidence found inside Elia's house. (9RT 1756-1761.) He also processed Elia's body, which was lying face up on the kitchen floor. (9RT 1762.) Elia had a small floral blouse and athletic shoes on, but was otherwise naked from the waist down. (9RT 1762, 1770.) She had a bullet wound to her upper chest area and there was blood underneath her body. (9RT 1762, 1772.) A pair of shorts was on the ground under Elia's foot and a pair of women's underwear was a few feet away from her. (9RT 1762, 1769-1771.) A sexual assault kit was done because Elia was naked from the waist down. (9RT 1900.)

It was determined that Elia was shot in the chest while she was lying on her back. (9RT 1772.) Some of the tile floor directly under her back was broken. (9RT 1772-1774.)

Sergeant Toms described Elia's bedroom as "ransacked," noting the bed was off its frame and papers and clothes were scattered on the floor. (9RT 1766.) He assigned a crime scene investigator to try to obtain fingerprints from the bedroom. (9RT 1767-1768.) About 30 fingerprints were discovered throughout the house. (9RT 1768, 1884, 1901.) None of the fingerprints or shoe impressions taken from Elia's house resulted in any suspects. (9RT 1884-1886, 1890.)

Sometime after midnight, the victims were taken to the sheriff's station for interviews. (8RT 1471, 10RT 1963, 1964.) Deputy Alban interviewed Jennifer, Gutierrez, and Mayra. (10RT 1963.) Detectives Kenneth Wolf and Carlos Espinoza interviewed Brianda. (10RT 1999-2001.) The facts related by the victims substantially conformed to those set forth above. (10RT 1963-1982, 1984-1996, 2001-2011.) Additionally, Jennifer said one of the men had a monster face tattoo on his arm. (10RT 1968, 1992, 1995.) Deputy Alban later discovered that Morales had a monster or devil face tattooed on his arm. (11RT 2441-2442.) Jennifer also mentioned she recognized one of the men to be a friend of Melvin, who lived in their old neighborhood. (10RT 1971-1972, 1994.)

On June 11, 2001 at 1:41 p.m., Detectives Wolf and Espinoza showed surveillance video from the grocery store the night of the murder to Brianda, Jennifer, and Mayra. (8RT 1556, 1611; 9RT 1821-1822; 10RT 2012-2014, 2018.) The video was grainy and fuzzy, making it difficult to identify the faces of the individuals shown in the video. (10RT 2061-2062.) Brianda, Jennifer, and Mayra pointed out one person they recognized at the entrance to the market and another man in a later portion of the video near the meat counter. (9RT 1822-1826; 10RT 2014-2018.)

Detective Wolf then showed the same video to Nery Quintanilla, a family friend. (9RT 1832, 1848-1849; 10RT 2012-2013, 2019.) She identified the man at the entrance to the market as Morales. (10RT 2019-2021.) Detective Wolf relayed this information to Sergeant Toms who put together a photo lineup including a prior booking photograph of Morales. (10RT 2021-2022.)

At approximately 3:43 p.m., Detective Wolf showed the photo lineup to Brianda who identified Morales as the man with the knife. (9RT 1826-1829, 1835-1836, 1873; 10RT 2022-2024.) Brianda started to cry as she circled Morales's picture in the lineup. (10RT 2027.) Brianda said she had seen Morales at a swap meet with Melvin, but did not know his name. (9RT 1833; 10RT 2023-2024.) Jennifer and Mayra did not identify Morales in the photo lineup. (10RT 2056-2057, 2091.)

A few days later, on June 15, 2001, Gutierrez was shown a photo lineup including Morales, but could not pick him out. (8RT 1466-1467; 10RT 2055, 2091.) He testified at trial that Morales looked "very different" on the night of the robbery than he did in the lineup. (8RT 1467.)

C. Autopsy

On June 11, 2001, Dr. Frank Sheridan, Chief Medical Examiner for San Bernardino County, performed an autopsy on Elia's body. (12RT 2464.) Dr. Sheridan determined that Elia's death was caused by a gunshot wound to the chest. (12RT 2459-2465.) Elia likely died within minutes, as the bullet went through both her aorta and left lung. (12RT 2466, 2471-2472.) Dr. Sheridan further determined that stippling around the wound indicated it was a close-range shot, within about one foot to one and a half feet. (12RT 2467-2468.) Elia's injuries further indicated that she was lying on her back on the floor when she was shot by a high-powered rifle by someone standing over her. (12RT 2469-2481.)

D. Events Leading to Morales's Arrest

1. Morales's mother's belief that Morales was involved in the crime

On June 20, 2001, Deputy Alban visited Morales's mother, Alejandra Sanchez, at her home to see if she had information about the crimes. (11RT 2326, 2416-2417.) Alejandra agreed to answer questions and they talked for about 30 minutes, during which time Alejandra said she believed Morales was involved. (11RT 2417-2418, 2423.) Alejandra agreed to go to the sheriff's station with Deputy Alban for a further interview. (11RT 2327, 2418.)

At the sheriff's station, Alejandra told Deputy Alban she had some information from Morales's brother, Angel Ivan Morales,[5] about what happened and who was involved in the crime. (11RT 2420.) Alejandra explained that she was cooperating and giving information about Morales's involvement because she felt bad for the orphaned children, lost a son in the past and knew how the victim's family felt, and did not want Morales to continue to commit crimes. (11RT 2419-2420.) When Deputy Alban asked where Angel lived, Alejandra directed him to Angel's neighborhood and pointed out his house. (11RT 2420-2421.) Deputy Alban then took Alejandra home. (11RT 2421-2422.) At trial, Alejandra denied these statements and denied showing Deputy Alban where Angel lived. (11RT 2326-2328, 2333.)

On June 22, 2001, police effected a search warrant at the home Morales shared with his girlfriend, Xiomara Escobar, and her four children. (11RT 2245-2246, 2257-2258, 2278-2279, 2426-2428.) Police found some photographs of individuals who appeared to match the descriptions given

[5] Angel was also known and referred to as Ivan throughout the proceedings.

by the victims and a black leather jacket with jewelry in the pockets. (11RT 2258-2259, 2428.) Some of the jewelry belonged to Escobar, but some did not. (11RT 2259.) Escobar told police she had kicked Morales out and thought he was in Los Angeles. (11RT 2260-2261.) Escobar also said Morales had not called her. (11RT 2261-2262.)

2. Morales's statements to Angel

On July 9, 2001, Sergeant Toms and Detective Espinoza contacted Angel at his home. (10RT 2096, 2125-2126, 2146-2147.) Angel said he knew the officers were there about Morales and agreed to go to the sheriff's station for an interview. (10RT 2096-2097, 2127, 2149-2150, 2158.)

When Angel got to the sheriff's station, Sergeant Toms and Detective Espinoza took him into an office and turned on the tape recorder. (10RT 2150.) Angel told the officers he was aware that Morales was involved in a homicide, but that they had not spoken for about 25 or 27 days. (10RT 2152, 2153, 2166-2167.) The officers found it difficult to conduct the interview in English, so after about half an hour they called Detective Wolf, who spoke Spanish, to join them. (10RT 2154-2157, 2167.)

The interview continued after Detective Wolf arrived. (10RT 2098, 2174.) Detective Wolf told Angel they were interested in any information he had about Elia's murder. (10RT 2176.) At first, Angel said all he had was information given to him by Jorge.[6] (10RT 2177.) The officers did not believe Angel was telling them what he knew, so they suggested they get his mother on the phone since she was the person who directed them to Angel. (10RT 2177, 2199-2202.) Before Detective Wolf could get Angel's mother on the phone, Angel said he did not have to do that and admitted he had a conversation with Morales. (10RT 2178-2179, 2202-2203.)

[6] Jorge Morales was one of Morales's cousins. (7RT 1357.)

Angel told Detective Wolf that Morales told him he was involved in a robbery and a rape of a woman. (10RT 2179.) Angel then immediately backed off of that statement and said he learned that from Jorge. (10RT 2179-2180, 2203.) Detective Wolf clarified that they wanted to know what Morales had told Angel, not what Angel heard from someone else, and Angel again said he had a conversation with Morales. (10RT 2180.)

Detective Wolf role-played with Angel, pretending to be Morales on the other end of the phone, and asked Angel to tell him exactly how the conversation went. (10RT 2180.) Angel said Morales told him he did a robbery on Saturday of a female who had lots of chains or jewelry after he followed her around a market in Fontana. (10RT 2181.) Morales told Angel two cousins were involved and that children saw him at the house where the robbery occurred. (10RT 2181-2182.) Morales admitted to Angel that he killed Elia because she recognized him and called him by name. (10RT 2183-2184.) Morales also admitted to Angel that he took about $600 and some jewelry. (10RT 2183-2184.) Angel told Detective Wolf that he had three separate phone calls with Morales about a week after the incident, and that during each phone call, Morales admitted to killing a woman during a robbery. (10RT 2184-2185.) During one conversation, Morales told Angel that Elia said to him, "Johnny, why are you doing this to me?"[7] (11RT 2237.) Angel also told Detective Wolf that about three

[7] At trial, Angel denied that he had any conversations with Morales about the robberies and Elia's murder. (10RT 2096, 2142.) Angel also denied or said he did not remember making any statements to Detective Wolf. (10RT 2099-2102, 2117-2118, 2119, 2123-2124.) He denied that he agreed to tell the detectives what happened when they said they would get his mother on the phone. (10RT 2118.) He specifically denied telling Detective Wolf that Morales admitted killing Elia in at least three phone conversations and that Morales told him he killed Elia because she recognized him. (10RT 2101, 2103, 2123.) Yet at the preliminary hearing,

months earlier, he had seen Morales at his apartment with a 26-inch rifle with a brown stock. (10RT 2186-1287.)

During the course of the interview, Angel made a pretext phone call to Jorge to help the officers find out more information about the robbery homicide. (10RT 2187-2188, 2192-2194.)

3. Recorded phone call between Morales and his mother

On July 12, 2001, Alejandra went to the sheriff's station again at the request of Sergeant Toms. (11RT 2334, 2350-2353.) Detective Robert Acevedo was present to translate, and the interview was tape-recorded. (11RT 2353.) Alejandra told the officers that she learned about the murder four days after Escobar had her baby. (11RT 2353-2354.) Alejandra explained that Morales called her and told her he was going to Minnesota. (11RT 2354.) Alejandra also told officers about some information she had learned from Escobar and Angel, and she identified people in some photo lineups. (11RT 2354-2355.) Finally, Alejandra agreed to make a pretext phone call to Morales to ask him about his involvement in this case. (11RT 2355-2357.)[8]

A phone call was attempted that day, but no contact was made with Morales. (11RT 2319, 2336-2337, 2345-2346, 2357-2358.) Alejandra agreed to make another phone call to Morales the next day and agreed to have recording equipment installed on her home phone in the meantime. (11RT 2358, 2361-2362.)

Angel admitted that the things he told Detective Wolf were the truth. (1RT 78.)

[8] At trial, Alejandra denied making these statements and testified that she did not remember picking people out of photo lineups or agreeing to make a pretext phone call. (11RT 2325-2326, 2334-2336.) She also denied making other statements that Detective Wolf attributed to her. (11RT 2339, 2341.)

After the interview was completed, Sergeant Toms and Detective Acevedo took recording equipment to Alejandra's house and hooked it up to her phone in case Morales called her back before the next day. (11RT 2320, 2337, 2346-2347, 2359-2360.) Alejandra said she wanted to and would record any calls from Morales. (11RT 2360.) The officers showed Alejandra how to use the equipment and then left. (11RT 2361.)

The next morning, Detective Wolf called Alejandra at her home and introduced himself. (11RT 2367-2368, 2378.) He had learned a second pretext phone call was to be attempted that day and volunteered to assist Alejandra in making the call from her home, an offer she accepted. (11RT 2367-2368, 2379.)

Detective Wolf arrived at Alejandra's home shortly thereafter and explained what he wanted Alejandra to do and how he was going to monitor the call. (11RT 2369-2370, 2372-2373, 2380-2381.) Alejandra told Detective Wolf she was curious to know whether Morales was involved or not and she asked several questions about the victim, which Detective Wolf answered generally. (11RT 2370, 2382-2383.)

Alejandra showed Detective Wolf where Sergeant Toms and Detective Acevedo had installed their recording equipment. (11RT 2370-2371, 2379.) Detective Wolf preferred to use his own tape recorder and set up his equipment on another phone. (11RT 2319, 2371-2372, 2380.) Detective Wolf then dialed the number he had for Morales, Alejandra made contact with Morales, and the call was recorded. (11RT 2308-2309, 2319, 2373-2375, 2384.) The call lasted about 30 minutes, during which time Detective Wolf listened in and jotted down questions for Alejandra to ask Morales. (11RT 2321, 2374, 2384-2386.)

During the conversation, Morales admitted to shooting Elia in the heart with an AK-47 because she recognized him from the bar where she

worked and that she died in three seconds.[9] (29CT 8310-8312, 8318, 8320, 8322, 8323-8327; Exh. 108.) Morales called Elia a "dummy" and said if she would have kept quiet and not said his name, nothing would have happened to her. (29CT 8325; Exh. 108.) He also admitted to entering both houses on the property. (29CT 8324.) He said that Escobar knew he killed Elia, and admitted talking to Angel. (29CT 8309-8310, 8315, 8317.) He did not think police would be able to find him because they would not be able to match the bullet or the firearm to him. (29CT 8318; Exh. 108.)

4. The children's statements to the social worker

On July 11, 2001, Yolanda Riech, a social worker from the Children's Assessment Center, conducted forensic interviews with Brianda, Jennifer, and Joe. (9RT 1904-1907.) All three of the interviews revealed substantially the same information as the children's testimony at trial with a few additions. (3SCT 716-721; 9RT 1910-1924, 1929-1943.)

Brianda elaborated more on her mother's relationship with Melvin, suggesting that Melvin sent the robbers because he was mad at her mother. (3SCT 718.) She said she was familiar with two of the intruders because she had seen them before with Melvin and she described and named Morales as one of those men. (3SCT 718.) Jennifer also explained that she was familiar with the intruder with the ponytail because he was friends with Melvin and she was aware that her mother would talk to the man with the ponytail at parties. (3SCT 719; 9RT 1918.)

5. Morales's arrest

On July 17, 2001, Sergeant Toms went to Minnesota to arrest Morales and Escobar. (11RT 2435.) He was there for about five days investigating.

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[9] The tape recording of the phone call was played in court. (11RT 2309-2312; Exhs. 107, 108.) To clarify the tape recording, the prosecutor noted Alejandra also goes by Olivia and Morales goes by both Johnny and Mario. (11RT 2311.)

(11RT 2435; 12RT 2536.) During this time, detectives in Eden Prairie, Minnesota assisted in locating an address that matched the phone number Sergeant Toms had for Morales. (11RT 2435-2436.) Police searched this address and found paperwork related to Morales and videos of Escobar's baby shower and a birthday party. (11RT 2428-2429, 2437-2438, 2445.) Police also found a phone containing caller ID information that matched the time, date, and phone number of Alejandra's pretext phone call. (11RT 2438-2439.)

Sergeant Toms located the address of Morales's and Escobar's employer and told the employer to call police if they came to work. (11RT 2436-2437, 2536.) On July 20, 2001, Morales and Escobar were arrested while attempting to pick up their final paychecks. (11RT 2256, 2292, 2439-2440, 2536-2537.) At this time, Sergeant Toms became aware that Morales had a monster face tattoo on his arm, similar to Jennifer's description of a tattoo she had seen on one of the intruders. (11RT 2440-2443.)

E. Additional Identification of Suspects

On August 2, 2001, Sergeant Toms showed the baby shower and birthday party videos discovered in Minnesota to Mayra and Gutierrez. (11RT 2429, 2430, 2433.) Mayra identified two people as being in her house the night of the robbery, including Javier Ever Flores and another man known as "grandpa." (11RT 2429-2431, 2448-2450.) Gutierrez also identified some people, including Morales, Jorge, and Enriquez or "Kiki." (8RT 1467-1469; 11RT 2431-2433, 2446-2448, 2451-2452, 2454.)

On August 3, 2001, Sergeant Toms showed the same videos to Brianda, Jennifer, and Joe. (11RT 2433-2434.) Brianda identified Morales and stated he was the man with the knife. (11RT 2434, 2452-2454.) She also recognized the man with the long curly hair who participated in the

robbery. (9RT 1829-1832; 11RT 2434, 2453.) Joe and Jennifer also identified one person each. (11RT 2434-2435, 2450-2451.)

On August 30, 2001, Sergeant Toms and Detective Wolf contacted Alejandra at her home and asked her to look at some photos and a video. (11RT 2340-2341, 2376.) She reviewed both and identified some people. (11RT 2341, 2376-2377.) After that, Alejandra told the officers she had helped them enough. (11RT 2377.)

F. Escobar's Testimony

Escobar was originally charged in the case and agreed to plead guilty to being an accessory after the fact. (11RT 2273-2278; Exh. 111.) She felt guilty for lying to the police, but did so because she was nervous, loved Morales, and did not want him to get in trouble. (11RT 2260-2262, 2274.) Escobar was to receive a maximum of three years in jail in exchange for cooperating with the police and testifying truthfully. (11RT 2277-2278.) Escobar had three prior misdemeanor convictions: one for burglary and two for petty theft. (11RT 2273.)

Escobar had seen Morales with weapons before. (11RT 2271.) Both handguns and a long rifle were kept at their apartment, possibly by Kiki or Jorge. (11RT 2272, 2281.) Escobar's brother, Ever Javier Flores, also brought guns to their home and gave one to Morales. (11RT 2281-2282.) And a week or two before the murder, Escobar saw Morales with a handgun in his waistband at her baby shower. (11RT 2272-2273.) When Escobar found the guns at her home, she told her brother she did not want them there and he took them away. (11RT 2282.)

On June 9, 2001, Escobar and Morales were at a family barbecue. (11RT 2248, 2285.) Morales got a phone call and Escobar heard him talk about an easy robbery where there was supposed to be a lot of money. (11RT 2248-2249.)

Sometime after 3:00 p.m., a taxi and another car pulled up outside. (11RT 2249-2250, 2251, 2285.) Escobar could not see all of the people in the taxi, but recognized one person named Enrique or Kiki. (11RT 2249.) She also recognized a person named Ivan Aleman in the other car. (11RT 2250.) Morales went out to speak with the people in the cars and then left with them. (11RT 2250-2251, 2285.) Escobar went home after the barbecue, but Morales did not come home that night. (11RT 2251, 2286.)

The next day, Sunday, Escobar called Jorge's girlfriend, Veronica, to try to find Morales. (11RT 2252, 2286.) Veronica said Morales was crying and in a bad way. (11RT 2287.) Escobar asked Veronica to find Morales and tell him to come home because she had to go to the hospital. (11RT 2287.) Morales called Escobar later that evening. (11RT 2252, 2287.) He was crying, said he did something serious and really bad, and talked about drowning himself. (11RT 2253, 2287, 2303.) Escobar told him it did not matter what he had done and that she needed him to come home because she was in labor and needed to go to the hospital. (11RT 2253, 2287.) Morales came home around 9:00 p.m. and took Escobar to the hospital. (11RT 2253, 2287.) Their daughter was born the next day, Monday, at 6:00 a.m. (11RT 2254, 2288.)

On Tuesday, Morales took Escobar home from the hospital. (11RT 2254, 2288.) On the ride home, Morales again told Escobar he had done something very serious and had an ugly problem. (11RT 2254.) Morales said he was scared and had to leave, so he took his car and drove to Minnesota that day. (11RT 2255, 2288-2289.)

Escobar knew Morales had been involved in at least a robbery in Bloomington. (11RT 2256.) Morales also told Escobar he had been involved in the robbery of her friend Mago in Ontario. (11RT 2256-2257.) And at some point, Alejandra called Escobar and told her the police were looking for Morales regarding a killing. (11RT 2291.) When Escobar

asked Morales why the police were looking for him, he again said he had committed something very serious. (11RT 2263.)

Sometime in the end of June or beginning of July, Escobar left San Bernardino with all her children to join Morales in Minnesota. (11RT 2257, 2262, 2290.) A week or two after Escobar arrived in Minnesota, Alejandra made the pretext phone call to Morales. (11RT 2263, 2264, 2291.) Escobar was in the apartment and overheard the conversation. (11RT 2264-2265, 2292.) She heard Morales say something about an AK-47 and about shooting and killing a woman. (11RT 2264, 2265.) Escobar also heard Morales say that Elia was a dummy because she could have kept quiet and called the police afterwards and nothing would have happened to her. (11RT 2265-2266.)

After they were arrested and on their way to jail in the back of a police car, Morales told Escobar he killed a girl because she recognized him.[10] (11RT 2264, 2293, 2297.)

G. May 13, 2001 Robbery (Count 7)[11]

On May 13, 2001, Blanca Martinez was sick and resting in bed with five friends around her when at least three men entered her bedroom to rob her. (11RT 2388-2391; 12RT 2495-2497.) The men spoke Spanish with a Central American accent. (11RT 2390.)

The man that came in first used a red rag or shirt to mask his face, pointed a gun at Martinez, and said it was a holdup. (11RT 2389, 2391, 2402; 12RT 2497-2498.) Either the first man or a second man with curly

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[10] It was suggested by the prosecutor that Escobar initially reported to Detective Toms that Morales confessed to her on the drive home from the hospital after she had their baby, but no evidence to this effect was presented at trial. (11RT 2264.)

[11] Although Morales was acquitted on this count, a short summary of the facts underlying this charge is included here because the facts are relevant to at least one of Morales's legal arguments.

hair held a gun against Martinez's temple and put her head face down on the bed. (11RT 2391, 2397, 2402-2403; 12RT 2498-2499.) Martinez's friends were put on the floor face down. (11RT 2392; 12RT 2500.)

The men asked where the money and drugs were. (12RT 2501.) They then opened drawers and started pulling things out, including gold and money. (11RT 2391-2392; 12RT 2499, 2500-2501.) Martinez also felt one of the men step on her bed to search up above. (11RT 2392, 2397.) The men took rings and other jewelry from Martinez and a chain from Elda Velasquez, one of Martinez's friends. (11RT 2394; 12RT 2501-2502.) The men stayed about 10 to 15 minutes, turned out the lights, cut the telephone line, and then left. (11RT 2393; 12RT 2501.)

Martinez looked around the room and saw open dresser drawers, a damaged door handle, her things scattered around, and blankets thrown out of the closet, like the men were looking for something. (11RT 2393-2394, 2398-2399, 2405.) Martinez reported that the men took all her jewelry, $3,000 from her drawer, and three rings off her fingers. (11RT 2394, 2398.)

In a statement given immediately after the robbery, Velasquez described the men and indicated she had no idea who any of the men were. (12 RT 2546-2549.) But during the investigation, Velasquez identified a few people from police lineups who she recognized and/or believed participated in the robbery, and she became visibly upset at the picture of Ever Javier Flores, Escobar's brother. (12RT 2539-2542.) Velasquez did not identify anyone in the lineup that included Morales or react to his picture. (12RT 2540.) She also did not identify Morales's brother Angel. (12RT 2541.)

At trial, Velasquez identified Morales as a participant in the robbery, pointed out differences in his appearance since the robbery, and stated that he bought two blankets from her two weeks earlier. (12RT 2506-2507.)

III. PENALTY PHASE

A. Prosecution's Case in Aggravation

1. Morales's criminal history

On March 16, 1999, Morales pleaded guilty to corporal injury to spouse/cohabitant/child's parent (§ 273.5). (3SCT 733-738.) He was sentenced to probation with 210 days in jail, anger management counseling, and no contact with the victim. (3SCT 737.)

2. Victim impact testimony

Elia's mother, Josefa Torres Tadeo, testified that Elia was the second oldest of her four children. (13RT 2924.) Elia was a year and a half when her father died in an accident. (13RT 2925.) Elia grew up in a poor town in Mexico, but was "a very joyful person." (13RT 2925.)

Elia was a "good girl" who enjoyed dancing and going to school, participated in church, and helped with housework at home. (13RT 2925-2927.) Elia was an outgoing person who "always won people over" and had a lot of friends growing up. (13RT 2926.)

Elia's older sister, Soraya, remembered growing up with Elia in Mexico. (13RT 2938-2939.) Elia was the funny sister while Soraya was more serious. (13RT 2939.) Elia was always teasing Soraya and making her laugh. (13RT 2939.) Elia also sometimes tricked Soraya into doing chores for her. (13RT 2941-2942.)

Soraya confirmed that Elia always had a lot of friends and liked to help them, lending them clothes and saving them seats at a school concert even if it meant she did not have a place for herself. (13RT 2940-2941.) Elia was easygoing, popular, and got along well with people, but Soraya was the better student. (13RT 2942.)

When Elia turned 15, she had a quinceañera. (13RT 2927-2928.) It was a special day for the family, and Elia got to wear a special dress and

dance to a live band. (13RT 2928-2929.) Elia was very happy and joyful. (13RT 2929.)

When Elia was 19, she left Mexico and moved to Santa Ana with her husband and Brianda. (13RT 2929.) She had Jennifer, Joseph, and Crystal after she left Mexico. (13RT 2929-2930.) Elia brought her children back to Mexico to visit her mother until her mother moved nearby. (13RT 2930-2931.)

Soraya moved to the United States five years after Elia and lived with Elia for three or four years. (13RT 2942-2943.) As adults, Soraya and Elia went to dances together a lot and saw each other every day. (13RT 2943.) Their children grew up together and they went to PTA meetings together. (13RT 2944.) Even as an adult, Elia remained lighthearted and good-natured. (13RT 2943.)

Some of Soraya's favorite memories of Elia were a baby shower when Elia was expecting Brianda, a trip they took to visit their brother in North Carolina, taking parenting classes together, and celebrating on New Year's Eve. (13RT 2944-2947.)

Elia was a very good mother who liked to spoil her children. (13RT 2930, 2943-2944.) Brianda testified that she was close with her mom and they had a lot of fun together. (13RT 2953.) She could talk to her mom about anything. (13RT 2953.)

Elia took Brianda, Jennifer, and Joe "to carnivals, fairs, and movies, and the circus, and anywhere." (13RT 2953-2954.) The children would also go on shopping trips with their mom and she would buy them almost anything they wanted. (13RT 2953-2954.) Brianda said her mom was a lot of fun because she acted like a little girl, teasing and laughing together. (13RT 2954-2955.)

Elia played Nintendo with Joe and Brianda. (13RT 2955.) Brianda said her mom did not really know how to play and just pushed any button. (13RT 2955.) They also watched movies together. (13RT 2955-2956.) Elia loved scary movies and Brianda got hooked on them too. (13RT 2956.) Elia and her kids played together all the time and Brianda, Jennifer, and Joe all had the same fun relationship with her. (13RT 2956.)

Elia was also a good cook. (13RT 2956.) She made pozole and caldo de res for Brianda and Joe all the time. (13RT 2957.) Jennifer's favorite was spaghetti and Elia made that anytime Jennifer asked. (13RT 2957.) Elia also helped out at the kids' schools and talked to them about behaving well in school and getting good grades. (13RT 2957-2958.)

Some of Brianda's favorite memories of her mother were a trip with the whole family to Big Bear where they played in the snow and went sledding, a birthday where her mom made a homemade piñata and cookies to take to school, playing with her mom at a school carnival, and the day her mom got an award for helping out so much in class. (13RT 2958-2963.) Brianda also remembered living near Disneyland when she was little and taking lots of trips there and to Knott's Berry Farm with her mom. (13RT 2963-2967.) Brianda said her trips to Disneyland and Knott's Berry Farm are not as fun anymore without her mom. (13RT 2965, 2967.)

Elia had a good relationship with her mother (Tadeo), brought presents when she visited, and took care of her when she was sick. (13RT 2930-2931.) Elia was also very close with Soraya. (13RT 2944.) Elia remained grounded even as she enjoyed the comforts and money life with her husband provided. (13RT 2930-2931.)

Soraya last saw Elia the Thursday before she was murdered when Elia came to the hospital where Soraya gave birth to her son. (13RT 2944.) Tadeo last saw Elia the night before she was murdered. (13RT 2931-2932.) The family had made carne asada, but Elia was not eating because she did

not feel well and Tadeo thought she looked sad. (13RT 2931.) Tadeo left Elia's house and grew increasingly concerned the next day when she did not hear from Elia. (13RT 2931-2932.)

The day of the murder, Brianda, Jennifer, and Joe had been swimming in the pool at their house. (13RT 2967-2968.) Elia did not usually swim with them and Brianda was surprised and happy when her mom got in the pool that day. (13RT 2968.)

Sometime after 9:00 p.m., Brianda called Tadeo and told her some men killed Elia. (13RT 2932-2933.) Soraya had just come home from the hospital with her new baby. (13RT 2948.) Tadeo did not believe Brianda and called Soraya's husband, Osvaldo, to take her to Elia's house. (13RT 2933, 2948.) Soraya said her mother's voice was full of pain, and she knew something bad had happened despite her husband's claim that he was taking Tadeo to the store. (13RT 2948.)

When Tadeo and Osvaldo arrived at Elia's house, it was surrounded by police officers who would not let them in. (13RT 2933-2934.) Tadeo waited outside for an hour and a half. (13RT 2934.) Eventually, a police officer brought a photograph of Elia to Tadeo for identification. (13RT 2934.) Tadeo felt "immeasurable pain." (13RT 2934.)

Tadeo and Osvaldo took Crystal home with them. (13RT 2934-2935, 2948.) Even though she was only four months old, Tadeo thought Crystal knew that she had lost her mother because she would not stop crying. (13RT 2934.) Crystal was still crying when Tadeo brought her in the house to see Soraya. (13RT 2948.)

Tadeo told Soraya to be strong and that "they killed your sister." (13RT 2948.) Soraya thought they had killed the other children too because she did not see them. (13RT 2949.) But Tadeo said the other children were with the police giving statements. (13RT 2949.) Brianda, Jennifer, and Joe joined the rest of the family when they were done at the

police station. (13RT 2934-2935.) Soraya held the wake for Elia at her house. (13RT 2949.)

Tadeo has seen a change in her grandchildren since their mother's murder, finding them to be traumatized, extremely hurt, sad, and frightened. (13RT 2935-2936.) Tadeo testified that Elia's death "destroyed our lives forever." (13RT 2936.) Tadeo misses Elia very much, especially on Mother's Day, Elia's birthday, the day of her murder, and other special holidays. (13RT 2936.) Tadeo believed that Elia was a good person who did not deserve this. (13RT 2936.)

Soraya testified that she and Elia had been planning a trip to Mexico before she was killed, but Soraya no longer had any desire to visit there. (13RT 2949.) The sisters were also planning to open a store together, and had saved money and signed a three-year contract. (13RT 2949.) Soraya tried to open the store on her own, but it did not work out. (13RT 2949.)

The thing Soraya misses most about Elia is her happiness and the way she laughed. (13RT 2949.) Soraya dreams about Elia every night. (13RT 2950.) Soraya said the thing that hurts the most is seeing Elia's children. (13RT 2950.) Elia was always planning the quinceañera for Brianda, who was almost 15. (13RT 2950.) Soraya also talked about hearing Brianda laugh in her room and thinking that Elia was there because Brianda has the same laugh as her mother. (13RT 2950.)

Brianda misses her mom, especially playing games together at home. (13RT 2968.) Brianda remembers being scared the night of the murder. (13RT 2969.) She still thinks about that night and what she could or should have done to change the outcome. (13RT 2969.)

Brianda also testified about changes in herself and her siblings since their mother's murder. (13RT 2970-2971.) Jennifer will no longer sleep alone; she always wants to sleep with a grown up because she is scared. (13RT 2970, 2974.) Joe gets scared in the mornings when Brianda has to

wake him up. (13RT 2970-2971, 2974.) And Brianda described herself as "more mean"—explaining she thinks it is because of the anger she has inside because the men took her mom from her. (13RT 2971.) Brianda also said she was sad. (13RT 2971.)

Since the murder, Brianda has moved around a lot. (13RT 2971.) Every time, she has to make new friends and tell them about what happened to her mom, which is hard to do because it brings back memories of the night she was killed. (13RT 2971-2972.)

Brianda visits her mother's gravesite once a week with her grandmother. (13RT 2972.) They stay about 15 or 20 minutes. (13RT 29972-2973.) While she is there, Brianda thinks about what it would be like if her mom was still alive. (13RT 2973.) She also talks to her mom and tells her that she misses her. (13RT 2973.)

Brianda kept some of her mom's jewelry and wears it every day to remind her of her mom. (13RT 2973.) She testified that she is afraid that the same thing will happen to them again, and she worries about it every night before she goes to sleep. (13RT 2973-2974.)

B. Morales's Case in Mitigation

1. Prison life

Anthony Casas, a former employee of the California Department of Corrections and Rehabilitation and expert in prison classification and security levels, testified for Morales. (13RT 2981-2986.) Mr. Casas knew nothing about the case and did not testify about the appropriate punishment for Morales. (13RT 3000-3001.) He had testified in 19 death penalty cases, always for the defense, and was paid $1,000 solely for his testimony in court. (13RT 3017-3018.)

Mr. Casas testified that a person sentenced to life in prison without the possibility of parole could only be placed in a level four, maximum security prison. (13RT 2987, 2995.) He explained that security measures of level four facilities included controlled movement, gun towers, sensors, and lethal electrified fences. (13RT 2990-2993, 2996-2997, 3018.) The prison cells themselves have mesh in the windows and a slot on the door that allows the inmate to be handcuffed while inside their cell. (13RT 2993-2994.) Despite the security measures, in Mr. Casas's opinion, not all life without the possibility of parole inmates are high-risk individuals. (13RT 3002-3003.)

Mr. Casas admitted on cross-examination that prison regulations allow officials to recommend and approve that a level four inmate be reclassified to level three. (13RT 3014-3016.) Mr. Casas also admitted that even though there had never been an escape from the new model maximum security prison, he could not guarantee that escape was impossible. (13RT 3003-3004.)

Mr. Casas confirmed that inmates sentenced to life without the possibility of parole would be in contact with other prisoners, guards, and civilian employees, including medical personnel. (13RT 3004-3005.) He also conceded inmates assault and kill each other and guards and join prison gangs, all of which gets them more respect and benefits. (13RT 3005-3006, 3012-3103.)

Mr. Casas explained that a person sentenced to life without the possibility of parole may have either contact or no-contact visits with family members, and that department policy was to house inmates as near to family as possible to facilitate such visits. (13RT 2996, 3009-3010.) Such inmates can further their education and can get jobs in certain areas of the prison. (13RT 2997-2998.) They are also allowed out of their cell to socialize in the prison yard. (13RT 2998, 3006.) Such inmates can also

decorate their cell with pictures, keep two appliances including a television or radio, receive magazines and mail, purchase special foods at the commissary, and make phone calls. (13RT 3007-3009.) They also have access to drugs and can make alcohol out of fermented fruit. (13RT 3011-3012.)

2. Morales's family

Angel and Alejandra testified for Morales. (14RT 3025-3026, 3042-3058.)

Morales and Angel were born nine months apart. (14RT 3026, 3036.) After Angel was born, Morales went to live with Alejandra's parents. (14RT 3027-3028, 3050.) Alejandra visited Morales and her parents every weekend. (14RT 3052.) Angel remembered visiting Morales at his grandparents' home and observed that he was treated fine. (14RT 3037.) Morales moved back home with his parents after four or five years. (14RT 3028, 3052.)

Angel said he and Morales had a normal childhood. (14RT 3027, 3037.) Their parents fed them, clothed them, sent them to school, made sure they went to church, and taught them right from wrong. (14RT 3037.) After they finished primary school, at 12 years old, Angel and Morales went to work in the fields with their father, Hector Morales. (14RT 3038-3039.) Angel said it was not hard work. (14RT 3039.)

Angel testified that their father would discipline them when they behaved badly and they would sometimes hide because he hit hard. (14RT 3032-3033, 3037.) Alejandra confirmed that Hector sometimes hit Morales's legs with his belt, leaving marks one time. (14RT 3053-3054.) Alejandra also disciplined the boys, at times using her hands or a belt. (14RT 3034-3035.) Alejandra admitted to hitting Morales with a tree branch and pushing him into a wall. (14RT 3054.)

Angel testified that he sometimes saw his father hit his mother with his hands and once with a rope. (14RT 3028-3030, 3037-3038.) Angel said Morales was usually there, but could not recall if he was there during the rope incident. (14RT 3029-3031.) Angel said the hitting did not happen often, but he could not recall the number of times. (14RT 3030-3031.) Alejandra testified that the children saw many instances of domestic violence, including Hector hitting her with a wet rope, a stick, a brick, and a fan belt. (14RT 3053.)

When Angel and Morales were around eight to ten years old, Alejandra left Honduras and moved to the United States. (14RT 3031, 3044.) Alejandra said she left because of their economically poor life and Hector's domestic violence. (14RT 3045, 3048-3050, 3052-3053.) The boys spoke with their mother often by phone after she left. (14RT 3031, 3056.) Their father told them their mother had abandoned them, but they believed she left for economic reasons. (14RT 3031-3032.)

Angel said he and Morales were not close and that Morales went off with his friends more than he hung out with Angel. (14RT 3036.) Angel heard that Morales drank alcohol with his friends, but never saw him drink. (14RT 3036.)

On cross-examination, Angel admitted he saw more of his mother and father's relationship than Morales, who sometimes lived with their grandparents, but he did not grow up to rob or kill anyone. (14RT 3038.)

A defense investigator visited the area in Honduras where Morales grew up. (14RT 3064-3066.) He took some pictures of one of the many homes the family lived in and interviewed Morales's father, uncle, and paternal grandmother. (14RT 3066-3071; 29CT 8367.)

Hector confirmed that Morales lived with his maternal grandparents for a few years when he was young. (29CT 8369-8370.) He stated that Morales did well in school, passed every year, and started coming to work

with him after he graduated from primary school. (29 CT 8370-8371.) The family went to church together regularly. (29CT 8379.) Hector also confirmed that when Morales was around nine years old, Alejandra moved to the United States to see if she could earn more money. (29CT 8371-8372.) He stated everything was normal after she left and that she sometimes sent home money, but they divorced about three years later. (29CT 8372-8373, 8375.) Hector remarried when Morales was around 12 years old. (29CT 8374-8375.) Hector said he and Morales had a good relationship. (29CT 8384.)

Morales's uncle and maternal grandmother gave almost the same testimony. (29CT 8389-8400, 8405-8413.) They both stated that Alejandra was well-behaved, humble, and proper, and that she and Hector had a very close relationship and got along well. (29CT 8390-8391, 8405-8407.) Morales's uncle remembered Morales as well-behaved and respectful. (29CT 8396.) Morales's grandmother remembered him as a happy, good person. (29CT 8410-8412.)

Dr. Michael Kania, a forensic psychologist, testified last for the defense. (14RT 3081-3084.) Dr. Kania did not interview or evaluate Morales, was not given any facts about the case, did not diagnosis Morales or run tests, and did not review any case materials. (14RT 3084, 3102-3103.) He was brought in to generally discuss attachment theory, early loss, and domestic violence in the home. (14RT 3084-3086.) In doing so, Dr. Kania answered several hypothetical questions posed by the defense. These hypotheticals were based on Morales's life, including his experience with violence in the home; Dr. Kania testified that such hypothetical situations could create problems with trust and security in a child and cause them to act similarly later in life. (14RT 3086-3101.) Dr. Kania clarified on cross-examination that corporal punishment as discipline is not necessarily abuse. (14RT 3104-3105.)

ARGUMENT

I. MORALES WAS NOT DENIED HIS RIGHT TO COUNSEL AT THE PRETRIAL AND PLEA BARGAINING STAGES

A. Overview

Morales contends he was denied his right to counsel under the federal and state constitutions during critical pretrial proceedings because the pretrial court incorrectly appointed private counsel instead of the public defender or other Capital/LWOP counsel. (AOB 107-249.) Respondent agrees that the court should have appointed the public defender when Morales's retained counsel asked to be relieved after special circumstance allegations were filed. Respondent disagrees, however, that this error created a constitutional violation or otherwise deprived Morales of the effective assistance of counsel during the pretrial and plea bargaining stages of his proceedings.

Instead of appointing the public defender, the pretrial court appointed private counsel, Wayne Rozenberg. At the time of his appointment, Mr. Rozenberg had been practicing criminal law for almost 10 years and had handled numerous homicide cases, including eight homicide trials. (29CT 8246.) Mr. Rozenberg never stated that he was unqualified or incompetent to handle Morales's case; he just acknowledged that he was not on the Death Penalty Appointment Panel, and thus, if Morales rejected the prosecution's plea offer and the death penalty was sought, new counsel would be assigned for trial. (2RT 138, 144.)

Morales contends that prejudice should be presumed because he was deprived of capital defense counsel during the critical period between the filing of the death eligibility special circumstance allegations and the prosecution's decision to seek the death penalty at trial. Pointing to various alleged deficiencies in Mr. Rozenberg's performance, Morales alleges that

Mr. Rozenberg failed entirely to function as capital defense counsel. However, the record shows that Morales was not actually or constructively denied the assistance of counsel. Therefore, there is no basis for presuming prejudice. During his one and a half years on the case, Mr. Rozenberg worked to secure a plea offer that would allow Morales to avoid the death penalty and have the possibility of parole, despite his recorded murder confession. Mr. Rozenberg also conducted discovery and investigations. While there were delays due to both counsels' ongoing trials, discovery, and a change in the trial prosecutor, the prosecution eventually offered Morales 50 years to life in prison to avoid the death penalty. Morales declined the offer despite Mr. Rozenberg's and the court's urging that he should take it.

Morales cannot show that he suffered any actual prejudice as a result of Mr. Rozenberg's representation in connection with the plea offer or otherwise. To the contrary, Mr. Rozenberg actively and effectively represented Morales throughout the pretrial stage by, among other things, successfully negotiating a beneficial plea offer on Morales's behalf. Morales was counseled off the record by Mr. Rozenberg and on the record by the court to ensure that he understood the offer and what would result if it was rejected. Morales cannot now claim ineffective assistance of counsel in an attempt to belatedly obtain the benefit of a plea offer he rejected.

Finally, the trial court properly considered and denied Morales's motion for posttrial relief based on Mr. Rozenberg's alleged ineffective assistance of counsel. A full hearing was not necessary because the trial court found it was evident from the record that Morales did not suffer any prejudice. The trial court did not abuse its discretion, and there is no basis for remand.

B. Legal Standards on Ineffective Assistance of Counsel

"[O]nce the adversary process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." (*Montejo v. Louisiana* (2009) 556 U.S. 778, 786.) The right to the assistance of counsel is also guaranteed by article I, section 15 of the California Constitution. (*People v. Doolin* (2009) 45 Cal.4th 390, 417.)

"The pleading—and plea bargaining—stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933, citing *Hill v. Lockhart* (1985) 474 U.S. 52; *Padilla v. Kentucky* (2010) 559 U.S. 356, 373 ["the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"].) As such, "claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* [*v. Washington* (1984) 466 U.S. 668 (*Strickland*)]." (*Missouri v. Frye* (2012) 566 U.S. 134, 140.)

The *Strickland* standard is highly deferential and reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, *supra*, 466 U.S. at p. 689.) The burden is on appellant to prove that (1) defense counsel's performance was deficient, i.e., fell below an objective standard of reasonableness under prevailing professional norms, and (2) but for counsel's unprofessional errors, there was a reasonable probability of a different result, i.e., a probability sufficient to undermine confidence in the outcome. (*Id.* at pp. 687-694; *In re Alvernaz*, *supra*, 2 Cal.4th at pp. 936-937.)

"[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland*, *supra*, 466 U.S. at p. 688.) While American Bar Association (ABA) and other standards provide "guides to determining what is reasonable," "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (*Id.* at pp. 688-689; *Bobby v. Van Hook* (2009) 558 U.S. 4, 8 (per curiam) [reiterating that ABA and other standards are "'only guides' to what reasonableness means, not its definition"].) Indeed, this court has said that "the ABA guidelines do not establish the standards for effective representation." (*People v. Rices* (2017) 4 Cal.5th 49, 63, citing *People v. Williams* (2013) 56 Cal.4th 630, 692; see also *In re Reno* (2012) 55 Cal.4th 428, 468 ["the ABA Guidelines require much more of counsel than is required by state and federal law governing ineffective assistance of counsel"].)

To establish prejudice where a plea offer has lapsed or been rejected, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." (*Missouri v. Frye*, *supra*, 566 U.S. at p. 147.) "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." (*Ibid.*) Ultimately, it is necessary for a defendant to show "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." (*Ibid.*)

Where a defendant fails to show prejudice, there is no need to reach the issue of deficient performance. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 60; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

C. The Pretrial Court's Appointment of Mr. Rozenberg Did Not Deprive Morales of His Constitutional Right to the Effective Assistance of Counsel

Morales contends that the pretrial court's appointment of Mr. Rozenberg instead of the public defender denied him of his right to the effective assistance of counsel. (AOB 141-165.) Respondent agrees that under the applicable local rules, the court should have appointed the public defender to represent Morales when his retained counsel requested to be relieved. Respondent disagrees, however, that the court's appointment of Mr. Rozenberg deprived Morales of his constitutional right to the effective assistance of counsel.

1. Procedural background

Morales was arraigned on August 6, 2001, and the trial court appointed the public defender's office to represent him. (3CT 612; 1RT 1.)[12]

On or around August 14, 2001, Morales retained attorney Earl Carter and the public defender was relieved. (1RT 1; 2SCT 318.) Mr. Carter represented Morales until March 25, 2002, when he asked to be relieved as counsel because the filing of special circumstances in the case changed his contractual relationship with Morales. (2SCT 318.) Richard Young was the assigned deputy district attorney at this time. (1RT 1.)

On April 11, 2002, the court relieved Mr. Carter and appointed Mr. Rozenberg to represent Morales. (1RT 24; 4CT 852; 29CT 8245; 1SCT 24,

[12] While the clerk's transcript indicates a "Conflict Panel Attorney" was appointed, the reporter's transcript later states that "the public defender is relieved." (3CT 612; 1RT 1.)

242.) The court did not explain on the record why it appointed Mr. Rozenberg instead of the public defender or a conflict attorney from the Capital/LWOP case panel as required by the Superior Court of San Bernardino County, Local Rules, rule 1413.

In subsequent proceedings, Mr. Rozenberg provided a declaration explaining that he received "a phone call from the court clerk for the Honorable Judge Gus Skropos." (29CT 8245.) Mr. Rozenberg further stated, "I initially informed the clerk that I was not on any panel for accepting appointments and was told that I had been appointed nonetheless." (29CT 8245.)

After his appointment, Mr. Rozenberg represented Morales at the preliminary hearing, consulted with Morales, received discovery, conducted investigations, and announced that he was almost ready for trial. (1RT 24-85; 2RT 88-89, 109-111, 140-141; 29RT 8245-8246; Confidential CT 1-12.) Mr. Rozenberg also actively negotiated with the prosecution to obtain a plea offer that would be in Morales's best interest. (2RT 126-127, 129-130, 138; 29RT 8245)

At a pretrial hearing on October 7, 2003, David Mazurek, who took over the prosecution for Mr. Young on June 20, 2003, indicated he had authority to offer Morales a plea deal of 50 years to life. (2RT 114, 135-138.) The offer had limitations, including that it must be accepted that day, and if not, Mr. Mazurek would seek internal approval from the Death Penalty Review Board to seek the death penalty and would likely obtain approval. (2RT 136-137.) Additionally, no further negotiations or offers would be pursued. (2RT 137, 141.)

Mr. Rozenberg agreed with Mr. Mazurek's representation of the offer. (2RT 138.) He explained that Mr. Young had previously talked of submitting the matter to the Death Penalty Review Board, but delayed due to discussions regarding a possible disposition. (2RT 138.) Mr. Rozenberg

told the court that he had discussed the possibility of this offer with Morales "a couple of times prior to today." (2RT 138.) Mr. Rozenberg also acknowledged that if the decision was made to seek the death penalty, "Mr. Morales would be assigned a new attorney, who is part of the Death Penalty Appointment Panel." (2RT 138.) Mr. Rozenberg opined, "It is my belief based upon my review of the facts of this case, that it would be in Mr. Morales' best interest to accept the offer as presently stated" because if the case went to trial he believed Morales would be convicted. (2RT 138-139.)

Mr. Rozenberg then discussed the plea offer privately with Morales for at least 30 minutes. (2RT 140-141.) When court reconvened, Mr. Rozenberg announced that Morales had "rejected the offer." (2RT 141.)

The court inquired of Morales, who confirmed that he understood the offer that had been made and the consequences of rejecting the offer. (2RT 141-143.) The offer was then withdrawn. (2RT 144.) The matter was continued briefly to await the decision of the Death Penalty Review Board. (2RT 144-145.)

On October 16, 2003, the prosecution indicated it was going to proceed with the case as a death penalty case, Mr. Rozenberg was relieved, and the public defender was appointed. (2RT 146-148; 1SCT 84.)

2. Mr. Rozenberg did not declare that he was unqualified or incompetent to represent defendants facing a potential death sentence

Morales contends that during the plea proceedings, Mr. Rozenberg declared that he was unqualified and incompetent to represent defendants facing a potential death sentence. (AOB 150-157.) Not so. Mr. Rozenberg simply stated that should the prosecution decide to seek the death penalty, "Morales would be assigned a new attorney, who is part of the Death Penalty Appointment Panel." (2RT 138.) The pretrial court confirmed,

"That's right." (2RT 138.) This was simply Mr. Rozenberg's and the court's acknowledgment that there was an established panel for death penalty attorneys and Mr. Rozenberg was not on the panel. (2RT 138, 144.) Basically, Mr. Rozenberg assumed that the court would be appointing new counsel from the panel and the court agreed.

While the court could have considered whether Mr. Rozenberg should continue to represent Morales under the circumstances despite not being on the panel (Cal. Rules of Court, rule 4.117),[13] it did not do so. Had Morales objected to Mr. Rozenberg's request to be relieved and indicated that he desired to keep Mr. Rozenberg as counsel, it would have been appropriate for the court to consider Mr. Rozenberg's qualifications. (*Ibid.*; *People v. Rices*, *supra*, 4 Cal.5th at pp. 59-61.) Indeed, if Morales was concerned about his speedy trial rights, as he now suggests, he should have objected to Mr. Rozenberg's request to be relieved on that ground. But Morales did not object. (2RT 138-144, 147-148.)

Mr. Rozenberg's request to withdraw was not, as Morales claims, an admission that he was incompetent. As indicated above, Mr. Rozenberg asked to be relieved as counsel based on his belief, and the court's confirmation, that counsel would be appointed from the death penalty appointment panel. That Mr. Rozenberg was not on the panel did not establish that he was unqualified or incompetent to serve as Morales's counsel, nor did his request to be relieved. (See Cal. Rules of Court, rule 4.117.) As this court has found, "Lack of capital trial experience does not

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[13] California Rules of Court, rule 4.117, "defines minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts." (*Id.* at subd. (a).) An attorney may be appointed even if he or she does not meet the minimum qualifications if the court finds that "the attorney demonstrates the ability to provide competent representation to the defendant" under a separate set of qualifications. (*Id.* at subd. (f).)

in and of itself establish incompetency." (*People v. Wright* (1990) 52 Cal.3d 367, 412, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Further, "The admission of an attorney to the state bar establishes that the state deems him competent to practice law in all types of actions, and, when a defendant is represented by a licensed attorney, a presumption exists in favor of the effectiveness of counsel." (*People v. Williams*, *supra*, 56 Cal.4th at pp. 691-692.)

Likewise, there is no merit to Morales's argument that Mr. Rozenberg "necessarily admitted that he had not investigated the law or facts sufficient to 'perform legal service with competence' in this capital case." (AOB 155.) Mr. Rozenberg never suggested he had not sufficiently investigated the law or facts of the case. In fact, at one point in the proceedings, Mr. Rozenberg represented that he was "essentially ready for trial," except for some new discovery he had just received. (2RT 109.) The record also shows that Mr. Rozenberg had been actively investigating and preparing for Morales's case, as well as negotiating with the prosecution, since his appointment. (1RT 24-85; 2RT 88-89, 109-111, 126-127, 129-130, 138, 140-141; 29RT 8245-8246; Confidential CT 1-12.) Moreover, Mr. Rozenberg assured Morales and the court that should the matter proceed to trial not as a death penalty case, he would do everything necessary to represent Morales. (2RT 139.) The court understood, saying "I've known you over the years, Mr. Rozenberg, and I've never known you to do anything less than your absolute best, which is very good within the limits of law in representing your clients." (2RT 139.)

The cases cited by Morales in support of his argument are inapposite, as they involved *involuntary* removal of an appointed counsel due to an apparent conflict of interest. (AOB 155, citing *People v. Daniels* (1991) 52 Cal.3d 815, 846-847; *People v. Jones* (2004) 33 Cal.4th 234, 244-245, *Smith v. Superior Court* (1968) 68 Cal.2d 547.) Here, the court did not sua

sponte remove Mr. Rozenberg, find him to be incompetent, or suspect a conflict of interest. Nor did any party suggest that Mr. Rozenberg was incompetent to represent Morales. Instead, Mr. Rozenberg requested to be relieved solely because he was not on the capital case panel. Moreover, Morales did not object to substitution of the public defender.

Finally, contrary to Morales's unsupported statements (AOB 156-157), nothing can be assumed from the pretrial court's failure to inquire whether Mr. Rozenberg felt he was competent to continue representing Morales despite the death penalty determination, or whether Morales wanted to continue on with Mr. Rozenberg. As discussed above, there is nothing in the record to show that the substitution of counsel was made for any other reason than to abide by the local rules requiring counsel from the death penalty appointment panel. While California Rules of Court, rule 4.117 certainly *permitted* the court to determine that Mr. Rozenberg could continue representing Morales despite the death penalty election, nothing in the rule *required* the court to do so when the public defender was ready to step in and Morales made no affirmative request to keep Mr. Rozenberg on the case.[14]

Nothing in the record supports Morales's allegations that anyone involved in the case believed Mr. Rozenberg to be actually incompetent or unqualified to handle Morales's case. Instead, all parties appeared to assume that after the death penalty decision was made, counsel from the death penalty appointment panel should be appointed. While Morales

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[14] Again, the cases cited by Morales are inapposite. The attorney in *People v. Woodruff* (2018) 5 Cal.5th 697 was *retained*, not *appointed*, and the defendant affirmatively indicated he wanted to proceed with his retained counsel despite the court's warnings that his representation appeared to be inadequate. (*Id.* at p. 726-727.) *People v. Rices*, *supra*, 4 Cal.5th 49, involved a *Marsden* motion that was denied following a full hearing on the defendant's complaints against counsel. (*Id.* at pp. 61-63.)

could have indicated a desire to keep Mr. Rozenberg on the case, especially to ensure his speedy trial rights, he did not. And while the court could have inquired into Mr. Rozenberg's qualifications under California Rules of Court, rule 4.117, its decision not to do so when the public defender was ready to step in did not violate Morales's constitutional rights.

3. The appointment of Mr. Rozenberg instead of a public defender does not warrant a presumption of prejudice

Superior Court of San Bernardino County, Local Rules, rule 1413[15] provides that "[t]he Public Defender of San Bernardino County shall represent all indigent persons charged with a capital or life-without-possibility-of-parole (LWOP) case." Rule 1413 further provides, "If the Public Defender declares a conflict of interest and/or is relieved from representing a person charged with a capital or LWOP case, the Court shall appoint counsel from the 'Capital/LWOP Case Panel.'" (*Ibid*.) Under this local rule, the court should have appointed the public defender instead of Mr. Rozenberg after Morales's retained counsel requested to be relieved.

Morales concedes that a violation of local rule 1413 "does not per se constitute a violation of the Sixth Amendment." (AOB 146.) However, Morales contends that in this case prejudice should be presumed because the court's mistake caused a complete deprivation of representation by competent counsel. (AOB 146-150, 157-163.) This claim is meritless.

The United States Supreme Court has explained that "[i]n certain Sixth Amendment contexts, prejudice is presumed." (*Strickland*, *supra*, 466 U.S. at p. 692.) For instance, "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."

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[15] At the time of the court's appointment of Mr. Rozenberg in April 2002, the rule was numbered 1450.3. The text of the prior and current rules are substantially the same.

(*Ibid.*) "[V]arious kinds of state interference with counsel's assistance" are also presumed to result in prejudice. (*Ibid.*, citing *United States v. Cronic* (1984) 466 U.S. 648, 659 and fn. 25 (*Cronic*).)

In *Cronic*, the Supreme Court identified three situations involving circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Cronic*, *supra*, 466 U.S. at pp. 658-659.) The first is the "complete denial of counsel" at "a critical stage." (*Bell v. Cone* (2002) 535 U.S. 685, 696.) The second is if "counsel fails to subject the prosecution's case to meaningful adversarial testing." (*Ibid.*) Finally, a presumption of prejudice is warranted "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." (*Ibid.*)

This is not an appropriate case to presume prejudice. Morales appears to be relying on the first *Cronic* exception. However, Morales was not actually or constructively denied counsel at any critical stage of the proceedings. While the pretrial court did not appoint the public defender, Mr. Rozenberg was an experienced trial attorney. At the time of his appointment, Mr. Rozenberg had been practicing criminal law for six years,[16] had "handled numerous homicide cases," and had "tried approximately 8." (29CT 8246.)

In support of his claim that he was essentially deprived of pretrial counsel, Morales points to several instances where Mr. Rozenberg allegedly failed to render pretrial assistance in accord with prevailing

[16] The State Bar of California's website indicates that Mr. Rozenberg was admitted to practice law for 10 years at the time of his appointment. (The State Bar of California, Attorney Search <http://members.calbar.ca.gov/fal/LicenseeSearch/QuickSearch?FreeText=rozenberg&SoundsLike=false> [as of Aug. 6, 2019].)

professional norms.[17] (AOB 168-209.) But the record contradicts Morales's claims of utter incompetence and establishes that Mr. Rozenberg in fact provided substantial assistance to Morales.

Mr. Rozenberg consulted appropriately with Morales through pretrial proceedings. He met with Morales one time in the jail[18] and during each court appearance. (29CT 8246; 1SCT 139.) Although Morales contends that Mr. Rozenberg appeared on his behalf only 10 out of 26 court sessions, or 38% of the time (AOB 170-171), he actually appeared 13 out of 28 court sessions, or 46% of the time, between his appointment on April 11, 2002 and his last appearance on October 16, 2003 (1RT 24-85; 2RT 86-148). During these meetings, Mr. Rozenberg discussed the ongoing plea negotiations and Morales "indicated that he understood what was happening and did not have any questions that were not answered." (2RT 138; 29CT 8245-8246.)

Mr. Rozenberg also conducted reasonable investigations. He requested and was granted the assistance of Brite Star Investigations, met with an investigator, and provided all discovery material. (Confidential CT 1-12.) Brite Star's investigators reviewed the discovery and case information, met with Morales at the jail three times, investigated Morales's confession, located and interviewed witnesses, located and interviewed Morales's family, and prepared reports. (Confidential CT 4-5, 10-11.) The scope of the investigation was likely influenced by the existence of Morales's recorded confession, his identification by multiple victims, and indications by Morales that he would take a plea deal after

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[17] These are not freestanding ineffective assistance of counsel claims. Morales does not argue that prejudice resulted from these alleged shortcomings.

[18] For comparison, the public defenders who represented Morales at trial only visited Morales twice in jail during the nine months between their appointment and the start of trial. (1SCT 142, 143.)

hearing his taped confession. (29CT 8245-8246; *Strickland*, *supra*, 466 U.S. at p. 691 ["The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"].) As to a potential penalty phase, the investigator's discussions with Morales and his family members would likely have produced relevant information, such as mitigating character, background, and history evidence, similar to the family history ultimately presented at the penalty phase. (§ 190.3; Confidential CT 5, 11.)

It was also reasonable for Mr. Rozenberg not to associate second counsel or a mitigation specialist at the pretrial stage considering he had been on the case for over a year, had extensive criminal experience including eight murder trials, the facts and legal issues were not complex, the cause of death was undisputed, and Morales confessed to multiple people and was identified by others. (*People v. Carrasco* (2014) 59 Cal.4th 924, 955-956.)

Mr. Rozenberg also adequately represented Morales at the preliminary hearing, where he questioned witness identifications of Morales and objected appropriately. (1RT 40-41, 42-44, 49, 50-51, 58, 60; 3CT 679-680, 681-683, 688 689-690, 697, 699.)

Furthermore, when Mr. Rozenberg learned that Mr. Young might request internal approval to seek the death penalty, it was Mr. Rozenberg who suggested that Morales might be interested in negotiating a plea agreement. (2RT 138.) Mr. Rozenberg suggested 50 to life as an option for a plea deal and discussed this option with both Mr. Young and Mr. Mazurek, until the prosecution finally offered the deal. (2RT 126-127, 129-130, 138.) In the meantime, Mr. Rozenberg was investigating Morales's case and preparing for trial, at one point announcing to the court that he would be ready for trial but had just received additional discovery. (1RT

24-85; 2RT 88-89, 109-111, 140-141; 29RT 8245-8246; Confidential CT 1-12.)

Morales cannot show that Mr. Rozenberg failed to function in any meaningful sense as the prosecution's adversary.[19] Defendants have been relieved of the obligation to show prejudice under *Cronic* "only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (*In re Visciotti* (1996) 14 Cal.4th 325, 353 [explaining that failure of counsel to present specific types of mitigating evidence does not warrant a presumption of prejudice]; see also *Wright v. Van Patten* (2008) 552 U.S. 120, 125 (per curiam) [requiring deprivation of counsel "on par with total absence"].) In *In re Avena* (1996) 12 Cal.4th 694, 726-727, this court rejected the defendant's argument that he was entitled to a presumption of prejudice. The attorney's representation was "minimal at best"—he waived opening argument at the guilt phase, called no defense witnesses, and did not address the two murders or special circumstance allegations during his brief closing argument. Nonetheless, this court found that counsel was neither "totally absent" nor "prevented" from assisting at trial. Therefore, the *Cronic* exception did not apply.

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[19] Morales also suggests that Mr. Rozenberg's failure to pursue payment for his services confirms that he put little effort into Morales's case. (AOB 199-201.) But the record suggests that Mr. Rozenberg put in a substantial amount of time on Morales's case, including but not limited to, meetings with Morales at the jail and after court, preparation for and representation at the preliminary hearing, reviewing discovery, consultations with the district attorney, conducting investigations, and attending numerous court appearances. As Mr. Rozenberg explained, by the time the billing oversight was discovered, "so much time had passed that it hardly seemed worth the effort to go back and deal with it," suggesting it would take too long to locate and review the necessary records and complete the required paperwork. (2SCT 316.) This does not mean that the work Mr. Rozenberg performed on the case was negligible.

Morales's claims of alleged deficiencies in performance do not come close to establishing a complete deprivation of counsel. Indeed, even if portions of Mr. Rozenberg's representation were not perfect, the record shows that he provided meaningful representation. Accordingly, no presumption of prejudice is warranted.

This case is readily distinguishable from the cases upon which Morales relies to support his claim that prejudice should be presumed. (AOB 213.) The cases cited by Morales all show a complete failure to act as counsel, unlike the record here. (*Mitchell v. Mason* (6th Cir. 2003) 325 F.3d 732, 735-737, 744 [counsel never consulted with his client during his seven-month representation and was suspended from practicing law for the month preceding trial]; *United States v. Morris* (6th Cir. 2006) 470 F.3d 596, 598-599, 601-602 [counsel met with his client for the first time in the "bull pen" located behind the courtroom and client was required to make an immediate decision on the plea offer made that day]; *Appel v. Horn* (3d Cir. 2001) 250 F.3d 203, 206, 215-217 [undisputed that counsel failed to act as an adversary to the prosecution or conduct even a minimal inquiry into client's competency during the 10-day period between counsel's appointment and the competency hearing]; *Childress v. Johnson* (5th Cir. 1997) 103 F.3d 1221, 1223, 1231 [counsel offered no assistance to defendant at a plea hearing]; *Tucker v. Day* (5th Cir. 1992) 969 F.2d 155, 159 [counsel acted as mere spectator at defendant's sentencing].)

In sum, although the pretrial court should have followed its local rules and appointed the public defender, Mr. Rozenberg's appointment and subsequent performance do not support a presumption of prejudice. In fact, Mr. Rozenberg's representation was beneficial to Morales as Mr. Rozenberg was able to persuade the prosecution to offer Morales a plea deal that would save his life and give him an opportunity for parole. Thus, prejudice cannot be presumed, and Morales is not entitled to relief.

D. Morales Has Not Established That Mr. Rozenberg Rendered Ineffective Assistance in Connection with the Plea Offer

Morales suggests that it can be *inferred* from Mr. Rozenberg's pretrial performance that he could not competently advise Morales concerning the advantages and disadvantages of rejecting a plea offer. (AOB 210-212.) Basically, Morales argues that due to Mr. Rozenberg's failure to investigate and prepare for a capital trial, he would be unable to offer informed advice regarding how the law would apply to the evidence in this case. But Mr. Rozenberg had investigated enough and knew enough to appreciate the risks going forward, especially given Morales's taped confession. He said as much in his declaration, stating that he "explained to [Morales] what the offer was, why he should accept that offer, and what would happen if he refused." (29CT 8246.)

Morales also argues that Mr. Rozenberg's lackluster pretrial performance eroded any trust or confidence that Morales might have placed in him. (AOB 211.) But there is no evidence that Morales ever asked for a new lawyer or expressed dissatisfaction with their relationship. Instead, during all discussions, Morales told Mr. Rozenberg that "he understood what was happening and did not have any questions that were not answered." (29CT 8246.)

Anyway, for the reasons discussed in the following section, the record showed both that Mr. Rozenberg acted competently in connection with advising Morales about the plea offer, and that Morales was unable to show prejudice.

E. The Matter Should Not Be Remanded to the Trial Court to Hold a Hearing on Morales's Ineffective Assistance of Counsel Claim

Morales contends that if this court determines the *Strickland* standard applies, the matter should be remanded to the trial court to hold a hearing on his ineffective assistance of counsel claim. (AOB 217-249.) Respondent disagrees. The trial court considered and denied Morales's claim, finding he did not suffer any prejudice. The trial court's decision was reasonable based on the evidence and argument before it, and a remand is not warranted.

1. Motion to prohibit death penalty based on ineffective assistance of counsel

On October 20, 2003, after the prosecution declared it would seek the death penalty, the case was transferred from San Bernardino County Superior Court's Fontana District to the Rancho Cucamonga District and assigned to Judge Uhler for trial. (2RT 152-154.) The parties, including the newly appointed public defender, first appeared before Judge Uhler on October 24, 2003. (2RT 155-157.)

After the guilt phase was complete, on October 19, 2004, Morales filed a motion to prohibit the death penalty in part based on the ineffective assistance of counsel and the trial court's initial failure to appoint the public defender. (28CT 7920-7970.)

On October 20, 2004, Morales's counsel and a deputy district attorney filling in for an ill Mr. Mazurek appeared before Judge Uhler. (13RT 2790-2799.) Based on Morales's filing and without the benefit of the prosecution's response, Judge Uhler remarked that it appeared "some significant problems" occurred when the case was in the Fontana court. (13RT 2790-2791.) Judge Uhler said that she gave a copy of the moving papers to the prosecution to present to the elected district attorney for

review. (13RT 2791-2792.) She indicated she did not believe the court had the authority to prevent the case from moving forward to the penalty phase. (13RT 2792.) She also stated there was no record as to why Mr. Rozenberg was appointed, but it appeared there were no conflicts and that the public defender should have been appointed from the start. (13RT 2794-2795.)

The next day, Morales filed additional points and authorities in support of his motion, and the court held a further hearing on the motion. (28CT 7977-7981; 13RT 2800-2842.) At the hearing, Mr. Mazurek advised the court he did not know how Mr. Rozenberg got appointed, but regardless, the issue should be whether his conduct fell below professional standards. (13RT 2801, 2802.) Mr. Mazurek disputed Morales's claim that Mr. Rozenberg hardly ever appeared on his case, pointing to evidence in the transcripts showing at least 12 appearances, several of which indicated ongoing settlement discussions. (13RT 2802-2803.) Mr. Mazurek argued the transcripts also showed that the prosecution's delay in submitting the case to the death review committee was due to Mr. Rozenberg's representations that there was a possibility Morales would plead guilty. (13RT 2803-2805.) Mr. Mazurek further argued the transcripts showed Mr. Rozenberg had discussions with Morales about settling the matter, both before and when the offer was made, and he advised Morales it was in his best interest to take the offer. (13RT 2805.) Mr. Mazurek also noted the court conducting the pretrial hearing had a lengthy discussion with Morales about the plea offer. (13RT 2805-2806.) Morales's counsel reiterated the argument he presented in his moving papers regarding Mr. Rozenberg's ineffective representation. (13RT 2807-2808, 2815-2816, 2822-2824.)

Judge Uhler restated her concerns about the delays, but acknowledged that there was another side to the story as shown by Mr. Mazurek's explanations that the delays were caused by ongoing settlement negotiations. (13RT 2808-2810, 2812-2814.) She acknowledged that this

case differed from other death penalty cases she had handled; in the three prior death penalty cases she had presided over, plea deals had not been considered so there was no issue of delay in making the decision to seek death. (13RT 2808, 2811, 2826, 2835.) She expressed concern about Mr. Rozenberg's attendance record and investigation of the case. (13RT 2812, 2820, 2826.) Although she believed Mr. Mazurek "shed some favorable light" on the issues, she expressed that she still had some concerns. (13RT 2814.) Ultimately, she determined that a further hearing with witnesses was necessary to make a final decision how to proceed. (13RT 2834-2842.)

On October 25, 2004, the parties reconvened. (13RT 2843-2858.) Judge Uhler decided not to take testimony, but to instead hold the penalty phase as normal and address the issues about what happened in Fontana after the jury was released. (13RT 2847-2848.) She observed it would likely take "a tremendous amount of time" to figure out what to do with what happened in Fontana and that the issue "could go on for months in regards to argument, investigation, and research." (13RT 2848, 2852.) She also noted that the ineffective assistance of counsel claims were untimely and should have been raised pretrial. (13RT 2851.)

The penalty phase moved forward and the jury returned a death verdict on November 5, 2004. (28CT 8043; 14RT 3225.)

After a few continuances, a further hearing on Morales's motion alleging ineffective assistance of counsel was set for August 12, 2005. (14RT 3243-3247.) At that time, Morales represented to the court that he wanted that to be the last date for motions because he was tired of being in county jail. (14RT 3247.)

On August 11, 2005, the prosecution filed a written opposition to Morales's motion accompanied by declarations from Mr. Young and Mr. Rozenberg, arguing that the motion should be dismissed because Morales could not show prejudice. (29CT 8233-8253.)

At the August 12 hearing, before the first witness could be called to the stand, Mr. Mazurek argued that no testimony should be heard because even assuming Mr. Rozenberg was completely ineffective, as alleged, Morales could not show prejudice because there was no independent, objective evidence that Morales would have accepted the plea offer but for Mr. Rozenberg's representation. (14RT 3249-3251.) Judge Uhler stated that she tended to agree with Mr. Mazurek. (14RT 3251-3252.)

After additional argument from the parties, Judge Uhler recounted the evidence against Morales, including his taped confession and statements of the co-defendant, and advised his counsel, "[Y]ou have a really tough road to convince me that whether he had some other attorney he would have changed his decision making process to reject the plea bargain agreement." (14RT 3256.) Judge Uhler further found that Morales was advised about all terms of the offer and likely outcome and made his own choice to reject the plea offer. (14RT 3257.) Judge Uhler specifically stated:

> So again, I agree with the prosecution that I don't see how you can establish prejudice because of the fact whether he had Mr. Rozenberg, Mr. Goldstein, one from the conflict panel, one on the LWOP panel, your client new [*sic*] exactly what kind of evidence that the prosecution had. You're [*sic*] client knew that they would probably seek death. Your client rejected that offer. He went to trial . . . So I can't fix what happened in Fontana. I can't go back to the original plea bargain agreement. Mr. Morales had an opportunity to accept it just like all the other defendants in my court when I tell them these are the consequences, these are the strengths and weaknesses of this case. Potentially this is what could happen. You should probably take the plea bargain agreement. He rejected it. He wanted to throw the dice. He thought maybe – I don't know what he was – he was thinking. Perhaps somehow the jury will not convict him. Maybe the taped conversation of the phone call was going to be – maybe lost or destroyed or concealed. Who knows. But he went with the thought I'm taking the risk. I'm taking those consequences. I'm going to go to trial. He has made it very clear on the record, Ms. Snodgrass.

(14RT 3257-3258.) Judge Uhler continued, "The bottom line is Mr. Morales was given competent counsel in my mind in the sense that Mr. Rozenberg told him, and made it very specific in his declaration, and by the other evidence, he was told by an independent judicial officer that these are the risks, these are the consequences. This is what may happen. He said fine. I want to go to trial." (14RT 3258.)

Morales's counsel argued that the whole attorney/client relationship was broken from the beginning, again pointing out the court's original error in appointing Mr. Rozenberg. (14RT 3258-3259.) Judge Uhler quickly responded, "[Y]ou cannot convince me Mr. Rozenberg didn't know what he was doing. He knew the strengths and weakness of the case." (14RT 3259.) Morales's counsel also argued Mr. Rozenberg did not know it was a special circumstances case. (14RT 3259.) Judge Uhler disagreed, finding "Mr. Rozenberg advised his client the potential was a death sentence in the case" and knew it was a special circumstances case. (14RT 3260.)

After further argument by the parties, Judge Uhler acknowledged that mistakes had been made pretrial in the way Mr. Rozenberg was appointed and in failing to notify the Honduran consulate—mistakes that could not be "fixed" at this point in the proceedings. (14RT 3265.) Regardless of these issues, Judge Uhler found that Morales was given an option to avoid the death penalty, and after being counseled by Mr. Rozenberg and the court, he chose to "roll the dice and go to trial." (14RT 3265-3266.) Judge Uhler determined that Morales had not proved that if he had a different attorney or investigator, or if the consulate had been notified, he would have changed his mind about taking the plea offer. (14RT 3266.)

In addition to finding Morales failed to prove prejudice, Judge Uhler stated, "I honestly don't think Mr. Rozenberg was ineffective counsel in a sense that he had done murder cases. He knew of the potential. This was made very clear." (14RT 3267.)

Judge Uhler concluded, "Mr. Rozenberg did what he had to do in terms of explaining to the defendant. The Court was in the position of explaining to the defendant the pros and cons of the plea bargain agreement offer. He rejected it and I don't think he can establish prejudice. I don't think he can through independent means in the re-weighing of the evidence [establish] he would have done anything otherwise except decided he wanted a trial which we provided him." (14RT 3269.)

2. The trial court properly considered and denied Morales's ineffective assistance of counsel claims

A trial court may consider a motion for a new trial on the ground of ineffective assistance of counsel.[20] (*People v. Smith* (1993) 6 Cal.4th 684, 696; *People v. Fosselman* (1983) 33 Cal.3d 572, 582 (*Fosselman*).) A trial court's denial of such motion is reviewed for abuse of discretion. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) Under this deferential standard, the trial court's ruling will not be disturbed "absent a manifest and unmistakable abuse of that discretion." (*Ibid.*)

Here, the trial court considered and denied Morales's motion for relief based on ineffective assistance of counsel. The trial court heard argument from both parties spanning several hearings and ultimately found that Morales could not show prejudice. The trial court specifically found that on several occasions, Mr. Rozenberg explained to Morales the strengths and weaknesses of his case and provided Morales with a copy of the taped phone call where he confessed to the crime. (14RT 3264, 3269.) The trial court further found that both Mr. Rozenberg and the pretrial court explained the potential for a death sentence at the time the plea offer was made.

[20] Although not a motion for new trial, Morales's motion to prohibit the death penalty based on ineffective assistance of counsel is similar enough that the same standard should apply.

(14RT 3257-3258, 3264, 3265-3266.) The trial court found that Morales made a choice to reject the plea offer and that was "the choice he has to live by." (14RT 3257-3258, 3264-3266, 3269.) The trial court specifically found that even if no errors had been made pretrial, Morales could not show that he would have made a different choice, based on the evidence against him, and taken the plea offer. (14RT 3257, 3266.)

Morales argues that the trial court denied him a fair hearing on his ineffective assistance of counsel claims. (AOB 238-249.) But the multiple hearings held by the trial court were fully adversarial. (*People v. Smith*, *supra*, 6 Cal.4th at p. 694, fn. 2.) Morales does not dispute that he was represented by competent counsel during the hearings. (*Id.* at p. 695.) And Morales's counsel was given "an opportunity to present argument or evidence in support of his contention." (*People v. Marsden* (1970) 2 Cal.3d 118, 124.)

Morales's specific claim that the trial court misapplied the prejudice prong of *Strickland* is unavailing. To establish prejudice where a plea offer has been rejected, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." (*Missouri v. Frye*, *supra*, 566 U.S. at p. 147.) Morales failed to meet this standard and the trial court properly denied his motion.

While Morales contends that the trial court should have allowed him and Mr. Rozenberg to testify, the trial court found their testimony was unnecessary to resolve the prejudice issue. (14RT 3255, 3268, 3269.) This decision was reasonable because Morales's statement that he would have accepted the plea offer if he had received effective representation "is self-serving and thus insufficient in and of itself to establish prejudice." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 945.) Moreover, Morales's statement is also "insufficiently corroborated by independent, objective evidence."

(*Ibid.*) In fact, all of the independent and objective evidence is to the contrary.

As this court has found, "In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

Here, the trial court found that court transcripts and declarations submitted by the parties showed that Mr. Rozenberg and the pretrial court both accurately communicated the plea offer to Morales. (14RT 3252, 3258, 3259, 3260, 3264, 3265, 3266, 3269, 3270.) The trial court further found the evidence showed that Mr. Rozenberg advised Morales what the consequences of rejecting the plea offer would be—i.e., a likely conviction based on his confession and a possible death sentence. (2RT 138-139; 14 RT 3252, 3256, 3257, 3258, 3259, 3264, 3265, 3266, 3267, 3269; 29CT 8245-8246.) The court also explained that Morales's rejection of the plea offer could potentially result in a death sentence. (2RT 140, 141-144; 14RT 3257, 3258, 3259, 3265, 3269.) Finally, Morales stated that he wanted to leave it in the jury's hands and take his chances at trial, specifically stating that it was the same to him whether he received 50 years to life or the death penalty, indicating he was not interested in the plea offer. (2RT 141-144; 14RT 3252, 3256, 3257, 3258, 3266, 3269.)

Because the trial court properly relied on the transcripts and declarations submitted by the parties in making its determination, Morales's argument that the trial court resolved the factual issues based on speculation is false. Even though Mr. Rozenberg did not explicitly state in

his declaration that he told Morales the likely sentence would be death, this can be reasonably inferred from Mr. Rozenberg's statement that he advised Morales "what the offer was, why he should accept that offer, and what would happen if he refused." (29CT 8246.) It can also be reasonably inferred from Mr. Rozenberg's statements to the court that it would be in Morales's best interest to accept the offer (2RT 138), which would only be true if there was a strong likelihood of a death sentence. That Mr. Rozenberg told the court he advised Morales that he would likely be convicted, but did not mention telling Morales about the likely sentence, does not mean that advice was not given.

Despite Morales's clear indication that he understood the plea offer and Mr. Rozenberg's advice that based on the evidence he would likely be convicted and receive the death penalty, Morales now contends that the difference between the terms of the plea offer and the minimum term he could have received if convicted was so small that any rational person would have accepted the plea offer. (AOB 244-246.) To be sure, both Mr. Rozenberg and the pretrial court counseled Morales to look out for his self-interest. (2RT 138-143; 29CT 8246.) However, Morales told the court that it was all the same to him whether he received 50 years to life or the death penalty. (2RT 142-143.) Morales advised the court, "I will leave it upon the jurors' hands." (2RT 143.) As the trial court found, Morales made "[a] conscious and intelligent decision" to reject the plea. (14RT 3270.) The trial court found that Morales was no different than the thousands of defendants who do the same thing—reject a plea offer to go to trial and then ask to go back to the plea offer after conviction. (14RT 3256-3257, 3257-3258, 3260, 3264-3265, 3267.)

Morales further argues that "no competent capital defense counsel could advise Mr. Morales with any assurance that a jury would *not* sentence him to death." (AOB 247.) Importantly, Morales has not and cannot allege

that Mr. Rozenberg suggested otherwise and the record confirms Mr. Rozenberg's opinion that Morales would be convicted and likely sentenced to death. Thus, this argument actually supports a finding that Mr. Rozenberg's advice to Morales was appropriate.

Additionally, although the trial court denied Morales an opportunity to present testimonial evidence, Morales's counsel submitted declarations and other evidence when his motions and supplemental papers were filed. (28CT 7920-7970, 7977-7981.) Morales's counsel was also given ample opportunity to argue the merits of his case during the various hearings. In fact, the trial court at one point stated to Morales's counsel, "I think, Ms. Snodgrass, you've established everything through declarations, through your arguments here in court, through minute orders and prior transcripts what occurred, and I don't think Mr. Mazurek is disputing any of that." (14RT 3269.) Thus, it cannot be said that the trial court denied Morales any due process when hearing his claims.

Morales's claim that the trial court "assume[d] that Mr. Rozenberg performed deficiently" (AOB 238) is also inaccurate. To the contrary, the trial court found Mr. Rozenberg was "competent counsel" and "did what he had to do in terms of explaining to the defendant." (14RT 3258, 3269.) The trial court further found, "I honestly don't think Mr. Rozenberg was ineffective counsel in a sense that he had done murder cases. He knew of the potential. This was made very clear." (14RT 3267.)

Indeed, later in his argument, Morales appears to concede that the trial court found Mr. Rozenberg to be competent counsel. (AOB 240.) Morales contends, however, that this finding was not supported by any actual evidence. (AOB 240-241.) In light of the trial court's finding of no prejudice, there is no need to reach the issue of deficient performance. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 60; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

But even if this court reaches the performance issue, the trial court's finding that Mr. Rozenberg was competent was supported by evidence in the record, which reflected that: (1) Mr. Rozenberg had numerous discussions with Mr. Young about an offer of 50 years to life to avoid the prosecution seeking the death penalty (29CT 8245); (2) Morales told Mr. Rozenberg he would take the deal after hearing his taped confession (29CT 8245-8246); (3) Mr. Rozenberg had several discussions with Morales about the possible plea offer before it was made (29CT 8246; 2RT 138; 13RT 2812); (4) Mr. Rozenberg discussed the official plea offer with Morales for "a considerable amount of time," during which he "again explained to him what the offer was, why he should accept that offer, and what would happen if he refused" (29CT 8246); and (5) Mr. Rozenberg advised Morales and the court that he believed Morales would be convicted and it was in his best interest to accept the plea offer (2RT 138-139). After all of this, Morales refused to take the offer. (29CT 8246; 2RT 141.) The court verified that Morales understood the offer and encouraged him to accept the offer in his own self-interest. (2RT 141-143.) Yet Morales stood firm and rejected the offer because 50 years in prison was the same to him as the death penalty. (2RT 142-143.)

In sum, the trial court's discretionary decision was reasonable based on all the transcripts, evidence, and arguments submitted to the court. Neither the testimony of Morales nor Mr. Rozenberg would have provided any independent, objective evidence that Morales would have accepted the plea offer if provided with different counsel.[21] Indeed, all the evidence

[21] Morales contends that Mr. Rozenberg performed deficiently by not alerting the pretrial court to the state's violation of Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), not informing Morales of his right to consular assistance, and not using such assistance to communicate with Morales. (AOB 201-209.) He also argues

presented shows that Morales was sufficiently warned of the strong case against him, including his taped confession, and the strong likelihood that the resulting penalty would be death. Despite Mr. Rozenberg's urging that he accept the plea offer, Morales rejected it and decided to take his chances with the jury. Morales has failed to show that the trial court engaged in "a manifest and unmistakable abuse of [its] discretion," and thus, the trial court's decision should not be disturbed. (*People v. McCurdy*, *supra*, 59 Cal.4th at p. 1108.)

II. THE PROSECUTION'S DECISION TO SEEK THE DEATH PENALTY WAS NOT VINDICTIVE

A. Overview

Morales contends his death judgment must be vacated because the prosecution's decision to seek the death penalty was vindictive, or at least, raised a presumption of vindictiveness that was not rebutted. The record in Morales's case precludes any finding of prosecutorial vindictiveness.

As explained by the United States Supreme Court, there is no element of punishment or retaliation in the "give-and-take" of plea bargaining as long as the defendant is free to accept or reject the prosecution's offer. (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 (*Bordenkircher*).) Here, plea negotiations had been ongoing between Mr. Rozenberg and the

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the state's errors with regard to the Vienna Convention compounded Mr. Rozenberg's errors. (AOB 214-216.) But as the trial court found, there is no remedy for the state's violation of the Vienna Convention. (2RT 225.) Moreover, Morales has not shown any prejudice from the lack of consular assistance at the pretrial stage. Indeed, as the United States Supreme Court has found, a defendant's argument "that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases were [*sic*] an inmate alleges that his plea of guilty was infected by attorney error." (*Breard v. Greene* (1998) 523 U.S. 371, 377 (per curiam).)

prosecution since his appointment. When the plea offer was finally made, Morales was advised of his two choices—take the offer of 50 years to life, or go to trial and face the possibility of the death penalty. After considering his options, Morales chose to reject the offer. Thus, the prosecution's pursuit of the death penalty, the expected consequence of Morales's rejection of the plea offer, was not vindictive and did not violate due process.

Additionally, there is no presumption of vindictiveness where, as here, the prosecution increases the charges or potential penalty pretrial. (*People v. Grimes* (2016) 1 Cal.5th 698 (*Grimes*), quoting *People v. Jurado* (2006) 38 Cal.4th 72, 98 (*Jurado*).) But even if there could be, the timing of the plea offer, rejection of the offer, and resulting capital case do not create a presumption of vindictiveness where plea negotiations had been ongoing and the reason the prosecution delayed seeking internal approval to seek the death penalty was because Mr. Rozenberg had continued to represent that Morales was interested in a plea. Thus, a presumption of prejudice does not apply here even if it could.

B. Procedural Background

1. Pretrial proceedings leading to the rejected plea offer and resulting capital case

On December 10, 2001, the complaint was amended to add the three death eligibility special circumstances. (3CT 639-645.) On April 11, 2002, Mr. Rozenberg was appointed to represent Morales. (1RT 24; 4CT 852; 29CT 8245; 1SCT 24, 242.) After Mr. Rozenberg's appointment, he and Mr. Young, the assigned prosecutor, discussed a possible resolution to the case on numerous occasions, attempting to work out a possible disposition of 50 years to life in prison in exchange for Mr. Young not seeking the death penalty. (29CT 8245, 8249.)

Sometime before June 12, 2003, Mr. Young was promoted and left his trial calendar. (29CT 8249; 2RT 112.) He was replaced by Mr. Mazurek. At Mr. Mazurek's first appearance on June 20, 2003, Mr. Mazurek informed the court he was not up to speed on the case and did not have any offers. (2RT 114-115.)

After reviewing the case, Mr. Mazurek advised Mr. Rozenberg that it was his intent to file the matter as a death penalty case. (29CT 8246.) On September 2, 2003, Mr. Rozenberg advised the court that he had spoken with Mr. Mazurek about the case, and the parties agreed that Mr. Mazurek would discuss a possible resolution with his "higher-ups" in the district attorney's office. (2RT 126.)

On September 12, 2003, Mr. Mazurek advised the court that there were ongoing discussions regarding a possible resolution. (2RT 129.) Mr. Mazurek indicated he had spoken with the victim's family and needed to discuss the offer with his supervisor. (2RT 129-130.) At this hearing, Morales stated that he wanted to go to trial and was not willing to waive any more time. (2RT 130-131.)

On October 7, 2003, as previously discussed, Mr. Mazurek represented he had authority to offer Morales a plea deal of 50 years to life. (2RT 135-138.) Mr. Mazurek made clear that if the offer was not accepted that day, he would seek and would likely obtain internal approval from the Death Penalty Review Board to seek the death penalty. (2RT 136-137.) Mr. Mazurek expressed that in his view, the case should be submitted for death review, but it was determined that due to the youth of the three victim children it would be best to attempt to avoid a trial that would require the children to testify. (2RT 137-138.)

As detailed in Section I.C.1, *ante*, after consulting with Mr. Rozenberg, Morales rejected the plea offer. Mr. Mazurek then obtained approval to seek the death penalty from the Death Penalty Review Board,

and Mr. Rozenberg was replaced with a public defender. The case was then transferred from Fontana to Rancho Cucamonga for trial, and at a hearing on October 24, 2003, Morales indicated that he was willing to waive time to allow the public defender to prepare the case. (2RT 155-156.)

2. Motion for relief based on vindictive prosecution

After the guilt phase, the public defender filed several motions to preclude the death penalty. (28CT 7876-7987.) In one of those motions, Morales argued that the prosecution of the case as a capital case punished him for exercising his constitutional right to a trial. (28CT 7948-7950.) In another motion, Morales argued that the circumstances of this case raised a presumption of vindictive prosecution that must be rebutted by the prosecution. (28CT 7983-7986.)

Multiple hearings were held on this and other issues raised in the public defender's motions. (13RT 2790-2799, 2800-2842, 2843-2858.)

At the first hearing, based solely on a review of the public defender's motions and without Mr. Mazurek appearing, Judge Uhler stated that in her experience in death penalty matters, the decision to seek death is normally made shortly after the preliminary hearing; she had never seen a situation where the prosecution waited over two years to make an offer and then made the determination to seek death after the offer was refused. (13RT 2792.)

During the second hearing, Mr. Mazurek addressed the court's concern regarding the timing of the decision to seek death. He explained: Mr. Rozenberg had ongoing settlement discussions with the district attorney's office; Mr. Young had talked about submitting the case to the death review committee but delayed doing so because of defense representations regarding a possible settlement; and Mr. Rozenberg had prior discussions with Morales about settling the matter. (13RT 2802-2805.) Mr. Mazurek pointed to some notes in Mr. Young's file indicating

settlement discussions had occurred before the case was transferred to Mr. Mazurek. (13RT 2804.) Mr. Mazurek also reiterated that the motivating factor in making the plea offer was to avoid making the murder victim's three young children testify at trial. (13RT 2806.)

In response to Mr. Mazurek's statements, Judge Uhler again observed that in the three death penalty cases she previously presided over, there were no plea negotiations and the prosecution went full steam forward with pursuing the death penalty. (13RT 2808, 2809, 2811, 2826, 2835.) However, Judge Uhler found that Mr. Mazurek's explanation regarding the ongoing settlement discussions "sheds a little different light" on the situation. (13RT 2810, 2814.) Still, Judge Uhler voiced concerns about the way the case was handled in the Fontana court and stated she would hold an evidentiary hearing to resolve those issues. (13RT 2812-2814, 2816-2818, 2820-2821, 2824-2828, 2829-2831.)

At the final hearing, Judge Uhler explained she had researched the issues further and decided there was no evidence of prosecutorial vindictiveness given the ongoing plea negotiations and clear indication that death would be pursued should the plea offer be rejected. (13RT 2843-2846.)

C. Legal Standards on Vindictive Prosecution

"Absent proof of invidious or vindictive prosecution, as a general matter a defendant who has been duly convicted of a capital crime under a constitutional death penalty statute may not be heard to complain on appeal of the prosecutor's exercise of discretion in charging him with special circumstances and seeking the death penalty." (*People v. Lucas* (1995) 12 Cal.4th 415, 477.)

The United States Supreme Court addressed the question of prosecutorial vindictiveness in the context of plea bargaining in *Bordenkircher*, *supra*, 434 U.S. 357. The defendant was charged with

uttering a forged instrument, punishable by a term of 2 to 10 years in prison. (*Id.* at p. 359.) During plea negotiations, the prosecutor offered to recommend a sentence of five years if the defendant agreed to plead guilty. (*Ibid.*) The prosecutor advised the defendant, whose attorney was present, that if he did not agree to plead guilty and "save the court the inconvenience and necessity of a trial," the prosecutor would seek an indictment under the state's recidivist statute, which would subject the defendant to a mandatory life sentence because of his two prior felony convictions. (*Ibid.*) The defendant chose not to plead guilty, and he was subsequently indicted on the more serious charge. (*Ibid.*) The Supreme Court held that "the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." (*Id.* at p. 365.)

The Supreme Court acknowledged, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citation]." (*Bordenkircher*, *supra*, 434 U.S. at p. 363.) The court held, however, that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." (*Ibid.*) The court reasoned that plea bargaining flows from "the mutuality of advantage" to both defendants and prosecutors, who each have their own reasons for wanting to avoid a trial. (*Ibid.*)

The *Bordenkircher* exception for plea bargaining is also recognized in California. (*Grimes*, *supra*, 1 Cal.5th at p. 736 ["Absent proof of vindictiveness or other improper motive, increasing the charges or

punishment when a plea bargain is refused does not constitute unconstitutional punishment or retaliation for the exercise of a defendant's legal rights"]; *Jurado*, *supra*, 38 Cal.4th at p. 98 ["It is not a constitutional violation, however, for a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty pleas, or to threaten to increase the charges if the defendant does not plead guilty"].)

The United States Supreme Court also addressed prosecutorial vindictiveness in the pretrial context in *United States v. Goodwin* (1982) 457 U.S. 368 (*Goodwin*). The defendant in *Goodwin* was charged with several misdemeanor and petty offenses, including assault. (*Id.* at p. 370.) His case was set for trial before a Magistrate Judge and was assigned to a prosecutor, who did not have the authority to try felony cases or seek grand jury indictments. (*Id.* at p. 371.) Goodwin initiated plea negotiations with the prosecutor, but ultimately decided not to plead guilty. (*Ibid.*) Goodwin's case was transferred to the District Court and a new prosecutor was assigned. (*Ibid.*) About six weeks later, after reviewing the case and discussing it with several parties, the new prosecutor obtained a four-count indictment including one felony count. (*Ibid.*) A jury convicted Goodwin on the felony count and one misdemeanor count. (*Ibid.*)

Goodwin moved to set aside the verdict on the ground of prosecutorial vindictiveness, but the District Court denied the motion. (*Goodwin*, *supra*, 457 U.S. at p. 371.) On appeal, the Court of Appeals concluded that the prosecutor did not act with actual vindictiveness in seeking a felony indictment but, based on prior Supreme Court cases, applied a presumption of prejudice due to the timing of the prosecutor's actions. (*Id.* at p. 372.) The Supreme Court disagreed that a presumption of prosecutorial vindictiveness was warranted given "the timing of the prosecutor's action." (*Id.* at p. 381.) The Supreme Court held that "[t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial

by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so unlikely that a presumption of vindictiveness certainly is not warranted." (*Id.* at p. 384.) As explained by the Court:

> A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

(*Id.* at p. 382.)

As this court has found, "an important factor in assessing the timing element is the attachment of jeopardy." (*In re Bower* (1985) 38 Cal.3d 865, 875; see also *People v. Michaels* (2002) 28 Cal.4th 486, 515 ["the attachment of jeopardy [i]s an 'important factor' in determining vindictiveness"].) "At the pretrial stage 'the prosecutor's assessment of the proper extent of prosecution may not have fully crystallized.'" (*Bower*, at p. 875, quoting *Goodwin*, *supra*, 457 U.S. at p. 381.) However, "*once a trial begins*—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information of the extent to which he should be prosecuted." (*Ibid.*)

This court has also recognized that "[i]n the pretrial setting, there is no presumption of vindictiveness when the prosecution increases the charges or . . . the potential penalty." (*Jurado*, *supra*, 38 Cal.4th at p. 98.) And indeed, no California case has found such a presumption pretrial. (*People v. Michaels*, *supra*, 28 Cal.4th at p. 515.) Instead, "the defendant must 'prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do.'" (*Jurado*, at p. 98, quoting *Goodwin*, *supra*, 457 U.S. at p. 384.)

D. Morales Cannot Show That the Prosecution Acted Vindictively When It Decided to Seek the Death Penalty[22]

The record clearly establishes that the prosecutor sought the death penalty after Morales freely rejected the plea bargain. The increase in punishment was part of the "give and take" of plea bargaining and was not vindictive. (*Bordenkircher*, *supra*, 434 U.S. at p. 363.)

Morales was charged with murder alleging three special circumstances, any of which would allow the prosecution to seek the death penalty. (2RT 136.) During plea negotiations, with Mr. Rozenberg present, Mr. Mazurek offered Morales 50 years to life. (2RT 135-138.) Mr. Mazurek stated he believed the case "should be submitted for death review," but "in meeting with the victim's family and understanding that there are three young children that are witnesses in this case and who would have to testify, I believe they are 13, 11 and 9 now, rather than have them have to take the witness stand and have them testify, the People would make this offer to avoid trial." (2RT 137-138.) Morales was further advised that if he did not accept the offer that day, Mr. Mazurek was prepared to submit a request to the Death Penalty Review Board for permission to seek the death penalty, which would likely be approved. (2RT 136-137, 139-140.) After discussing the offer with Mr. Rozenberg for at least 30 minutes, Morales rejected it. (2RT 140-141.) About one week later, Mr. Mazurek's request to seek the death penalty was approved. (2RT 146-147.)

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[22] Because Morales did not challenge the prosecution's decision to seek the death penalty pretrial, his claim is forfeited. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 477; *People v. Edwards* (1991) 54 Cal.3d 787, 827 [claim of vindictive prosecution not preserved for appeal unless it was a basis for motion to dismiss in trial court].) Morales's motions to preclude the death penalty do not save him from forfeiture because they were not made pretrial.

As in *Bordenkircher*, Morales was present with counsel when the plea offer was made, the prosecutor was clear about what was being offered and why, and Morales was advised multiple times that if he did not accept the offer, the prosecution would seek a greater punishment. Even knowing all of this and consulting privately with counsel, Morales rejected the offer and the prosecution's request to seek the death penalty was approved, as expected. Mr. Mazurek's conduct, "which no more than openly presented the defendant with [two] unpleasant alternatives," did not violate due process. (*Bordenkircher*, *supra*, 434 U.S. at p. 365.) In fact, the pretrial court and Morales discussed this exact choice on the record, and Morales said "it's all the same to me" and decided to "leave it upon the jurors' hands." (2RT 142-143.)

Despite the similarities between *Bordenkircher* and this case, Morales contends that *Bordenkircher* does not apply for two reasons: (1) this is a capital case, and (2) Morales did not make a free, informed, and intelligent choice to face the possibility of the death penalty when he decided not to take the plea offer. (AOB 288.) Both arguments fail.

1. The capital nature of the case does not require a departure from *Bordenkircher*

Contrary to Morales's claims (AOB 283-288), neither *United States v. Jackson* (1968) 390 U.S. 570 (*Jackson*) nor *Corbitt v. New Jersey* (1978) 439 U.S. 212 (*Corbitt*) support his argument that death exposure is a critical distinction in the plea bargaining context. The issue presented in *Jackson* was the constitutionality of a federal kidnapping statute that allowed the death penalty where a defendant was convicted after exercising his right to a jury trial, but not following a court trial. (*Jackson*, at pp. 570-581.) The Supreme Court held that the death penalty clause of the statute was unconstitutional because it needlessly encouraged guilty pleas and jury waivers. (*Id.* at pp. 581-591.) The Court explained that Congress could not

pursue its objectives by needlessly penalizing the exercise of basic constitutional rights. (*Id.* at pp. 582-583.)

Jackson is easily distinguished from *Bordenkircher* and this case, which both concern plea bargaining at the pretrial stage where the defendants contemplated waiving all trial rights. Indeed, *Jackson* was decided 10 years before *Bordenkircher* and cited therein. The Supreme Court could have made a distinction between capital and noncapital plea bargaining if it thought the situations should be treated differently, but the Court made no such distinction.

In *Corbitt*, the Supreme Court addressed a New Jersey statutory scheme that provided a mandatory punishment of life imprisonment for first degree murder and a punishment of no more than 30 years for second degree murder following a jury conviction, but allowed either punishment to be imposed for a plea of *non vult* or *nolo contendere*, even if the crime qualified as first degree murder. (*Corbitt*, *supra*, 439 U.S. at p. 215.) The defendant in *Corbitt* relied principally on *Jackson* to argue that because defendants pleading *non vult* could be sentenced to a lesser term than those convicted by a jury of first degree murder, the mandatory life sentence he received after being found guilty by a jury of first degree murder was unconstitutional. (*Id.* at pp. 216, 218.)

The Supreme Court found that the lack of a death penalty in the New Jersey statutes was a material fact distinguishing it from *Jackson*, as was the fact that pleading guilty under the New Jersey law could still subject the defendant to the maximum penalty of life in prison. (*Id.* at p. 217.) While the Supreme Court distinguished *Jackson* based in part on the death penalty aspect, it did not broadly hold, as Morales contends, that the constitution would not tolerate in the capital context what it would otherwise tolerate in the noncapital context. (*Id.* at p. 217; AOB 284-285.)

Unlike *Corbitt* and *Jackson*, this case does not involve a statute that categorically treats defendants who choose to go to trial differently. Rather, like *Bordenkircher*, it involves individualized bargaining, which is tolerated and encouraged by our legal system. (*Bordenkircher*, *supra*, 434 U.S. at p. 364.) To the extent Morales argues that there can be no plea bargaining in capital cases, he is wrong. Defendants entered guilty pleas to avoid the potential imposition of death sentences by a jury in *Brady v. United States* (1970) 397 U.S. 742, *Parker v. North Carolina* (1970) 397 U.S. 790, and *North Carolina v. Alford* (1970) 400 U.S. 25. (*Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 30.) "Each was dissuaded from exercising his rights to a jury trial and to plead not guilty . . . but the Court found no constitutional infirmity despite the claim in each case that *Jackson* compelled a contrary result." (*Ibid.*)

Additionally, this court has considered vindictive prosecution claims in two death penalty cases, finding no vindictive motive in either case. (*Jurado*, *supra*, 38 Cal.4th at pp. 97-100; *Grimes*, *supra*, 1 Cal.5th at pp. 735-737.) In *Jurado*, the prosecution initially announced that it was not seeking the death penalty, but changed its decision almost a year later. (*Jurado*, at pp. 98-99.) In the meantime, Jurado had pleaded guilty to murder after successfully moving to dismiss the special circumstances, which were reinstated following the prosecution's petition for writ of mandate. (*Id.* at p. 98.) This court explained that there was no presumption of prejudice because of the pretrial setting. (*Ibid.*) The court also found that Jurado had failed to "present evidence of a vindictive motive for the prosecution's decision to seek the death penalty." (*Id.* at p. 100.)

In *Grimes*, the original district attorney decided not to seek the death penalty. (*Grimes*, *supra*, 1 Cal.5th at pp. 735-736.) A new district attorney was later appointed. (*Id.* at p. 736.) The new district attorney reconsidered the original decision and decided to seek the death penalty, but gave the

defendant the opportunity to plead guilty in exchange for a sentence of life without the possibility of parole. (*Ibid.*) The district attorney ultimately sought the death penalty after the defendant refused to plead guilty. (*Ibid.*) Citing *Goodwin*, this court held that "[t]he district attorney was free to change the decision made by his predecessor not to seek the death penalty." (*Ibid.*) The court also found that "the record establishes nothing more than that a plea bargain was offered and refused," which did not show prosecutorial vindictiveness. (*Id.* at pp. 736-737.)

This court cited *Bordenkircher* and *Goodwin* when deciding both *Jurado* and *Grimes*, indicating that the reasoning in those cases extends to death penalty cases. (*Jurado*, *supra*, 38 Cal.4th at pp. 98-99; *Grimes*, *supra*, 1 Cal.5th at p. 736.) Morales contends that *Grimes* should not apply here because the prosecutor in *Grimes* determined that the case was appropriate for the death penalty before offering the plea and gave the defendant three weeks to consider the plea offer. (AOB 294-295.) However, the factual differences between *Grimes* and this case are inconsequential.

The record reflects that both Mr. Young and Mr. Mazurek thought this case was worthy of the death penalty and only delayed requesting approval to seek the death penalty because of the ongoing plea negotiations. (13RT 2851; 29CT 8245-8246.) Indeed, when Mr. Mazurek initially took over the case, he advised Mr. Rozenberg that it was his intent to file the matter as a death penalty case. (29CT 8246.) Additionally, while the defendant in *Grimes* was given three weeks to consider the plea offer, his counsel was only appointed two weeks earlier and there is no evidence that he had invoked his speedy trial rights. (*Grimes*, *supra*, 1 Cal.5th at p. 734.) In contrast, Mr. Rozenberg had been representing Morales for over a year at the time of his plea offer, had discussed the possibility of a plea offer with Morales a couple of times before the offer was actually made, and Morales

had invoked his speedy trial rights, creating a more urgent timeline for the plea negotiations than in *Grimes*.

Here, as in *Grimes*, the record shows "nothing more than that a plea bargain was offered and refused." (*Grimes*, *supra*, 1 Cal.5th at pp. 736-737.) Accordingly, the prosecution's pursuit of the death penalty after Morales rejected the plea bargain does not constitute vindictive prosecution.

2. The record shows that Morales made a free, informed, and intelligent choice to reject the plea offer and face the possibility of the death penalty

Morales argues that this court in *Twiggs v. Superior Court* (1983) 34 Cal.3d 360 (*Twiggs*) recognized that informed choice was a critical element in *Bordenkircher*, and suggests it was lacking here. (AOB 290.) While Morales is correct that informed choice is an important factor in the analysis, he is wrong that it was lacking here.

The defendant in *Twiggs* was not given notice that if he did not accept the plea offer, the prosecution would amend the information to allege five prior felony convictions and prison terms, "strongly suggest[ing] that the prosecutor unilaterally imposed a penalty in response to the defendant's insistence on facing a jury retrial." (*Twiggs*, *supra*, 34 Cal.3d at pp. 364-365, 370-371.) This court found that "the record suggests that the more serious charges were not part of the 'give-and-take' of plea negotiations." (*Id.* at p. 371.)

In contrast, while the prosecutor in *Bordenkircher* had not obtained the recidivist indictment at the time of the plea offer, "his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty." (*Bordenkircher*, *supra*, 434 U.S. at p. 360.) This was

"[a] significant factor" in *Bordenkircher* that was not present in *Twiggs*. (*Twiggs, supra*, 34 Cal.3d at p. 370.)

As in *Bordenkircher*, Morales was fully informed regarding the terms of the plea offer and the consequences of rejecting the offer. Morales was advised at length about the terms of the plea offer, including that if he did not plead guilty, the prosecution would request internal approval to seek the death penalty and that the offer would expire if not accepted that day. (2RT 135-140.) Morales rejected the offer after privately consulting with Mr. Rozenberg for at least 30 minutes. (2RT 140-141.) The pretrial court then inquired of Morales, who confirmed that he understood the plea offer. (2RT 141.) Despite his confirmation, the court explained the offer one more time and expressed concern that Morales was "letting [his] sense of macho or bravery get in the way of [his] thinking." (2RT 141-142.) Morales again assured the court he understood the offer and the court's concerns. (2RT 142.) The court and Morales discussed the two options, with the court noting Morales was "being given a choice between two very terrible, hard, difficult choices." (2RT 142-143.) Morales responded that 50 years to life in prison was the same as a death sentence to him. (2RT 143.) The court then expressly clarified that while Morales was going to state prison either way if convicted, the question he was deciding between was "[w]hether [he] will walk out after a long time or not walk out at all." (2RT 143.) Morales then clearly told the court, "With all due respect, I will leave it upon the jurors' hands." (2RT 143.)

The colloquy between the court and parties, and especially the discussion between the court and Morales after he had an opportunity to speak to Mr. Rozenberg, reflects nothing more than that Morales made a free, informed, and intelligent choice to reject the plea offer and face the possibility of the death penalty. Nevertheless, falling back on his ineffective assistance of counsel arguments raised in Section I, *ante*,

Morales contends that Mr. Rozenberg was not competent to advise him about the potential increased penalty consequence of invoking his trial rights. (AOB 289-291.) These arguments fail for the same reasons discussed in Section I: Mr. Rozenberg was not incompetent; Mr. Rozenberg never said he could not competently advise Morales on the plea offer, and in fact, had been negotiating the plea since his appointment; Mr. Mazurek did not suggest Mr. Rozenberg was incompetent or unable to meaningfully advise Morales about the plea offer; and Morales discussed the potential plea offer with Mr. Rozenberg on several occasions before their final consultation after the offer was made. Moreover, Morales cannot overcome his statements on the record acknowledging that he understood the plea offer, he knew he faced a potential death sentence if he rejected the plea, and he made a conscious choice between two options to have the jury decide his fate.

The record reflects that Morales made a free, informed and intelligent choice to face the possibility of the death penalty when he rejected the plea offer. Therefore, *Bordenkircher* controls, and Morales's vindictive prosecution claim fails.

E. Vindictiveness Cannot Be Presumed Pretrial, But Even If It Could, It Should Not Be Presumed Here

This court has found that the presumption of vindictiveness does not apply pretrial (*Jurado*, *supra*, 38 Cal.4th at p. 98) and that no California case has presumed vindictiveness in a pretrial setting (*People v. Michaels*, *supra*, 28 Cal.4th at p. 515). The Supreme Court has also declined to apply a presumption of vindictiveness in the pretrial setting. (*Goodwin*, *supra*, 457 U.S. at pp. 380-384.)

Despite this, Morales contends that this court did presume vindictiveness pretrial in *Twiggs*. (AOB 278.) But in *Twiggs*, this court found "the situation is analogous to that in the postconviction context,"

given that the case involved the retrial following a mistrial and the prosecution enhanced the charges against the defendant with information available before the first trial. (*Twiggs*, *supra*, 34 Cal.3d at pp. 373-374.) This court found, "The facts of this case present the very situation that the *Goodwin* court suggested 'is much more likely to be improperly motivated than is a pretrial decision.'" (*Id.* at p. 374, quoting *Goodwin*, *supra*, 457 U.S. at p. 381.) Thus, *Twiggs* did not concern a normal pretrial posture and is inapposite.

But even if vindictive prosecution can be presumed pretrial, the presumption should not be applied here. Although Morales contends that vindictiveness should be presumed due to the length of time between the initial charges and the eventual plea offer (AOB 291-292), the length of time was irrelevant because the case was clearly still in the pretrial stages despite its longevity. In fact, Mr. Rozenberg started negotiating a plea with Mr. Young when he was appointed and continued his negotiations with Mr. Mazurek when he replaced Mr. Young. While the case was delayed for two years, mostly due to conflicting trial schedules, it was clear in the record, as discussed in Section I, *ante*, that the prosecution was always contemplating seeking the death penalty and only held off based on Mr. Rozenberg's representations that Morales was interested in a plea.[23] Due to the ongoing nature of the plea negotiations, primarily at Morales's request, vindictiveness cannot be presumed in this case.

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[23] Morales contends that Mr. Young "announced ready to try the case in the noncapital courthouse in October of 2002." (AOB 254; see also AOB 291, 293.) But that is not what the cited portion of the transcript reflects. Instead, the transcript shows that a new trial readiness date was set for October 18, when the parties would announce ready or not, as they had numerous times in the past as they continued to negotiate a plea. (2RT 92-93.) In fact, Mr. Young was not even present at that hearing. (2RT 92-93.)

Morales also argues that vindictiveness should be presumed because the prosecution's decision to seek the death penalty "was made almost immediately after Mr. Morales finally invoked his right to a speedy trial." (AOB 293.) This is not completely accurate. While the *decision* was made after Morales invoked his speedy trial rights, the record indicates that Mr. Mazurek was in the process of seeking internal approval for the plea offer before Morales decided he no longer wanted to waive time.

Specifically, Mr. Mazurek first appeared for the prosecution on June 20, 2003. (2RT 114.) At that point, Mr. Mazurek explained he was not up to speed on the case, did not have any offers, and would be talking to Mr. Rozenberg. (2RT 114-115.) Just over two months later, on September 2, 2003, Mr. Mazurek and Mr. Rozenberg indicated they had reached a possible resolution to the case and additional time was granted to allow Mr. Mazurek to discuss the matter "with his higher-ups." (2RT 126-128.) Ten days later, Mr. Mazurek advised the trial court he had talked to the victim's family about the possible plea offer and now needed to talk to his boss for a final decision. (2RT 129-130.) Mr. Mazurek requested two weeks to get final approval for the plea offer, and Morales for the first time decided he no longer wanted to waive time. (2RT 130-131.) The plea offer was made on October 7, 2003, and Morales rejected it, which resulted in the prosecution electing to seek the death penalty. (2RT 135-145.)

None of Mr. Mazurek's actions support Morales's claim that he acted vindictively in deciding to seek the death penalty. Since taking over the case, Mr. Mazurek was under the impression that Morales desired a plea offer to avoid the death penalty, and he actively worked to get approvals for the plea offer before and after Morales invoked his speedy trial rights. Mr. Mazurek explained that his reason for offering a plea was to save the victim's three young children from testifying at a trial. (2RT 137-138.) That final approval of the plea deal was not obtained until after Morales

invoked his speedy trial rights does not mean that the plea offer was motivated by Morales's invocation of his rights.

Morales suggests that the prosecutor gained "a considerable litigation advantage" by obtaining additional time to get up to speed and prepare to try the case. (AOB 293.) But Morales overlooks the fact that both parties received additional time to prepare for trial, which did not commence until July 12, 2004.

In sum, even if vindictiveness could be presumed in the pretrial context, there is no basis for doing so here.

III. THE TRIAL COURT PROPERLY ADMITTED LIMITED EVIDENCE OF A POSSIBLE ATTEMPTED RAPE TO SUPPORT THE PROSECUTION'S THEORY OF FELONY MURDER; MORALES'S PROSECUTORIAL MISCONDUCT CLAIMS ARE FORFEITED AND MERITLESS; MORALES'S TRIAL ATTORNEY DID NOT RENDER INEFFECTIVE ASSISTANCE

A. Overview

There can be no dispute that Morales and others committed home invasion robbery and first degree burglary of Elia's and her neighbor's homes. Given Morales's recorded confession, there is also no dispute that he was the person that shot Elia in the heart, killing her, as the jury found.

Despite the overwhelming evidence supporting the jury's findings, Morales now contends that he was denied a fair trial because the trial court allowed the prosecution to pursue a theory of felony murder based on attempted rape even though the court dismissed the attempted rape special circumstance. Morales specifically alleges the prosecutor erred when describing the evidence he intended to introduce to support such a theory, the trial court erred by permitting such evidence, and his own counsel was ineffective for failing to sufficiently challenge it.

Morales's contentions fail for several reasons. As this court has found, the prosecution may proceed on a theory of first degree felony

murder based on attempted rape even when the trial court has dismissed an attempted rape special circumstance. (*People v. Davis* (1995) 10 Cal.4th 463, 512-514 (*Davis*).) The trial court did not abuse its discretion in determining that the proffered evidence was sufficient to allow the theory to go before the jury.

Additionally, Morales's prosecutorial misconduct arguments are forfeited because he failed to object or request an appropriate admonition below. But even if considered, the claims fail because Mr. Mazurek did not misrepresent the evidence he expected to present at trial in support of his theory of felony murder based on attempted rape. He also did not commit misconduct at argument when he recounted evidence presented at trial and drew reasonable inferences from that evidence.

Furthermore, Morales cannot show that his counsel provided ineffective assistance with regard to the attempted rape evidence. Defense counsel's decisions were reasonable tactical decisions and, in any case, did not result in prejudice.

Finally, even if any error occurred it was harmless beyond a reasonable doubt given the extremely limited evidence and argument presented on the attempted rape issue in contrast with the abundant evidence that Morales participated in both the robbery and burglary and shot Elia when she recognized him.

B. Procedural Background

1. The trial court granted Morales's section 995 motion to dismiss the attempted rape special circumstance allegation, but allowed the prosecution to present evidence of attempted rape to support a felony murder theory

On August 5, 2004, Morales filed a section 995 motion to dismiss the special circumstance allegation of murder in the course of an attempted rape because there was insufficient evidence produced at the preliminary

hearing to sustain the allegation. (26CT 7514-7522.) The prosecution filed an opposition and Morales replied. (2SCT 378-383; 1S2CT 75-76; 26CT 7523-7530.)

On August 25, 2004, the trial court held a hearing on the motion. At the start of the hearing, the court announced its intent to grant the section 995 motion, finding no evidence of intent to disrobe Elia, no evidence of who actually did the disrobing, and no physical evidence that a rape was actually attempted. (7RT 1326-1327.) In response, Mr. Mazurek argued that the logical and reasonable interpretation of the evidence was that Elia's pants and underwear were removed for some untoward reason other than robbery, which was only prevented from taking place because Elia recognized Morales. (7RT 1328-1332.) The court presented alternate reasonable interpretations of the evidence, determined that the preliminary hearing provided no evidence from which the jurors could be convinced beyond a reasonable doubt that Morales was involved in an attempted rape, and granted the section 995 motion. (7RT 1332-1335.)

Mr. Mazurek advised the court he would seek to amend the information at the close of his case based on additional evidence that was not presented at the preliminary hearing. (7RT 1335-1336.) This evidence included: (1) the men that followed the family home from the market were blowing kisses to Elia; (2) when the family was held in the bedroom, one of the assailants grabbed Elia's shirt and pulled it down while Morales walked up and grabbed her breasts; (3) Morales grabbed Elia by the hair and dragged her down the hallway, placing him in the kitchen with her when she was disrobed; and, (4) Morales told someone that Elia said, "Johnny, why are you raping me," before he shot her. (7RT 1336.) The court responded, "We'll cross that bridge when we get there." (7RT 1336-1337.)

Defense counsel then told the court she would object if, at any point, Mr. Mazurek attempted to present evidence of attempted rape, and asked that Mr. Mazurek be prevented from mentioning the issue in his opening statement. (7RT 1337.) While recognizing Mr. Mazurek could possibly conform to proof, the court admonished him not to mention attempted rape in his opening statement. (7RT 1337-1338.) The court specifically advised Mr. Mazurek that unless he could think of some other relevance for the evidence, it would probably not be allowed. (7RT 1339.)

Mr. Mazurek then argued that the evidence was "highly relevant" to a theory of first degree murder during the course of an attempted rape under the felony-murder rule. (7RT 1339-1340.) The court agreed and allowed Mr. Mazurek to present evidence relevant to that theory and address it in his opening statement. (7RT 1340-1341.)

2. Subsequent pretrial proceedings relevant to the attempted rape evidence

The next day, on August 26, 2004, when discussing the order of the prosecution's witnesses, defense counsel indicated she would be objecting to Joe's testimony because it was cumulative to anything his sisters would testify about. (7RT 1373-1374.) Mr. Mazurek disagreed, stating that Joe "sees something that the other two girls do not," referencing the incident where one assailant pulled up his mother's shirt in the bedroom while another assailant groped her chest. (7RT 1374.)

While there was some debate over whether Joe would be able to identify Morales, the court ultimately found Joe's testimony was not cumulative, stating, "[I]t sounds like there may be additional evidence that Mr. Sanchez can provide to the jurors." (7RT 1375.) The court also found Joe may have "a better ability to recollect than the other two individuals, so it certainly would not be cumulative in that sense." (7RT 1375.) The court reminded the parties that "we extensively voir dired the jurors in regards to

the fact that children were going to be testifying. That may be emotional. They may feel sympathetic towards these children . . . But we explained they have to be objective and impartial in listening to their testimony, and they said they would." (7RT 1375.)

On August 30, 2004, defense counsel objected to exhibits 24 and 25—photographs of Elia's breasts and legs/genitals exposed—as prejudicial. (7RT 1389-1390.) Mr. Mazurek explained the photographs were relevant to intent and to attempted rape, showing the way Elia was found at the scene. (7RT 1392.) According to Mr. Mazurek, Elia's bra was pulled down by the perpetrators, exposing her breasts. (7RT 1392-1393.) However, upon finding Elia's body, Elia's neighbor pulled her shirt down and covered her lower body with a towel. (7RT 1392.) Defense counsel disagreed that the neighbor pulled her shirt down. (7RT 1392.) The court admitted exhibit 24—the photograph of Elia's legs/genitals exposed—over defense objection, finding it relevant and not unduly prejudicial based on the other photographs. (7RT 1393.) The court reserved judgment on exhibit 25—the photograph of Elia's breasts exposed—until it could hear the witness's testimony at trial. (7RT 1393.)

That same day, despite the court's ruling allowing the admission of the attempted rape evidence based on the felony murder theory, defense counsel filed a motion to exclude evidence to support attempted rape based upon violations of federal and state due process and section 995. (27CT 7610-7614; 7RT 1401-1402.) The court questioned the purpose of this motion given the case authority allowing the prosecution to proceed as requested. (7RT 1402.) Defense counsel explained that he understood the case law and was just intending to preserve the record on due process grounds. (7RT 1402.) The court denied the motion, stating it would "allow the People to continue with their effort to try to prove the felony murder

during the course and commission of an attempted rape as being one of their theories of first degree murder." (7RT 1402-1403.)

The court also tailored an instruction, which was approved by both parties, that advised the jury that the special circumstance of murder during the commission of an attempted rape was no longer before it and not to speculate as to why. (7RT 1403.)

3. Attempted rape evidence presented at trial

At trial, Mr. Mazurek elicited testimony from Joe that he saw three men following them around the market and blowing or throwing kisses at his mom while they were shopping. (8RT 1633-1634; 9RT 1678.) Joe said those same men later entered his family's house looking for money and told him and his sisters to go to the bedroom and lie down. (8RT 1643-1644.) Joe also said that he saw one of the men pull down his mother's shirt halfway and another man "touch it." (8RT 1647; 9RT 1693-1695.) Mr. Mazurek asked Joe to point to the area of his body that the men touched on his mom. (8RT 1647.) Joe pointed to his chest area. (8RT 1647-1648.) On cross-examination, Joe agreed when defense counsel asked if the man "came up and grabbed her chest." (9RT 1695.) The trial court sustained a defense objection to Joe's in-court identification of Morales as one of the perpetrators, so the prosecution could not tie Joe's testimony to Morales. (8RT 1664-1665.)

At trial, neither Brianda nor Jennifer recalled seeing any of the men blow kisses to their mother. But Brianda did report to Detective Wolf right after the crime occurred that she saw the men that had followed them around the market blow kisses to her mother from their car as they were driving home. (10RT 2003.) Brianda also saw Morales drag Elia by her hair out of the bedroom and down the hallway, which put him in the kitchen when her shorts and underwear were removed. (9RT 1795-1796, 1799.)

Next, Detective Wolf testified that Angel said Morales told him he was involved in a robbery and rape of a woman. (10RT 2119, 2179.) Angel then backed off that statement and said he learned that from Jorge, not Morales. (10RT 2119, 2179-2180.) Jorge did not testify. Angel also reported to Detective Wolf that Morales told him Elia said, "Johnny, why are you doing this to me?" (11RT 2237.)

4. Prosecution's decision to abandon its theory of first degree felony murder based on attempted rape

At the close of the prosecution's case, Mr. Mazurek stated that he would no longer be arguing felony murder based on the attempted rape theory. (12RT 2529-2530.) Mr. Mazurek did not concede that the evidence admitted at trial was irrelevant. He did, however, agree to withdraw exhibit 24—the photograph of Elia's legs/genitals exposed—from the guilt phase of the trial. (12RT 2530.) As to exhibit 25—the photograph of Elia's breasts exposed—Mr. Mazurek argued it remained relevant to Joe's credibility because it corroborated his testimony about his mother's shirt being pulled down so that someone could touch her exposed breast. (12RT 2562-2563.) The court found there was really no dispute about Joe's credibility and ordered exhibit 25 withdrawn for the guilt phase only because it was more prejudicial than probative. (12RT 2564.)

C. The Trial Court Did Not Abuse Its Discretion When It Allowed the Prosecution to Present Evidence to Support Its Felony Murder Theory Based on Attempted Rape

Morales contends that the trial court erred when it allowed the prosecution to introduce the limited attempted rape evidence. (AOB 349-350, 355-357, 358, 361.) Not so. The trial court properly exercised its discretion when it found the evidence proffered by the prosecution relevant to its theory of first degree felony murder based on attempted rape. This

evidence was directly related to the pending murder charge and did not involve any prior crimes or unrelated charges. The trial court's decision was reasonable and should not be disturbed.

"[A]n appellate court applies the abuse of discretion standard to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) The trial court's discretion is broad, "both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value." (*People v. Horning* (2004) 34 Cal.4th 871, 900.) Reversal is warranted only where the trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Morales's argument that the trial court improperly admitted evidence of attempted rape is based almost exclusively on cases addressing the admissibility of prior uncharged crime evidence to prove the accused has the propensity or disposition to commit the charged crime. (AOB 323-330, 337-338; *People v. Guerrero* (1976) 16 Cal.3d 719 [prosecution introduced testimony concerning the defendant's commission of an uncharged rape that occurred six weeks earlier and involved a different victim to prove theory that the charged murder was committed in the course of an attempted rape]; *People v. Alcala* (1984) 36 Cal.3d 604, 629-636 [admission of evidence of prior occasions where the defendant enticed young girls into his car, took them to isolated places, and subjected them to forced sexual activity and violence, in trial alleging murder and kidnaping of a different girl]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405 [use of evidence of prior, uncharged lewd acts committed by defendant against both the complaining witness, his stepdaughter, and her older sister to show he used the same design or plan]; *People v. Thompson* (1980) 27 Cal.3d 303, 314-321 [introduction of evidence of an uncharged robbery the

defendant allegedly committed two weeks *after* he shot two people in their home to show that the murder was committed with an intent to steal, despite the fact that nothing was taken].) Here, however, the prosecution did not introduce evidence of prior uncharged rapes or attempted rapes to establish propensity, but instead introduced evidence of the attempted rape of the murder victim in this case; this evidence was directly relevant to the murder charge, which could be proved under a felony murder theory.

While it is true that unrelated, uncharged crimes are generally inadmissible (Evid. Code, § 1101), the same is not true for uncharged crimes that bear directly on the charged crimes. In *Davis*, this court held that when a trial court grants a section 995 motion and dismisses a special circumstance of felony-murder rape, the prosecution may nevertheless seek to present evidence of first degree felony murder with the underlying felony of attempted rape. (*Davis*, *supra*, 10 Cal.4th at pp. 512-514.) This court explained that "in ruling on the Penal Code section 995 motion, the trial court found sufficient evidence to support the murder charge; it made no factual finding concerning the *theories* that could support the charge, including the theory of felony-murder rape." (*Id.* at p. 514.)

Despite *Davis*, Morales contends that the trial court erred by allowing the prosecutor to present evidence to support his felony murder theory of attempted rape without sufficiently analyzing the evidence the prosecutor intended to present. (AOB 347-361.) But *Davis* did not indicate that any heightened scrutiny applied when the prosecutor moved to proceed under its theory of felony-murder rape. The prosecution filed a written motion in support of using attempted rape as a basis for a theory of felony murder and alleged that new evidence indicated possible sexual intercourse between the victim and defendant. (*Davis*, *supra*, 10 Cal.4th at p. 512.) The court allowed the evidence over defendant's objection and stated that an

instruction on felony murder would be given *if* the evidence supported such a theory. (*Ibid.*)

Similarly, here, Morales's section 995 motion was granted, resulting in dismissal of the felony-murder rape special circumstance, and the prosecution expressed its intent to proceed under a theory of first degree felony murder with the underlying felony of attempted rape. The prosecution orally described the additional evidence it believed would be presented at trial, including: Morales and the other men who followed the family at the market blew kisses to Elia; Morales groped Elia during the robbery when another assailant pulled her shirt down; Morales dragged Elia down the hall to the kitchen right before she was disrobed; and Morales told someone that Elia said, "Johnny, why are you raping me," before he shot her.[24] (7RT 1336.)

Based on *Davis* and the proffered evidence, the trial court permitted the prosecution to present the relevant evidence. Morales cannot show that the trial court abused its discretion in this regard. To the extent Morales argues the capital nature of this case takes it outside of *Davis* (AOB 335-337), he is mistaken, as *Davis* was also a capital case.

Respondent acknowledges this court has cautioned, "Trial courts have the duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) As just discussed, the trial court properly permitted the prosecution to present evidence in support of its felony murder theory based on attempted rape. However, after the prosecution announced at the close of its case that it would no longer be

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[24] As discussed in Section III.D, below, the prosecutor did not make false representations of the expected evidence to the court, and the court had no reason to believe that the prosecution's proffer was not in good faith.

arguing felony murder based on the attempted rape theory, the court did not give any instructions on this theory. (12RT 2529-2530.) Morales does not challenge that decision or allege that instructions should have been given. Thus, the trial court performed the screening function contemplated in *Guiton* and no further action was necessary after the prosecution removed the theory from consideration. The prosecutor's ultimate decision not to proceed on the proffered theory does not negate the propriety of the trial court's initial decision to allow the evidence to prove the prosecution's felony murder theory.

D. Morales Forfeited His Prosecutorial Misconduct Claims by Failing to Object Below; in Any Event, the Prosecutor Did Not Commit Misconduct When He Advised the Court of the Evidence Supporting His Theory of Felony Murder Based on Attempted Rape, Nor Did He Commit Misconduct in Argument

Morales suggests Mr. Mazurek intentionally made false representations to the trial court regarding the evidence he would use to support a felony murder theory based on attempted rape. (AOB 347-361.) He further argues that even if not intentional, Mr. Mazurek's misrepresentations to the court amounted to serious misconduct. (AOB 349.) Finally, he contends Mr. Mazurek committed gross misconduct during closing argument. (AOB 372-378.) As discussed below, these forfeited claims are without merit.[25]

[25] Although Morales couches his claim as prosecutorial misconduct, "[t]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 853, internal quotation marks omitted.) "A more apt description of the transgression is prosecutorial error." (*Ibid.*, internal quotation marks omitted.)

1. Morales's failure to object below forfeited his prosecutorial misconduct claims

To preserve a claim of prosecutorial misconduct at trial, a defendant must have made a contemporaneous and specific objection in the trial court and requested an appropriate admonishment. (*People v. Mendoza* (2016) 62 Cal.4th 856, 905.) The objection must specifically identify the claim of prosecutorial misconduct and its grounds. (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) If there was no objection, the claim is only reviewable if an admonition would not have cured the harm. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

Morales did not object that Mr. Mazurek provided false or misleading offers of proof of attempted rape evidence during pretrial proceedings. (7RT 1336-1341.) Instead, Morales's counsel initially advised the court of the defense's intent to object to the relevancy of the evidence. (7RT 1337-1338.) And in a pretrial proceeding the next day, Morales's counsel objected only to Joe's testimony and only on cumulative and relevance grounds. (7RT 1373-1374.) If defense counsel had objected then on the same grounds he argues here, the court could have inquired further regarding the evidence and whether the prosecutor had made any false or misleading statements.

Morales also did not object during the portion of the prosecutor's closing argument he now claims to be misconduct. (12RT 2650-2651.) If Morales had objected, the trial court could have addressed the prosecutor's remarks and, if warranted, admonished the jury accordingly. (*People v. Price* (1991) 1 Cal.4th 324, 440 [any misconduct in argument could have been cured by a timely objection and admonition].) Because Morales cannot show that an objection would have been futile or that an admonition would not have cured the harm, his claims are forfeited.

Morales admits he failed to object, but argues this court should consider his prosecutorial misconduct claim because (1) his counsel was ineffective for failing to object, and (2) the prosecutor's argument must be considered in assessing the prejudicial impact of evidentiary or instructional error and in determining fundamental fairness. (AOB 376-378, 395-397.) As discussed in Sections III.E, III.F, and III.G, *post*, none of these arguments save Morales's claim from forfeiture.

Even setting aside Morales's forfeiture and considering his claim on the merits, Mr. Mazurek committed no errors and Morales suffered no prejudice.

2. The prosecutor did not misrepresent potential evidence supporting his theory of felony murder based on attempted rape during pretrial proceedings

Morales contends that Mr. Mazurek falsely represented some of the testimony that would be presented at trial. (AOB 352-361.) As discussed below, this contention is not supported by the record.

A prosecutor's behavior "violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*Hill*, *supra*, 17 Cal.4th at p. 819.) Otherwise, a prosecutor's behavior "that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Ibid.*)

a. Evidence of Morales groping or grabbing Elia's chest

Morales contends that Mr. Mazurek repeatedly misrepresented Joe's expected testimony pretrial and deliberately deceived the court into admitting otherwise inadmissible evidence. (AOB 354.) Morales points to a series of statements made by Mr. Mazurek pretrial that allegedly prove

intentional misrepresentation. (AOB 352-354.) However, Morales mischaracterizes these statements and takes them out of context.

For instance, when Morales objected to Joe's testimony as cumulative and irrelevant in a proceeding the day after the judge ruled the attempted rape evidence would be admitted, Mr. Mazurek responded that it was not cumulative because Joe "sees something that the other two girls do not." (7RT 1374.) Mr. Mazurek suggested Joe's testimony would not be necessary if Morales wanted to stipulate that he groped Elia's chest after one of the other intruders pulled her top down. (7RT 1374.) In response to this, the court asked whether Joe was going to be able to identify Morales. (7RT 1374.) Mr. Mazurek responded, "I believe he was shown a party – and maybe Detective Toms can help me out. But I believe he identified him from a clip from a video at a party. I believe." (7RT 1374.)

Contrary to Morales's argument, Mr. Mazurek did not "persist[] in his deception, falsely representing that Joe had identified Mr. Morales from a video still of his baby shower as the man who grabbed the victim's breasts in the bedroom." (AOB 353.) Instead, when talking about Joe's identification of Morales from a video, Mr. Mazurek used the qualifier, "I believe," three times and asked for help from one of his detectives, which was not forthcoming. Notably, Mr. Mazurek never said that Joe specifically identified Morales as the man who grabbed Elia's breasts, as opposed to one of the other intruders. Mr. Mazurek apparently believed that Morales was the man who groped Elia, and may have thought that because some time had passed since the traumatic events, Joe might now be able to identify Morales as the man who grabbed Elia's breasts.

Also contrary to Morales's argument, Mr. Mazurek did not "still persist[]" after an additional defense objection. (AOB 353.) In fact, Mr. Mazurek said nothing more on the issue after his statement about how he *believed* Joe might testify. (7RT 1375.) It was the court that responded to

this defense objection, stating, "If you are going to request a 402 hearing outside the presence of the jurors, we can do that. But it sounds like there may be additional evidence that [Joe] can provide to the jurors." (7RT 1375.) The court went on to conclude that "it sounds like the young boy may have relevant information excluding what the other individuals have to say." (7RT 1375.)

Morales also complains about an exchange between Mr. Mazurek and the court that took place the next day. During this discussion, the court repeated Mr. Mazurek's representation that "one witness is going to testify about the breasts being groped," to which Mr. Mazurek stated, "Yes, at least one." (AOB 353; 7RT 1391.) Although it might have been more accurate for Mr. Mazurek to stop his answer at "yes," his addition of "at least one" was not false and did not misrepresent the testimony he hoped to present. Mr. Mazurek's response simply confirmed that at least one of the children would testify about the groping, which he believed at the time to be true. Mr. Mazurek did not state that either of the other two children would testify to the same information. In fact, his argument throughout was that Joe would be testifying about things his sisters did not see.

Thus, the record does not support Morales's contention that Mr. Mazurek deliberately and repeatedly misrepresented Joe's testimony to the court. Instead, Mr. Mazurek spoke in qualifiers, such as "I believe" Joe will testify this way and "at least one" witness will testify that way. Mr. Mazurek's responses certainly were not the same as the "deceptive and reprehensible methods" found improper in *Hill*.

In fact, most of the information Mr. Mazurek indicated would be presented at trial was actually presented. (7RT 1336.) For instance, Joe testified that the men who followed the family in the market blew kisses to his mother. (8RT 1633-1634, 1678.) Brianda's testimony confirmed that Morales was one of those men. Joe also testified that one of the men

grabbed Elia's shirt and pulled it down while another man grabbed her chest or breasts.[26] (8RT 1647-1648; 9RT 1693-1695.) While Joe ultimately was not able to identify the person who touched his mother, as discussed above, the trial court had specifically considered that Joe might not be able to identify any of the men at trial and still found his testimony was relevant. (7RT 1374-1376.) Additionally, Brianda testified Morales grabbed her mother by the hair and dragged her down the hallway into the kitchen immediately before she was disrobed, placing Morales with Elia in the kitchen at that time. (9RT 1799, 1868.) Thus, other than Joe's inability to identify Morales as the person who touched his mother's chest, most of the evidence Mr. Mazurek identified pretrial was presented to the jury and Mr. Mazurek's pretrial statements were not intentionally false or misleading.

Still, Morales contends that whether intentional or not, Mr. Mazurek's false misrepresentations to the court basically forced the court into error. (AOB 354-355.) In support of this contention, Morales relies heavily on *United States v. Luna* (9th Cir. 1994) 21 F.3d 874 (*Luna*). But *Luna* is distinguishable. In *Luna*, two uncharged robberies were used to prove identity in the two charged robberies. (*Id.* at pp. 875-878.) The uncharged robberies were temporally remote, occurring a month or more after the charged robberies, and did not involve the same victim. (*Ibid.*) In contrast here, the uncharged attempted rape was committed in conjunction with the murder and supported the prosecution's theory of felony murder based on

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[26] Morales argues that Joe testified that the grabbing of Elia's chest happened at the same time that her necklace was forcibly removed, suggesting that it was only an act of robbery and nothing more. (AOB 313, 482.) While Joe testified the men took his mom's jewelry from her hands and her necklace, he also testified in detail that one man pulled his mother's shirt down while another man grabbed her chest, establishing more than a simple act of robbery. (8RT 1647-1648; 9RT 1693-1695.)

attempted rape; it was not a separate, prior event admitted solely to prove identity. Additionally, when the evidence in *Luna* did not play out at trial as expected, the prosecutor continued to insist proof would be forthcoming and the court allowed the issues to go to the jury (*Id.* at pp. 882-883), whereas here, Mr. Mazurek abandoned his felony murder theory based on attempted rape after his case-in-chief, presumably after realizing the evidence did not play out as expected, and the issue did not go to the jury. Thus, *Luna* does not require a different result here.

b. Morales's alleged statement that Elia said, "Johnny, why are you raping me?"

Morales further contends that Mr. Mazurek's offer of proof regarding Elia's alleged statement, "Johnny, why are you raping me?" was flawed because it lacked specificity. (AOB 357-361.) Specifically, Morales argues that Mr. Mazurek did not identify the source of his alleged information. (AOB 358.)

But Mr. Mazurek specified his understanding that Morales made the alleged statement to Jorge. (7RT 1336.) And both parties expected Jorge to testify, as indicated in the colloquy regarding the defense's request for prior records of prosecution witnesses, including Jorge. (7RT 1357.) Defense counsel also raised potential Fifth Amendment issues with Jorge's testimony. (7RT 1358-1362.) During this discussion, Mr. Mazurek indicated that he only intended to ask Jorge what statements Morales made to him, and not about any incriminating information. (7RT 1361.)

Morales acknowledges much of this, but still contends that the offer of proof was deficient because Jorge himself had not made any statements to law enforcement at that time. (AOB 359.) But even though Jorge had not made any statements himself, Morales's mother advised police that Angel told her about statements Morales made to Jorge. (7RT 1360.) And Jorge was expected to testify directly about those statements at trial,

including the statement that Elia said, "Johnny, why are you raping me?" Thus, Mr. Mazurek's offer of proof was not deficient, but rather reflected Jorge's anticipated testimony with accuracy. Indeed, defense counsel admitted that she had received discovery of the evidence Mr. Mazurek was planning to rely on and did not question the offer of proof. (7RT 1336, 1338.)

Finally, Morales contends the evidence presented at trial shows that Mr. Mazurek did not actually have any competent evidence that conformed to his proffer that Elia said, "Johnny, why are you raping me?" before he shot her. (AOB 360.) But Mr. Mazurek did not ever claim to be sure that Morales told Jorge that Elia made that statement. Instead, Mr. Mazurek told the trial court that Morales "supposedly" made the alleged statement. (7RT 1336.) Mr. Mazurek did not guarantee that any witnesses could prove the statement was made. (7RT 1336.) In fact, later during the same hearing, Mr. Mazurek informed the court he planned to ask Jorge what Morales actually told him. (7RT 1361.) Jorge did not ultimately testify, and the alleged statement was not introduced into evidence. However, evidence was produced that Morales told Angel that Elia said, "Johnny, why are you doing this to me?" (11RT 2237.) Although the evidence came out differently at trial, that does not mean the prosecutor had no reasonable basis for believing the evidence would show that Elia said, "Johnny, why are you raping me?"

Thus, nothing that Mr. Mazurek told the court about the testimony he believed would be presented at trial constituted misconduct.

3. The prosecutor did not commit misconduct in argument

Morales contends the prosecutor committed misconduct by referring to the uncharged attempted rape in his closing argument because the issue of whether Elia was the victim of an attempted rape was no longer in play.

(AOB 372-378.) Additionally, Morales argues that the prosecutor both misstated the evidence presented and encouraged the jurors to base their verdicts on speculation and facts not in evidence. (AOB 372-376.)

With regard to argument, a prosecutor is given "wide latitude" and "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*Hill*, *supra*, 17 Cal.4th at p. 819.) Whether the inferences drawn by a prosecutor are reasonable is a question for the jury to decide. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 474.) Additionally, the defendant must show a reasonable likelihood that the jury construed or applied the comments in an improper or erroneous manner. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Morales appears to argue that Mr. Mazurek discussed inadmissible evidence against court order. (AOB 372-373.) But the trial court allowed the evidence at issue and it was introduced at trial without objection. The court never altered its initial ruling admitting the evidence and Morales does not cite to any orders that were violated. While Mr. Mazurek advised the court at the close of his case that he would not be arguing felony murder based on attempted rape as initially planned, the evidence had already been admitted and no order of the court issued to change that.

Morales also argues that it was misconduct for Mr. Mazurek to mention the attempted rape evidence because it was no longer relevant after the prosecution gave up arguing the felony murder theory. (AOB 374-375.) However, the evidence, which had not been stricken, was relevant to Angel's credibility. Mr. Mazurek only made reference to the evidence while arguing that Angel's prior inconsistent statements should be taken for the truth. (12RT 2649-2652.)

Mr. Mazurek pointed to the instance when Angel said Morales was involved in a robbery and rape and then immediately backed off that statement as an example of how Angel tried to protect Morales and minimize what he had done. (12RT 6250.) This was a way for Mr. Mazurek to explain to the jury why, at trial, Angel denied remembering any of the details he had made in his prior statements. Similarly, when Mr. Mazurek referred to Elia's statement, "Johnny, why are you doing this to me? "and argued the statement was consistent with the evidence of Elia's clothing being removed, he was pointing out just one of many examples of how Angel's prior statements conformed with the evidence. (12RT 2651.) Other examples highlighted by Mr. Mazurek included Angel's prior statements indicating that there was a woman with a lot of chains or jewelry, Morales followed the woman around Cardenas Market, the children saw Morales at the house, Morales killed the woman because she recognized him, and Morales took $600 and some gold chains. (12RT 2651-2652.)

Morales also argues that Mr. Mazurek misstated the evidence. The record proves otherwise. Detective Wolf testified about his conversations with Angel, during which Angel stated that Morales had told him "he was involved in a robbery and a rape of a woman" and then Angel "immediately backed off and said . . . he had learned this from Jorge." (10RT 2179-2180.) Angel also told Detective Wolf that Morales "said that [Elia] had said to him, Johnny, why are you doing this to me, end of quote." (11RT 2237.) In his closing statement, Mr. Mazurek reminded the jury of these statements. (12RT 2650, 2651.) Mr. Mazurek then said, "Think about that for awhile. Think about how the victim ended up on the floor, her panties off, and put that in context of the statement, 'Johnny, why are you doing this to me?' Put that in context." (12RT 2651.) Mr. Mazurek did not say that Morales told Angel that Elia made this statement while her clothing

was being removed. (AOB 375.) Instead, it is clear that Mr. Mazurek was arguing that it made sense that Elia made her statement while she was being stripped of her shorts and underwear. This was a "fair comment on the evidence." (*Hill*, *supra*, 17 Cal.4th at p. 819.) It was also a "reasonable inference" or "deduction[] to be drawn" from the evidence presented. (*Ibid.*)

As this court has held, "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Whether the inferences drawn by a prosecutor are reasonable is a question for the jury to decide. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 474.) So the jury here might reasonably find that Elia asking, "Johnny, why are you doing this to me?," referred to either an attempted rape or the home invasion robbery and burglary. Either way, Mr. Mazurek's comment on the evidence was not misconduct.

Finally, Mr. Mazurek did not encourage the jurors to base their verdicts on speculation or facts not in evidence. Accordingly, Morales's reliance on *Fosselman*, *supra*, 33 Cal.3d 572, is misplaced. (AOB 346, 373, 375.) In *Fosselman*, while cross-examining the defendant, the prosecutor stated his personal belief that the defendant wanted to rape one of the victims. (*Id.* at pp. 579-580.) The trial court found the prosecutor's statement improper because it was "based on purported facts not in evidence." (*Id.* at p. 580.) In contrast, here, Mr. Mazurek did not state any personal beliefs, but recounted the actual evidence presented at trial and asked the jury to make reasonable inferences about the evidence presented. Moreover, Mr. Mazurek did not urge the jurors to find Morales guilty of murder or find true the special circumstances or enhancements based on evidence of attempted rape or sexual assault. As discussed above, Mr. Mazurek's only reference to sexual assault was in connection with discussing Angel's statements.

E. Even If the Trial Court or Prosecutor Erred, Morales Cannot Show Prejudice

Morales contends that the alleged errors resulted in irrelevant, highly inflammatory evidence of attempted rape being admitted and not subjected to meaningful adversarial testing. (AOB 361-372.) He further alleges that the prosecutor exploited the prejudicial impact of the evidence by arguing the irrelevant, unfounded and highly prejudicial inference that Morales attempted to rape Elia before she was killed. (AOB 372-378.) Both contentions are false.

First, as to relevance, the trial court deemed the attempted rape evidence relevant to the crimes charged as it supported one theory of felony murder. (7RT 1336-1341.) Morales does not dispute this, but contends repeatedly that Mr. Mazurek later conceded the attempted rape evidence was irrelevant. That never happened. Instead, after deciding not to proceed with the felony murder theory based on attempted rape following his case-in-chief, Mr. Mazurek agreed to withdraw exhibit 24 (the photograph of the lower portion of Elia's naked body) from consideration during the guilt phase. (7RT 1393; 12RT 2530.) While defense counsel objected to exhibit 24 as irrelevant, Mr. Mazurek's agreement to withdraw the exhibit did not concede relevancy. (12RT 2530.) In fact, Mr. Mazurek did not say anything about relevance during this brief exchange. (12RT 2530.) He only responded, "As to the guilt phase, that is correct," meaning he was agreeing to withdraw exhibit 24 from the guilt phase portion of the trial only. (12RT 2530.)

But even if Mr. Mazurek conceded that exhibit 24 was not relevant, that does not mean that he agreed all of the evidence of attempted rape was irrelevant, as suggested by Morales. (AOB 362, fn. 46.) No other evidence was discussed during this brief exchange, so there is no basis for Morales's broad assertion that the prosecution made such a sweeping concession. In

fact, as discussed above, the evidence was relevant to the issue of Angel's credibility. And at no point did the trial court rule that the attempted rape evidence was inadmissible or order that it be stricken.

Second, as to adversarial testing, Morales cannot dispute that his counsel had adequate opportunity to cross-examine all of the prosecution's witnesses who presented evidence relevant to the attempted rape theory. He argues instead that he "was precluded from submitting [the evidence] to adversarial testing through rebuttal in his own case or a meaningful closing argument." (AOB 362.) But Morales does not provide a persuasive reason why his counsel could not respond sufficiently to the prosecution's closing argument. Morales argues that defense counsel would herself be arguing irrelevant and improper matters if she responded to the prosecutor's argument and would seem to be endorsing the importance of the issue. However, it seems doubtful that the trial court would prohibit defense counsel from addressing an argument made by the prosecutor. Whether defense counsel decided for tactical reasons not to address the issue is a matter of choice, not denial of opportunity.

Regarding rebuttal evidence, the only affirmative evidence Morales suggests he might have offered is testimony from the analyst who tested Elia's sexual assault kit. (AOB 368.) But such evidence was unnecessary to the prosecution's *attempted* rape theory, as attempted rape has only "two elements: (1) the specific intent to commit the crime of rape and (2) a direct, although ineffectual, act toward its commission." (*People v. Clark* (2011) 52 Cal.4th 856, 948.) Thus, no physical evidence is required to prove attempted rape. Indeed, the medical examiner confirmed he found no physical evidence of a sexual assault. (12RT 2487.) The analyst who tested Elia's sexual assault kit presumably would have also testified that there was no evidence of sexual assault. Because Morales had full opportunity to cross-examine the prosecution's witnesses and cannot show

that he was prevented from presenting any material evidence on rebuttal, his claim fails.

Third, Morales's claim that the jury heard "a considerable amount" of "highly inflammatory" attempted rape evidence is exaggerated and inaccurate. (AOB 362.) The prosecution presented minimal evidence in support of its attempted rape theory, which is likely why the prosecution ultimately decided not to argue the theory to the jury.

The evidence presented at trial included:

- Joe testified that while shopping with his mother and sisters before the robbery, three men followed them around the store blowing kisses to his mother. (8RT 1633-1634.) Joe also testified that when the family was in the bedroom during the robbery, one of the men pulled down his mother's shirt and the man with the curly hair in a ponytail touched or grabbed her chest. (8RT 1647-1648; 9RT 1695, 1923.) Joe did not identify Morales as the man who touched his mother's chest and the court did not allow him to make an identification. (8RT 1648, 1664-1665.) But it is undisputed that Morales had short hair at the time of the murder and that a different man had curly hair in a ponytail. (AOB 416; 8RT 1657; 9RT 1863-1866, 1878-1879, 1912-1914.) On cross-examination, defense counsel questioned Joe about both of these incidents. (9RT 1678, 1693-1695.)
- Brianda testified that Morales pulled her mother by the hair down the hall toward the kitchen, placing them together before Elia was disrobed. (9RT 1796, 1798-1800, 1811, 1829, 1834, 1866, 1868.)
- Gutierrez, Mayra, and Sergeant Toms testified that Elia was naked from the waist down when they found her. (8RT 1449, 1450, 1463 [Gutierrez]; 8RT 1553, 1563, 1603 [Mayra]; 9RT

1762, 1770, 1900 [Sergeant Toms].) Deputy Alban confirmed that Gutierrez and Mayra reported to him that they found Elia naked from the waist down. (10RT 1977, 1981-1982.)

- Mr. Mazurek used exhibit 24, a photograph described as Elia's "legs exposed" and "disrobing of the lower portion of the body," during his examination of Mayra to confirm how Elia looked when she was found in the kitchen. (7RT 1390, 1391; 8RT 1563-1564.) Defense counsel's request to have Elia's pubic hair blacked out was denied and there was no argument that the photograph was unduly graphic. (7RT 1393.) After his case in chief, Mr. Mazurek withdrew exhibit 24 from the guilt portion of the trial. (12RT 2530.)
- Sergeant Toms testified that officers collected a sexual assault kit. (9RT 1900.) The medical examiner testified that the sexual assault kit was sent to a lab for testing, but that he performed his own examination of Elia's body and found no evidence of a sexual assault. (12RT 2487.)
- Detective Wolf testified that Angel said that Morales "told him he was involved in a robbery and a rape of a woman." (10RT 2179.) Detective Wolf said that Angel "immediately backed off and said Jorge – he had learned this from Jorge." (10RT 2180.)

Additionally, the argument presented included:

- In his opening statement that spanned 10 pages, Mr. Mazurek told the jury they would hear that the men who followed the family around the market blew kisses to Elia, one of the men pulled down Elia's shirt and groped her chest, and Elia was found naked from the waist down. (7RT 1415, 1417, 1418.)
- Mr. Mazurek's closing argument spanned 59 pages. (12RT 2620-2678.) In one paragraph, Mr. Mazurek mentioned

> Detective Wolf's testimony about his conversation with Angel and Morales's alleged statement that "he was involved in a robbery and a rape of a woman." (12RT 2650.) In a second paragraph, Mr. Mazurek mentioned Angel's statement to Detective Wolf that Morales told him Elia said, "Johnny, why are you doing this to me?" (12RT 2651.) Mr. Mazurek asked the jury to think about what Elia was referring to—"Doing what? Think about that for awhile. Think about how the victim ended up on the floor, her panties off, and put that in context of the statement, 'Johnny, why are you doing this to me?' Put that in context." (12RT 2651.)

As described above, the attempted rape evidence admitted at trial was minimal and far from inflammatory. No witnesses could speak to what actually happened in the kitchen between Elia and her assailants before she was shot. No one could say how Elia ended up naked from the waist down or why. Although Joe discussed a groping incident in the bedroom, he identified the man that touched his mother's chest as having long, curly hair. Yet it is undisputed that Morales did not have long, curly hair on the day of the murder. And Morales did not confess to rape or any other sexual assault in his long and detailed confession to his mother, while he did confess to burglary, robbery, and shooting Elia in the heart when she recognized him. That Elia was naked from the waist down when she was found in the kitchen was simply a fact of the case and, while it was normal for investigators to conduct a sexual assault kit in light of that, no evidence of sexual assault was presented. Finally, Angel's hearsay statement that he heard from Jorge that Morales confessed to raping a woman is just that, hearsay.

In contrast to this limited attempted rape evidence, there was abundant evidence that Morales murdered Elia during the commission of a home

invasion robbery and burglary. In fact, Morales confessed to shooting Elia in the heart with an AK-47. (29CT 8311, 8318, 8322, 8326.) He even explained that he shot her because she recognized him, providing a motive for the murder. (29CT 8310, 8320 8325.) He actually said that if Elia had just been quiet and not said his name, they would have left without killing her and she could have called the police afterward. (29CT 8325.) Morales also explained why he and the other assailants were at Elia's house in the first place—they had been told her husband was a drug dealer and that there was money at their house. (29CT 8319-8321.)

During his confession to his mother, Morales discussed other details that matched the witness testimony presented at trial, including that there were six men involved, they took a taxi to the house, and they invaded two houses on the same property. (29CT 8323-8325.) Gutierrez and Mayra testified about Morales and the other men invading and ransacking their home first. They said two men stayed behind at their house while the other men went to Elia's home. In turn, Elia's three children testified that three or four men invaded their home through the kitchen door, took them all to the bedroom, asked where the money was, and ransacked the bedroom. The children testified that Elia was dragged out of the bedroom by Morales and that shortly thereafter they heard a gunshot and found their mother dead in the kitchen. Testimony also showed that money and jewelry were taken from both homes. Finally, Morales's girlfriend confirmed the taxi portion of Morales's confession, testifying that Morales abruptly left a family barbeque after a taxi and another car arrived and that she overheard him on the phone talking about going to rob someone, that the robbery would be easy, and there was supposed to be a lot of money.

In light of Morales's confession and all of the corroborating evidence, there can be no doubt that Morales personally killed Elia during the commission of a burglary and robbery. Considering the mountain of

evidence that Morales murdered Elia during the commission of a burglary and robbery, in contrast to the minimal attempted rape evidence that was presented and the limited nature of the prosecutor's reference to evidence of sexual assault during closing argument, any errors by the prosecutor or trial court were harmless under any standard.

F. Morales's Trial Counsel Did Not Render Ineffective Assistance of Counsel

To excuse forfeiture of his prosecutorial misconduct claim, Morales asserts that his trial counsel was ineffective for failing to object enough or on the right grounds and for failing to obtain a dismissal of the attempted rape special circumstance allegation before jury selection. (AOB 350, 378-404.) But Morales "cannot automatically obtain merit review of a noncognizable issue by talismanically asserting ineffective assistance of counsel." (*People v. Riel* (2000) 22 Cal.4th 1153, 1202.) As discussed below, Morales's trial counsel provided competent representation in all of the challenged respects, and, in any case, Morales suffered no prejudice as a result of the alleged deficient performance.

1. Defense counsel's agreement to delay a decision on the section 995 motion until after jury selection did not constitute ineffective assistance

Morales argues that trial counsel's failure to obtain a dismissal of the attempted rape special circumstance allegation before jury selection fell below an objective standard of reasonableness. (AOB 382-395.) Respondent disagrees.

To prove ineffective assistance of counsel, "The defendant must show that counsel's action or inaction was not a reasonable tactical choice." (*People v. Michaels*, *supra*, 28 Cal.4th at p. 526.) In most cases, the reasons for counsel's action or failure to act are not reflected in the record on appeal. (*Ibid.*) "If the record does not shed light on why counsel acted

or failed to act in the challenged manner, [reviewing courts] must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Because of the limitations in the record on appeal, ineffective assistance of counsel "claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Mickel* (2016) 2 Cal.5th 181, 198; *People v. Lopez* (2008) 42 Cal.4th 960, 966; see also *People v. Snow* (2003) 30 Cal.4th 43, 111 [on habeas, facts and circumstances not contained in the record on appeal can be brought to light to show counsel's reasons for pursuing a particular trial strategy].) Indeed, this court has "repeatedly emphasized that a claim of ineffective assistance of counsel is more appropriately decided in a habeas corpus proceeding." (*People v. Michaels*, *supra*, 28 Cal.4th at p. 526.)

If decided on appeal, Morales's ineffective assistance of counsel claim should be denied because Morales's trial attorney may very well have made a tactical decision not to press for a ruling on the section 995 motion prior to jury selection. Morales's attorney may have known that even if the attempted rape special circumstance allegation was dismissed, evidence of attempted rape could still be admitted to support a felony murder theory under *Davis*, *supra*, 10 Cal.4th 463. Furthermore, Morales's attorney may have recognized that evidence of sexual assault might be admitted as circumstances of the crime in the penalty phase even absent an attempted rape special circumstance. Therefore, it would be important to screen jurors for their feelings regarding the topic.

Furthermore, given that the attempted rape evidence was ultimately admitted to prove the prosecution's attempted rape felony murder theory, Morales did not suffer any prejudice from the trial court's delay in deciding

the section 995 motion. Had the trial court granted defense counsel's section 995 motion before or during jury selection, one of two results could have occurred: either defense counsel would have chosen not to voir dire the jury regarding the attempted rape evidence that was later admitted to support one of the prosecution's legal theories, or the prosecution would have raised the felony murder theory based on attempted rape at that time and defense counsel would have proceeded to voir dire on the issue.

Whether the trial court's decision came before or after jury selection was of no consequence since the attempted rape evidence was ultimately allowed in. Even Morales acknowledges this fact. (AOB 394.) Thus, defense counsel did not provide ineffective assistance by not pushing the trial court to decide this issue before or during jury selection, and if anything, the delay benefitted Morales by allowing his counsel to weed out potential jurors who might have issues with the attempted rape evidence that was ultimately admitted at trial.[27]

2. Defense counsel did not provide ineffective assistance by not objecting to Mr. Mazurek's offer of proof of the attempted rape evidence

Morales contends that his trial counsel failed to make appropriate objections to Mr. Mazurek's initial offer of proof of the attempted rape evidence. (AOB 395-397.) For the reasons discussed in Section III.D.2, *ante*, Mr. Mazurek's offer of proof was not false, misleading, or based on

[27] Morales argues that the trial court's error in appointing Mr. Rozenberg resulted in Morales being thrust into a position where he had to make an intolerable choice between a speedy trial and representation by prepared, competent counsel. (AOB 390-393.) In making this argument, Morales relies on cases where the court appointed counsel the day of or just days before trial. (AOB 390-393.) In contrast to those cases, here, trial counsel first appeared in this case on October 24, 2003, and jury selection began on July 12, 2004, giving trial counsel almost nine months to file her section 995 motion. (2RT 155-157; 8CT 2155; 3RT 235.)

incompetent evidence. Therefore, there was no basis for defense counsel to object to the evidence that Mr. Mazurek intended to present, and counsel's lack of objection was reasonable. (*People v. Ghent* (1987) 43 Cal.3d 739, 772 ["a mere failure to object to evidence or argument seldom establishes counsel's incompetence"].)

Moreover, as Morales concedes, his trial counsel did later challenge the prosecution's evidence, in the same and subsequent proceedings, and even filed a motion asking the trial court to reconsider its ruling on the attempted rape evidence. (AOB 395-396; 7RT 1360-1361, 1373-1375, 1390-1392, 1401-1403; 27CT 7610-7614.) Still, after considering all of the evidence, arguments, and objections, the trial court determined that the prosecution should be allowed to present the attempted rape evidence to support one of its theories of felony murder under *Davis*, *supra*, 10 Cal.4th 463. (7RT 1402-1403.) Any further objection would have been futile. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 [explaining that defense counsel does not provide ineffective assistance by declining to lodge a futile objection].)

3. Defense counsel was not ineffective for failing to move to strike the attempted rape evidence or object to Mr. Mazurek's argument

Morales argues that defense counsel's decision not to move to strike the attempted rape evidence after Mr. Mazurek indicated he would not be arguing that theory to the jury along with counsel's failure to object to Mr. Mazurek's use of that evidence in his argument constituted ineffective assistance. (AOB 397-404.) Morales admits that defense counsel may have refrained from objecting for tactical reasons, reasoning that such a motion would do more harm than good. (AOB 397.) Morales also acknowledges this court has held that defense counsel may reasonably decide not to bring a meritorious motion to strike in fear that it will

highlight objectionable evidence. (AOB 397-398, citing *People v. Catlin* (2001) 26 Cal.4th 81, 165.) Despite this, Morales argues defense counsel's decision in this case was not reasonable and improperly assessed risk related to the evidence. While Morales's current counsel may disagree with trial counsel in hindsight, that does not make his trial counsel's decision unreasonable. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 437 [counsel must be shown to have *no* rational tactical purpose].)

Trial counsel's decision not to move to strike the attempted rape evidence or respond to that evidence in counsel's own closing were reasonable, tactical choices. As recounted above, some of the attempted rape evidence Mr. Mazurek expected to come in at trial did not materialize, which is likely why he decided he would not argue that theory to the jury. The evidence presented at trial was thus minimal.

"[T]he decision whether to object, move to strike, or seek admonition regarding [objectionable] testimony is highly tactical, and depends upon counsel's evaluation of the gravity of the problem and whether objection or other responses would serve only to highlight the undesirable testimony." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 165.) In light of the minimal evidence introduced in support of the prosecution's theory that Morales attempted to rape Elia, it was reasonable for defense counsel not to bring the attempted rape evidence to the forefront of the jury's mind at the close of trial. To limit the jury's consideration of the attempted rape evidence, defense counsel would have needed to request corrective instructions for several of the witnesses' testimony, thus focusing the jury again on the very testimony defense counsel hoped to strike. Based on this record, it appears that defense counsel's inaction had a legitimate tactical basis, and thus, was reasonable. (See *People v. Lucas*, *supra*, 12 Cal.4th at p. 437.)

Morales rehashes much of his prosecutorial misconduct argument in an effort to show that even if defense counsel's initial decision not to move to strike the evidence was reasonable, counsel's later decision not to object to the prosecutor's argument was not. (AOB 398-401.) Initially, as discussed in Sections III.C and III.D, *ante*, the attempted rape evidence was properly found to be relevant and admitted at trial, and no subsequent order of the court ruled otherwise. Therefore, Mr. Mazurek was not prohibited from commenting on this evidence in his closing. But even if his argument was improper, it was brief, consisting of two short references to trial testimony. Defense counsel's decision not to object to this brief statement buried in the middle of an argument that spanned 59 pages was reasonable, especially since defense counsel was in a position to see the jury and determine how closely the jurors were paying attention at any given time.

The capital nature of the case does not change this analysis. (AOB 402-403.) When the section 995 motion was being considered, Mr. Mazurek argued that the attempted rape evidence was "a circumstance of the crime that the jury is going to be able to consider in the penalty phase." (7RT 1338.) This is accurate, as section 190.3, factor (a), allows the jury to consider all of the circumstances of the crime of which the defendant was convicted. Accordingly, the attempted rape evidence was permissible factor (a) evidence, not, as Morales suggests, factor (b) evidence requiring proof beyond a reasonable doubt (AOB 403).[28]

Thus, even if the attempted rape evidence had been stricken from the guilt phase, the jury would have heard it at the penalty phase. In fact, during the hearing on the section 995 motion, the court made clear that its

[28] In Claim IV, discussed in Section IV, *post*, Morales argues that the penalty verdict must be reversed because, among other things, the evidence of sexual assault against Elia was factor (b) evidence and was required to be proved beyond a reasonable doubt.

discussion was limited to whether the attempted rape evidence was relevant to the guilt phase, not the penalty phase. (7RT 1339.) Additionally, at the close of his case, Mr. Mazurek agreed to withdraw exhibit 24 but clarified the withdrawal was only as to the guilt phase and that he would introduce this evidence at the penalty phase. (12RT 2530.)

In sum, Morales has not demonstrated that any of trial counsel's conduct fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for counsel's allegedly deficient performance, the result of the trial would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 686-687; *People v. Williams* (1997) 16 Cal.4th 153, 215.)

G. Morales Was Not Denied His Right to a Fundamentally Fair Trial; Any Error Was Harmless

Morales contends that the combined errors of the prosecutor, trial court, and defense counsel resulted in a fundamentally unfair trial and require reversal of the special circumstance and gun enhancement verdicts as well as the death judgment. (AOB 404-443.) He argues that absent the attempted rape evidence, there was a reasonable chance that at least one juror would have had reasonable doubt that he was the actual killer. (AOB 404-443.) But the record does not support such a finding.

As discussed throughout this section, no errors occurred. The attempted rape evidence was properly admitted at trial to prove the prosecution's felony murder theory based on attempted rape. Furthermore, there was no prosecutorial misconduct or ineffective assistance of trial counsel.

But even if the attempted rape evidence was admitted in error, it was harmless and did not render Morales's trial unfair. "Application of the ordinary rules of evidence generally does not impermissibly infringe on a [] defendant's constitutional rights." (*People v. Kraft* (2000) 23 Cal.4th 978,

1035.) Specifically, the violation of state rules of evidence does not violate the federal due process clause. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [admission of relevant evidence does not violate due process unless the evidence is so prejudicial as to render the trial fundamentally unfair].) "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." (*Rose v. Clark* (1986) 478 U.S. 570, 579; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009.)

Given the overwhelming evidence that Morales murdered Elia during the commission of a robbery and a burglary, he cannot demonstrate a reasonable probability of a better result absent the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As detailed in Section III.E, *ante*, Morales confessed that he shot Elia in the heart with an AK-47. He admitted that he shot her because she recognized him, and he blamed her for her own death, explaining that if Elia had not said his name, she would not have been killed.

In contrast to the compelling evidence that Morales was the actual killer, the evidence that Morales attempted to rape Elia was limited and weak. As discussed in Section III.E, *ante*, the only evidence suggesting that Morales could have attempted to rape Elia was that Elia was naked from the waist down when she was found dead in the kitchen, Morales was in the kitchen with her before she was disrobed, and Elia asked "Johnny, why are you doing this to me?" before Morales shot her. Joe could not identify Morales as one of the men who blew kisses to his mother or groped her chest. In fact, Joe's description of the man that touched his mother's chest as having long curly hair did not match Morales's description as bald or closely shaved at the time of the crimes. (AOB 416; 8RT 1657; 9RT 1863-1866, 1878-1879, 1912-1914.) No witnesses were present in the kitchen when Elia was shot. No witnesses could explain how or why Elia ended up naked from the waist down. And Morales did not confess to

attempted rape or sexual assault during the recorded phone call with his mother.

While Morales contends the attempted rape allegation and evidence were "extraordinarily prejudicial" and "exceptionally inflammatory" (AOB 412-415), these characterizations are contradicted by the minimal evidence actually presented at trial. Further, the cases Morales cites in support of his claim of extreme prejudice all involved evidence of prior rapes or attempted rapes or other crimes unrelated to the charged offenses. (See AOB 412.) That is not the case here, where the attempted rape was alleged to have occurred immediately prior to Elia's murder and supported a felony murder theory. This case is completely unlike *People v. Guerrero*, *supra*, 16 Cal.3d 719, where evidence of an uncharged rape that occurred six weeks earlier and involved a different victim was allowed at trial to prove the prosecution's theory that the defendant murdered the current victim in the course of an attempted rape, despite the fact that she was fully clothed and there was no evidence of attempted rape.

Even if sexual assault allegations can sometimes influence a jury's findings on other charges, as Morales suggests, he cannot show that the minimal evidence actually presented at trial affected the jury's findings as to the charged crimes, special circumstances, or firearm enhancements. As Morales acknowledges, the jury was subjected to extensive voir dire on the subject of the attempted rape allegation and the potential jurors' responses were critical to defense counsel's jury selection strategy. (AOB 385-389.) Thus, even if admission of the minimal attempted rape evidence was in error, its admission alone does not demonstrate a reasonable probability of a better result absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The test "must necessarily be based upon reasonable probabilities rather than upon mere possibilities." (*Id.* at p. 837.)

Although Morales contends that differences in some of the witnesses' accounts indicate that there was a question about who the actual shooter was (AOB 415-418), the witnesses' statements were not critical to the identity of the shooter given Morales's confessions. Morales admits that none of the witnesses were present in the kitchen when Elia was shot and did not know for sure who was in the kitchen at that time, let alone who actually pulled the trigger. (AOB 415.) Accordingly, the jury must have believed Morales's confessions to find him guilty of personally using a rifle to shoot and kill Elia. Morales's suggestion that the jury could have believed he never left Gutierrez and Mayra's house (AOB 416) is undermined by his confessions and Brianda's consistent identification of Morales as one of the men in her house and the man that pulled Elia by her hair out of the bedroom and to the kitchen right before she was shot. (9RT 1796, 1798-1799, 1811, 1829, 1834, 1866, 1868.)

Morales also contends there were problems with his confessions. (AOB 418-441.) Morales first gives reasons why Escobar's and Angel's testimony that Morales confessed to them should not be believed, pointing to the circumstances under which Angel gave his statements to the police, and Escobar's arrest as an accessory, her changed statements, and the possible involvement of her brother in the crime. (AOB 418-421.) Even assuming there is reason to question Escobar's and Angel's credibility, Morales's taped, detailed confession to his mother sealed his fate.

Contrary to Morales's assertions, his taped confession included clear admissions that he personally shot and killed Elia, even though portions of the tape recording were denoted as unintelligible. (29CT 8308-8331.) As discussed above, during the conversation with his mother, Morales confessed to shooting Elia in the heart because she recognized him. (29CT 8310, 8311, 8318, 8320, 8322, 8325, 8326.)

Morales disputes that his own words incriminated himself and contends that his statements on the phone call with his mother just as likely showed innocence as guilt. (AOB 424-438.) Morales's attempts to poke holes at individual portions of his statements fall short. Although, like most conversations, the language used was not always precise, it was clear from the exchange that Morales admitted that he personally shot Elia because she recognized him. Confirming that he shot Elia, Morales told his mother, "Well yes it was me" and "Even if it hadn't been it's still the same." (29CT 8310-8311.) In response to a question by his mother, "What did you do it with? Did she die from a blow or what?" Morales responded, "No. A shot." (29CT 8318.) Later, Morales's mother asked him, "Where did you shoot the lady?" to which Morales responded, "I think the heart." (29CT 8326.) Morales went on to say, "Three seconds and that's it," "You can't live," and "She just said, oh and that was it." (29CT 8326.) When his mother asked, "It doesn't get your conscience?" Morales simply replied, "Well yeah but what can I do now?" (29CT 8326-8327.) When again discussing that he shot Elia because she said his name, Morales explained to his mother, "I told her she was a dummy, told her she was a puta, dummy she should have kept quiet and she could have called the police after . . . Nothing would have happened to her, I didn't even know her." (29CT 8325.)

All of these admissions were interspersed with details about the crimes, including the number of houses they robbed, how many people were involved, some of the accomplices' names, the motive for the robberies, and references to the fact that neither the bullet nor the firearm used could be traced to Morales. (29CT 8311-8312, 8317-8327.) The only reasonable way to interpret the conversation is that Morales shot and killed Elia.

Morales argues that even accepting that he admitted to all of the charged crimes and to personally killing Elia, there was one significant reason to doubt the truth of those statements—i.e., it was more reasonable to conclude that he suspected one of his accomplices had forced his mother to make the phone call to him and was listening in, giving him a motive to falsely implicate himself to avoid retaliation. (AOB 422, 438-441.) This argument is not supported by any evidence and falls short on logic. If Morales suspected that one of his accomplices was listening in, it would make more sense for him to deny any knowledge of the crime.

Morales's argument that the jury had reasonable doubt over the reliability of his admissions because it acquitted him on count 7, the separate robbery of Martinez (also known as Mago), is equally without merit. That part of the recorded conversation is not clear. Morales's mother asked him about where Elia's husband kept his drugs and the conversation briefly drifted to a reference about "Margo" sending the cops. (29CT 8321.) There were then four statements by Morales that were unintelligible before the conversation had clearly come back around to Elia's murder. (29CT 8322.) During this brief reference to "Margo," Morales never admitted to robbing her. (29CT 8321.) While Morales said, "They were looking for me because of the robbery at the house," that statement could have just as easily referred to the robbery at Elia's house, which they were discussing just prior to that statement.

Additionally, the evidence presented at trial regarding count 7 was riddled with conflicts and a questionable identification. The prosecution first called Martinez, but she could not identify anyone involved in the robbery. (11RT 2400.) The only other witness called by the prosecution was Velasquez, a good friend of Martinez's who was in her room when the robbery occurred. Velasquez testified that someone she knew named Johnny was one of the robbers, but she initially refused to identify him in

court, saying she was afraid he might retaliate. (12RT 2502-2504.) During a break in testimony, Velasquez asked the prosecutor if Morales could stand so she could get a better look at him. (12RT 2506.) Morales stood and Velasquez identified him as one of Martinez's robbers. (12RT 2506-2507.) Velasquez said Morales looked different in court than he did at the time of the robbery. (12RT 2506.) She also said that she saw him two weeks before the robbery when he bought two blankets from her. (12RT 2507.)

On cross-examination, defense counsel brought out several contradictions between Velasquez's testimony and her statements to police. (12RT 2507-2523.) Velasquez testified Morales was the third person to come into Martinez's room. (12RT 2515.) She denied telling police that the third person was between 250-300 pounds, much heavier than Morales at the time, despite the stipulated police testimony to that effect. (12RT 2515, 2548-2549.) Velasquez also denied crying when police showed her a lineup containing Ever Flores, and said she cried at Morales's picture. (12RT 2521-2522.) But Detective Toms confirmed that Velasquez cried at Ever Flores's lineup and identified him and one other person but did not identify anyone from the lineup containing Morales or cry when she viewed it. (12RT 2539-2540, 2542.) The stipulated police testimony also revealed that Velasquez told police she had never seen any of the suspects before and had no idea who they were. (12RT 2547.) And after Elia's murder, Velasquez told police she did not know anyone named Johnny Morales. (12RT 2520.) Thus, the jury likely acquitted Morales on count 7 because it could not be sure Morales was one of Martinez's robbers in light of Velasquez's contradictory testimony.

The jury found Morales guilty of murder and found true the special circumstances and firearm enhancements based on Morales's powerful confessions and all of the corroborating testimony. The minimal evidence

of attempted rape did not affect the jury's verdicts, and any error in this regard was harmless under any standard. Morales has failed to show that he was denied a fair trial, and the verdicts on the special circumstances and gun enhancements should be upheld.

IV. DURING THE PENALTY PHASE, EVIDENCE OF SEXUAL ASSAULT WAS PROPERLY ADMITTED AS CIRCUMSTANCES OF THE CRIME AND DID NOT NEED TO BE PROVED BEYOND A REASONABLE DOUBT

A. Overview

Raising many of the same arguments regarding the attempted rape evidence already addressed in Section III, *ante*, and raising new arguments that additional errors occurred with respect to the same evidence during the penalty phase, Morales contends that the cumulative effect of the errors committed during both phases of trial prejudiced his penalty phase and prevented him from receiving a fundamentally fair penalty trial. (AOB 444-531.) Specifically, Morales argues that the evidence presented at trial was factor (b) evidence that required an instruction on proof beyond a reasonable doubt, and that the trial court erred by not giving such an instruction sua sponte. He further argues that the prosecutor erred by misstating the evidence in his closing argument and ignoring the court's rulings, and that the court erred by failing to admonish the jury to disregard the prosecutor's remarks. Finally, Morales argues that his counsel was ineffective in failing to object to the evidence the prosecution introduced in aggravation, failing to elaborate on objections, failing to request the proof beyond a reasonable doubt instruction, and failing to respond to the prosecutor's closing argument.

As discussed in the previous section, no errors occurred during the guilt phase, and the evidence supporting the prosecution's theory of felony murder based on attempted rape was properly admitted. With respect to the

penalty phase, the evidence relating to sexual assault was properly admitted as factor (a) evidence—"circumstances of the crime of which the defendant was convicted in the present proceeding" (§ 190.3, subd. (a))—not factor (b) evidence. The proof beyond a reasonable doubt standard applies only to factor (b) evidence. Therefore, the trial court did not err by not giving that instruction sua sponte, and Morales's counsel did not provide ineffective assistance by failing to request it. Additionally, the prosecutor did not misstate the evidence or ignore court rulings, and the jury was admonished that the argument of counsel did not constitute evidence.

Because no errors were made, there were no errors to cumulate. But even if this court finds error, there is no reasonable possibility that any error affected the jury's death verdict.

B. The Aggravating Factors Presented at the Penalty Phase

Mr. Mazurek filed his Notice of Factors in Aggravation Pursuant to Penal Code Section 190.3 on or around May 11, 2004.[29] (2SCT 374-377.) He indicated that he intended to present factor (a) evidence regarding the circumstances of the charged crimes, eight instances of other criminal activity involving force, violence, or threats under factor (b), and one prior felony conviction under factor (c).[30] (2SCT 374-376.)

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[29] The record does not include a date-stamped copy of the filing, but the signature page and proof of service indicate a submission date of May 11, 2004.

[30] Section 190.3 sets forth the aggravating and mitigating factors that may be considered by the jury. The first three factors are:

> (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 pursuant to Section 190.1.

On October 13, 2004, Morales filed an opposition to the notice of aggravating factors, attempting to limit the type and amount of factor (a) evidence the prosecution could introduce and limit or preclude the prosecution from introducing five items of factor (b) evidence identified in the notice. In the alternative, Morales requested an Evidence Code section 402 hearing before the penalty phase. (28CT 7853-7875.) Morales filed a separate motion on October 20, 2004, seeking in part to preclude the prosecution from introducing the three remaining instances of factor (b) evidence and the prior felony conviction due to violations of the Vienna Convention. (28CT 7876-7919.)

Hearings were held on these issues on October 25, 2004. Mr. Mazurek indicated he would not be introducing evidence regarding three prior robberies he had previously intended to use as factor (b) evidence. (13RT 2849, 2861-2862.) He also agreed he would not discuss the robbery that was the basis for count 7, which resulted in acquittal. (13RT 2862.) The trial court advised Mr. Mazurek that while Morales's prior felony conviction of domestic violence was admissible as factor (c) evidence, the three related domestic violence crimes could not be admitted as factor (b) evidence without the victim's testimony. (13RT 2875-2878.)

The trial court also limited the prosecution's victim impact testimony by allowing Mr. Mazurek to call only one of Elia's three children to testify, finding all three would be cumulative. (13RT 2849, 2857-2858, 2862-2867.) But the court granted Mr. Mazurek permission to introduce exhibit 24, the photograph of Elia naked from the waist down. (13RT 2868-2871.)

> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.

Mr. Mazurek argued that the condition of Elia's body at the time of the murder was a circumstance of the crime. (13RT 2868.) The trial court agreed, finding that the photo was relevant to the circumstances and nature of the crime and not cumulative. (13RT 2871.)

In his opening statement, Mr. Mazurek explained to the jury that during the penalty phase they would hear about Morales's prior felony conviction, circumstances of the convicted crime, and other background information. (13RT 2909-2915.) Specifically, Mr. Mazurek told the jury they would learn a lot about Elia, what she meant to her family, and the impact of Elia's murder on her family. (13RT 2911-2915.) The jury then heard from Elia's mother, sister, and daughter Brianda. (13RT 2922-2975.) The victim from Morales's prior felony conviction and related domestic violence offenses did not testify, so only the fact of conviction was introduced. (14RT 3113-3114.)

In his closing argument, Mr. Mazurek explained to the jury that its job in the penalty phase was to weigh the aggravating and mitigating factors or circumstances to determine the appropriate penalty. (14RT 3163-3169.) He first discussed the eight mitigating factors and argued that none applied. (14RT 3169-3180.)

Mr. Mazurek then moved to the three factors in aggravation. (14RT 3180.) Mr. Mazurek described Morales's prior felony conviction as a violent criminal act and directed the jury to review the court documents submitted into evidence. (14RT 3180.) To avoid double-counting the factors in aggravation and because Morales's prior conviction was easily admitted as factor (c) evidence, Mr. Mazurek did not argue the prior conviction as factor (b) evidence. (14RT 3180.) Instead, Mr. Mazurek explicitly took factor (b) out of the analysis and presented the domestic violence conviction under factor (c) only. (14RT 3180.)

Mr. Mazurek then moved on to discuss the factor (a) evidence. (14RT 3180-3186.) He explained that factor (a) evidence "includes what the victim, herself, must have experienced while she was being murdered." (14RT 3181, 3184-3186.) Mr. Mazurek described the fear Elia must have experienced when armed men burst in through the door of her home and how she must have felt helpless to protect her children. (14RT 3185.) He described the terror and horror Elia must have felt after being groped, dragged away, and sexually assaulted in the kitchen. (14RT 3185-3186.) Mr. Mazurek also described the impact on Elia's mother, sister, and children, especially the impact on the children finding Elia naked from the waist down and eventually realizing one day what actually happened to her. (14RT 3181-3184.)

C. The Condition of Elia's Body and Other Limited Evidence Introduced During the Guilt Phase to Support the Prosecution's Felony Murder Theory Based on Attempted Rape Was Not Other Violent Crime Evidence Under Factor (b)

Morales contends that the evidence admitted at the guilt phase to support the prosecution's felony murder theory based on attempted rape qualified as factor (b) evidence in the penalty phase and should not have been considered by the jury because the prosecution failed to prove attempted rape beyond a reasonable doubt. (AOB 447-486.) But Morales classifies the evidence incorrectly.

As this court has explained, "Factor (a) permits the jury to consider the circumstances of the charged offenses, and factor (b) permits the jury to consider a defendant's violent crimes *other than* the crime(s) at issue in the proceeding before it." (*People v. Russell* (2010) 50 Cal.4th 1228, 1271, italics added.) Here, the evidence introduced during the guilt phase to support the prosecution's felony murder theory based on attempted rape

constitutes factor (a) evidence since it involves circumstances of the charged offenses at issue in the current proceedings. (*Ibid.*)

This court has further explained that the circumstances of the crime under factor (a) "'extend to that which surrounds the crime materially, morally, or logically.'" (*People v. McDowell* (2012) 54 Cal.4th 395, 419, quoting *People v. Hamilton* (2009) 45 Cal.4th 863, 926.) They include more than "the immediate temporal and spatial circumstances of the crime." (*Hamilton*, at p. 926.)

Given the broad interpretation accorded to factor (a) "circumstances of the crime," it cannot reasonably be argued that the condition of Elia's body at the time of the murder was not factor (a) evidence. In fact, Morales concedes that in the penalty phase, the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences, with photo evidence of the victim's dead body. (AOB 508.) As explained by this court, "We repeatedly have determined that photographs of the victims' bodies may be admissible at the penalty phase to demonstrate graphically the circumstances of the crime, a factor relevant to the issues of aggravation and penalty." (*People v. Smithey* (1999) 20 Cal.4th 936, 939.)

The same is true for the other evidence admitted at the guilt phase in support of the prosecution's felony murder theory based on attempted rape—e.g., Joe's testimony about the men blowing kisses at the store and the two men involved in groping Elia during the robbery, and Brianda's testimony that Morales pulled Elia by her hair to the kitchen before she was disrobed. These facts are all highly relevant to how the crime unfolded from the initial contact at the grocery store through the murder.

As described in Section III, *ante*, the only other evidence introduced on this issue were two statements made by Angel to Detective Wolf: (1) Morales told Jorge he was involved in the robbery and rape of a woman (10RT 2179-2180), and (2) Morales told Angel that Elia said, "Johnny, why

are you doing this to me?" (11RT 2237). Mr. Mazurek did not refer to the first statement in the penalty phase. As for Elia's statement, it was highly relevant to the circumstances of the crime because it corroborated Morales's confession that he shot Elia because she recognized him and confirmed Morales's motive for the murder. Elia's statement also pertained to the circumstances of the crime because, given the other evidence, it was suggestive of a sexual assault by Morales. As discussed in Section IV.D.2.b, *post*, the evidence supported a reasonable inference that Morales sexually assaulted Elia, and such conduct could properly be considered under factor (a).

All of this evidence, which was properly admitted at the guilt phase, was materially, logically, and temporally related to the circumstances of the charged offenses. (*People v. McDowell*, *supra*, 54 Cal.4th at p. 419; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 926; *People v. Russell*, *supra*, 50 Cal.4th at p. 1271.) Therefore, the evidence could be considered as factor (a) evidence during the penalty phase.

D. Mr. Mazurek Did Not Argue Any Factor (b) Evidence to the Jury, Misstate the Evidence, or Ignore Court Rulings; Morales Forfeited His Prosecutorial Misconduct Claims; the Trial Court Did Not Commit Error

Morales contends that the prosecutor argued factor (b) evidence to the jury, and committed misconduct in misstating the evidence and ignoring the court's rulings. In addition, Morales claims the trial court erred in failing to admonish the jury to disregard remarks made by Mr. Mazurek. (AOB 487-494.) He is wrong on all counts.

1. Mr. Mazurek did not argue any factor (b) evidence to the jury

Morales contends that Mr. Mazurek argued the commission of unadjudicated violent sexual crimes against Elia as factor (b) evidence to the jury. (AOB 487.) Not so.

Mr. Mazurek gave notice before trial that he intended to argue five robberies and three domestic violence incidents as factor (b) evidence. (2SCT 375-376.) None of these incidents involved Elia or sexual crimes. (2SCT 375-376.) And Mr. Mazurek ultimately decided against introducing any of this evidence. (13RT 2849, 2861-2862, 2875-2878.)

The only factor (b) evidence Mr. Mazurek contemplated arguing to the jury was Morales's prior felony conviction for domestic violence. (14RT 3180.) He acknowledged the conviction could be considered under both factors (b) and (c) and told the jury, "So what I'm going to do is take down factor b because what I want to talk about is covered in factor c anyway." (14RT 3180.)

Morales contends that the prosecutor's argument that Morales groped Elia and dragged her to the kitchen to strip her from the waist down to sexually assault her constituted factor (b) evidence. (AOB 487-494.) Morales argues that "the prosecution cannot avoid its heavy burden of proof beyond a reasonable doubt by the mere expedient of affixing the factor (a) label to evidence of unadjudicated violent criminal activity." (AOB 462.)

However, Morales overlooks decisions by this court that have allowed evidence of violent criminal activity as circumstances of the crime in the penalty phase even though the defendant was not charged with the violent criminal conduct in the guilt phase. For example, in *People v. Tully* (2012) 54 Cal.4th 952, 1048, this court rejected the defendant's claim that the prosecutor misled the jury and lowered the burden of proof by suggesting

that the defendant's uncharged rape of the victim was a section 190.3, factor (b) consideration rather than a factor (a) consideration. The court pointed out that the prosecutor properly explained that the uncharged rape was to be considered a circumstance of the crime and not uncharged criminal activity. (*Ibid*.)

In *People v. Malone* (1988) 47 Cal.3d 1, 36, during his penalty phase argument, the prosecutor described the victim as having been "sexually assaulted" even though rape and sodomy special circumstances had previously been dismissed. On appeal, the defendant argued that the prosecutor improperly submitted the rape and sodomy offenses to the jury as aggravating factor (b) evidence when there was insufficient evidence to permit the offenses to be considered. (*Id*. at p. 36.) This court rejected the defendant's argument, finding that there was evidence of sexual assault, which is not a specific crime and in lay terms refers to "an unwanted touching or a threat to accomplish such." (*Id.* at p. 37.) Moreover, the court determined, "The prosecutor's references to the sexual assault were made not in the context of defendant's other criminal activity, but rather, in the context of the circumstances of the crime and defendant's capacity to conform his behavior to the law. As such, they were not improper." (*Ibid*.)

As discussed in Section IV.D.2.b, *post*, the evidence supported a reasonable inference that Morales sexually assaulted Elia. Accordingly, argument to that effect related to the circumstances of the crime and did not impermissibly lower the burden of proof for unadjudicated factor (b) crimes.

2. Morales forfeited his prosecutorial misconduct claims by failing to object below and failing to timely request an admonition, but even if considered, there was no prosecutorial misconduct

Morales contends that Mr. Mazurek misstated the guilt phase evidence over his sustained objections. (AOB 487-494.) His contentions are both forfeited and meritless.

a. Morales forfeited his prosecutorial misconduct claims because he failed to object to the alleged misstatements and/or request a timely admonition

Defense counsel only objected three times that Mr. Mazurek misstated the evidence during his closing argument. (14RT 3149, 3183, 3186.) Counsel first objected when Mr. Mazurek argued Morales killed Elia because she recognized him. (14RT 3149.) The trial court overruled the objection and admonished the jury that "anything said by the attorneys in their closing argument is not the evidence and you are going to make your decision based solely on the evidence that you have heard." (14RT 3149.) Morales does not challenge this part of Mr. Mazurek's argument on appeal. (AOB 487-494.)

Defense counsel also twice objected that Mr. Mazurek misstated the evidence when he referred to Elia asking Morales, "Johnny, why are you doing this to me?" (14RT 3183, 3186.) After the second objection to the same statement, Mr. Mazurek responded, "It doesn't [misstate the evidence]." (14RT 3186.) Based on a later colloquy between the court and parties, it is clear that defense counsel's objection was to whether the statement was admitted into evidence, not whether the statement was made. (14RT 3188-3190.) Defense counsel's objections were sustained, but counsel did not request an admonition. (14RT 3183, 3186.) These two

objections, to the same alleged misstatement of the evidence, are the only objections made in relation to Morales's prosecutorial misconduct claims.

Despite his narrow objection at trial, Morales raises several alleged instances of prosecutorial error on appeal. (AOB 487-494.) But Morales has forfeited these claims of additional alleged misstatements because he failed to object to them during argument. (*People v. Tully*, *supra*, 54 Cal.4th at p. 1045 [failure to object at argument forfeits claim on appeal].)

Morales has also forfeited any challenges to the one statement he objected to twice because he failed to request an admonition after the court sustained his objections. (14RT 3183, 3186; *People v. Wallace* (2008) 44 Cal.4th 1032, 1092 [objecting without requesting admonition fails to preserve claim].) A defendant must both object and request an admonition "in a timely fashion." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 169-170.) Morales does not contend that an admonition would not have cured the harm alleged. In fact, he requested an admonition *after* Mr. Mazurek completed his argument, but because he did not request one at the time his objections were sustained, the trial court found his late request to be untimely. (14RT 3189.)

Because Morales failed to object to the numerous instances of alleged misconduct he raises on appeal, and failed to request an admonition when two of his objections were sustained, he has forfeited his prosecutorial misconduct arguments.

b. Mr. Mazurek did not commit misconduct during argument

Morales contends that Mr. Mazurek committed misconduct during argument by misstating the guilt phase evidence and the permissible inferences to be drawn therefrom. (AOB 487.) Specifically, Morales argues that Mr. Mazurek improperly argued that he groped Elia in the bedroom, stripped her of her shorts and underwear, and sexually assaulted

her. (AOB 491-493.) Even if this court considers Morales's forfeited claims of error, they should be rejected on the merits and because Morales cannot prove prejudice.

As discussed in Section III.D.3, *ante*, a prosecutor is given "wide latitude" during argument and "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*Hill*, *supra*, 17 Cal.4th at p. 819.) The prosecutor "has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) "Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to decide." (*Ibid*.)

Mr. Mazurek's argument that Morales dragged Elia down the hallway to the kitchen to strip her from the waist down and sexually assault her was a reasonable inference or deduction to be drawn from the following evidence: Brianda testified that Morales was the person who dragged her mother by the hair out of the bedroom (9RT 1796, 1798-1799, 1811, 1829, 1834); Elia was shot shortly thereafter; Elia was found in the kitchen naked from the waist down (8RT 1448-1449, 1463, 1553; 9RT 1762, 1821); Morales told Angel that Elia said, "Johnny, why are you doing this to me?" before he shot her (11RT 2237); and Morales admitted he killed Elia because she recognized him (10RT 2183-2184; 11RT 2264; 29CT 8310-8312, 8318, 8320, 8322, 8323-8327; Exh. 108). Based on the timing and circumstances of Elia's statement and the condition in which she was found, it was reasonable for Mr. Mazurek to infer that Morales had taken off her shorts and underwear. If Elia wanted to know why Morales was robbing her, it seems that she would have asked when the group of men first invaded her home, while the group ransacked the house, or as Morales dragged her to the kitchen. Instead, she made this statement shortly before

she was shot and found naked from the waist down. In addition, the question, "Johnny, why are you doing this *to me*?" (emphasis added), suggests actions directed towards her person as opposed to her belongings.

As previously discussed, the evidence suggesting sexual assault was a circumstance of the offense, not new evidence of other violent crimes as argued by Morales. (AOB 493, citing *People v. Fuiava* (2012) 53 Cal.4th 622, 728-729 [misconduct for prosecutor to invite the jury to speculate about defendant's prior criminal history and how many other people he had killed when there was no evidence defendant had killed anyone else]; *People v. Bolton* (1979) 23 Cal.3d 208, 212 [misconduct for prosecutor to invite jury to speculate about new evidence never presented at trial].) Thus, it was proper for Mr. Mazurek to make reasonable inferences about this evidence in argument.

It was also not misconduct for Mr. Mazurek to urge the jury to imagine "what Elia experienced," put itself in Elia's place, and ask, "What do you think was really going on when the Defendant was pulling off her pants and her underwear and Elia says, Johnny, why are you doing this to me?" (AOB 488-489; 14RT 3183, 3184-3186; *People v. Tully*, *supra*, 54 Cal.4th at p. 1045 [not misconduct "for the prosecutor to urge the jury to put itself in the victim's place"].) As this court has repeatedly held, "[I]t is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (*Ibid.*, quoting *People v. Slaughter* (2002) 27 Cal.4th 1187, 1212.) Part of Elia's suffering was being dragged into the kitchen, having her shorts and underwear taken off, and having no idea what the armed men were going to do to her next.

Finally, Morales argues that Mr. Mazurek erred by arguing that he groped Elia in the bedroom. (AOB 491.) Mr. Mazurek referred to the groping incident only two times in his closing. Once at the beginning of his

argument when he initially recounted all of the circumstances of the offense and implied that Morales groped Elia in front of her children (14RT 3145), and later toward the end of the argument when he said, "Before she's groped, her shirt is pulled down, and her chest is groped by one of the Defendants" (14RT 3185). Morales did not object either time.

Even if Mr. Mazurek erred by initially stating that Morales groped Elia, his second reference to the incident clarified that he meant one of the other robbers groped her. Moreover, the jury had heard Joe's testimony and could decide for themselves what the evidence actually showed. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 474.) Thus, even if Mr. Mazurek erred when he first discussed the groping evidence during argument, this singular, minor mistake did not comprise a pattern of egregious conduct that infected the trial with unfairness or involve use of a deceptive or reprehensible method to persuade the jury. (*Hill*, *supra*, 17 Cal.4th at p. 819.)

Morales argues that since he did not grope Elia, the jury was being asked to punish him for something he did not do. But the evidence suggests that at the very least, Morales was present when Elia was groped in front of her children. Nevertheless, Morales chose to compound her humiliation and suffering by dragging her to the kitchen and stripping her naked below the waist. The groping incident was part and parcel of the circumstances of the crime that Morales committed.

c. Any misconduct was harmless

Even assuming Mr. Mazurek misstated the evidence at argument or committed any other misconduct, any error was harmless because there is no reasonable possibility that the evidence affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448; *People v. Wallace*, *supra*, 44 Cal.4th at p. 1092.)

Even if one or both of Mr. Mazurek's references to the groping incident in the bedroom constituted misconduct, Morales cannot show a reasonable likelihood that the jury construed or applied the comments in an improper or erroneous manner. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) This was a brief reference in the span of a lengthy closing argument that recounted all of the circumstances of the offense. Not only was the groping incident minor in light of the remaining evidence, but the jury heard Joe's testimony that he could not identify Morales and also heard Joe's description of the man who groped Elia, which did not match Morales's appearance. It is not reasonable to assume that the jury simply cast away Joe's testimony and accepted Mr. Mazurek's initial misstatement as true. Accordingly, any error in this regard did not affect the death verdict.

Moreover, the court twice admonished the jury that arguments of counsel do not constitute evidence. The second time, the court explained to the jury, "[I]n regards to the statements made by either attorney during their closing arguments – and sometimes I don't really remember or recollect, based on the passage of time, what is said. But you obviously are going to be the final decision maker as to what testimony was actually stated, and the only decision that you're going to have to make is what came from the witness stand in terms of that testimony." (14RT 3196.) Accordingly, any misstatement of the evidence regarding who groped Elia did not affect the death verdict.

Assuming it was error for Mr. Mazurek to argue that the evidence showed that Morales sexually assaulted Elia, such error was also harmless. Given the nature of the crime—a home invasion robbery/burglary by at least five armed men, the presence of several minor children, the point-blank killing of their mother for the sole reason that she identified one of her attackers, and the children's discovery of their half-naked dead

mother— and the powerful victim impact testimony from Elia's mother, sister, and daughter, there is no reasonable possibility that Mr. Mazurek's argument that Morales sexually assaulted Elia affected the penalty phase verdict. (*People v. Williams*, *supra*, 49 Cal.4th at p. 461 ["error may be harmless when the evidence is trivial in comparison with the other properly admitted evidence in aggravation"].)

3. The trial court did not err in denying Morales's late request for an admonishment

Morales contends the trial court erred in refusing to admonish the jurors to disregard Mr. Mazurek's improper remarks regarding Elia's statement, "Johnny, why are you doing this to me?." (AOB 493.) Not so. As discussed above, while defense counsel objected two times that Mr. Mazurek misstated the evidence when he referred to Elia's statement and those objections were sustained, defense counsel did not request an admonishment either time. (14RT 3183, 3186.) Instead, defense counsel waited until after Mr. Mazurek completed his argument and then raised the issue of an admonishment with the trial court. (14RT 3189.) As the court explained, the request was untimely because the argument had been completed and Mr. Mazurek would not have another opportunity to argue in front of the jury. (14RT 3189.)

At that point, a discussion ensued about whether Mr. Mazurek actually misstated the evidence or not. The discussion focused only on the statement objected to—that Elia said, "Johnny, why are you doing this to me?" (14RT 3189.) Mr. Mazurek argued that the statement came in at trial, while defense counsel argued it did not. (14RT 3189.) The trial court explained that it had sustained the objection because it did not have an independent recollection of the statement. (14RT 3190.) The court then overruled defense counsel's objection, finding no prosecutorial misconduct or willful violation of the court's orders. (14RT 3189-3190.) And indeed,

on review, Elia's statement did come in at trial through Detective Wolf's testimony, and thus, defense counsel's objections should have been overruled since no misstatement of the evidence was made. (11RT 2237.)

E. Because No Factor (b) Evidence Was Presented During the Penalty Phase, the Trial Court Properly Instructed the Jurors to Consider All Evidence Received During the Guilt Phase in Determining the Appropriate Penalty Without Instructing on the Beyond a Reasonable Doubt Standard

Morales contends that the trial court improperly instructed the jury to consider all evidence received during the guilt phase without also instructing the jurors that they must be convinced beyond a reasonable doubt before using other violent crimes evidence to determine the appropriate penalty. (AOB 495-502.) But the beyond a reasonable doubt instruction is only applicable when factor (b) evidence is used during the penalty phase, and as discussed above, the prosecution did not present any factor (b) evidence. Thus, the trial court's instructions were proper and no additional instructions were required.

The trial court's instructions did not suggest that factor (b) evidence was presented in this case. The trial court used standard CALJIC No. 8.85, which instructs the jury to consider all of the evidence received at trial and the factors relevant at the penalty trial. (28CT 8028-8029.) This instruction includes all of the factors, (a) through (k), from section 190.3 and instructs the jury to take them into account and be guided by them "if applicable." (28CT 8028-8029.) The instruction does not say that all of the factors are relevant in every proceeding or suggest that factor (b) evidence was at issue here.

Moreover, because the prosecution did not introduce any factor (b) evidence at the penalty trial, the trial court did not have to instruct the jurors with CALJIC No. 8.87. This instruction regarding *other* criminal

activity and the proof beyond a reasonable doubt standard is only required when factor (b) evidence is used at the penalty trial. (*People v. Moore* (2011) 51 Cal.4th 1104, 1145-1146.) As previously discussed, while Mr. Mazurek initially intended to introduce evidence of up to eight prior robberies and domestic violence incidents (2SCT 374-376), he did not end up presenting any of that evidence to the jury at the penalty phase. Because the prosecution only introduced evidence related to the circumstances of the crime under factor (a) and Morales's prior felony domestic violence conviction under factor (c), CALJIC No. 8.87 was inapplicable.

Morales's interrelated argument that the jury was required to find that a specific Penal Code section was violated as a result of the alleged sexual assault also fails (AOB 497-500). Again, no factor (b) evidence of other crimes was presented to the jury, and the nonspecific crime of sexual assault may be considered as a circumstance of the crime. (See *People v. Malone*, *supra*, 47 Cal.3d at p. 37.) Thus, contrary to Morales's contention, the trial court's instructions at the penalty phase did not violate state or federal law.

F. Defense Counsel Did Not Render Ineffective Assistance at the Penalty Phase

Morales contends that his trial counsel's performance at the penalty phase was ineffective for several reasons. (AOB 502-518.) For the reasons discussed below, Morales has failed to carry his burden of establishing deficient performance and/or prejudice.

1. Defense counsel acted reasonably in not seeking to preclude the prosecutor from arguing and the jury from considering guilt phase evidence as evidence that Morales sexually assaulted Elia

Morales acknowledges that defense counsel filed a written motion in opposition to the prosecution's notice of aggravating factors, which included a specific objection to the prosecution's evidence showing the

condition of Elia's partially naked body and a blanket objection to the prosecution presenting aggravating evidence regarding attempted rape. (AOB 505-506; 28CT 7855-7856.) He also acknowledges that defense counsel argued at the motion hearing. (AOB 507; 13RT 2868-2871.) Indeed, the trial court granted defense counsel's motion to exclude one of the challenged photographs. (13RT 2871.)

Morales contends, however, that defense counsel's actions and arguments were insufficient because they were limited to the presentation of "further evidence," and did not address evidence already admitted and arguments already made at the guilt phase. (AOB 506.) Specifically, Morales contends that the jurors should not have been permitted to consider, and the prosecutor should not have been permitted to encourage them to consider, the guilt phase evidence for purposes of determining whether Morales committed a sex crime against Elia. (AOB 508.)

However, as discussed above, all of the guilt phase evidence at issue constituted factor (a) circumstances of the crime evidence. The penalty phase instructions require the jury to "consider all of the evidence which has been received during any part of the trial of this case." (CALJIC No. 8.85.) The instructions further direct the jury to "determine what the facts are from the evidence received during the *entire* trial." (CALJIC No. 8.84.1, italics added.)

Furthermore, it was the prosecutor's prerogative to argue the reasonable inference from the evidence that Morales sexually assaulted Elia. Such conduct could be properly considered by the jury as circumstances of the crime. (*People v. Malone*, *supra*, 47 Cal.3d at p. 37.)

Accordingly, there was no basis for defense counsel to request that the court prohibit the prosecutor from arguing that Morales sexually assaulted Elia, or admonish the jury that they could not consider the evidence for this

purpose. Defense counsel therefore did not perform deficiently in failing to bring motions and make objections in this vein.

2. Defense counsel did not perform deficiently in failing to correct the trial court's understanding of prosecutorial misconduct and failing to elaborate on her prior objections

Morales acknowledges that defense counsel objected during the prosecution's closing argument. (AOB 510.) Two of those objections, both contending that Mr. Mazurek misstated the evidence when he argued Elia stated, "Johnny, why are you doing this to me?," were sustained. (14RT 3183, 3186.) After Mr. Mazurek's closing argument, defense counsel requested an admonishment and suggested that Mr. Mazurek's actions "border[ed] on prosecutorial misconduct" because he "continually misstate[d] the evidence to the jury." (14RT 3188-3189.) The trial court found defense counsel's request for admonishment to be untimely and found no misconduct based on the parties' and the court's differing recollections of the evidence presented at trial. (14RT 3189-3190.)

Morales contends that defense counsel provided ineffective assistance by not advocating further on this issue and objecting that the evidence did not qualify as factor (a) evidence. (AOB 511-512.) First, Morales argues that defense counsel should have had further discussions with the court regarding prosecutorial misconduct because the trial court was laboring under the faulty belief that bad faith was necessary to establish misconduct. (AOB 511.) The trial court believed that the prosecutor's misstatements were innocent mistakes of recollection and therefore did not qualify as misconduct.

However, any further argument by defense counsel regarding misconduct would have been futile. As explained in Section IV.D.3, *ante*, the objections to Elia's statement were based on defense counsel's belief that Elia's statement was not in evidence, and the court initially sustained

the objections because the court could not remember whether the statement came into evidence. But Elia's statement was in fact part of the record, and Mr. Mazurek's reference to it was appropriate.

Next, Morales argues that defense counsel should have added to her objections that "the unadjudicated criminal activity to which the prosecutor's argument referred did not qualify as factor (a) evidence, could not be proved or found beyond a reasonable doubt as required under factor (b), and that an undifferentiated 'sexual assault' is not proper aggravation under factor (b)." (AOB 512.) For the reasons discussed above, evidence that Morales sexually assaulted Elia could be considered as circumstances of the crime and did not qualify as factor (b) evidence. Therefore, defense counsel had no basis for objecting to the improper consideration of factor (b) evidence, and did not perform unreasonably in failing to make such an objection. (See *People v. Anderson*, *supra*, 25 Cal.4th at p. 587.)

3. Defense counsel acted reasonably in not requesting instructions on the beyond a reasonable doubt standard relevant only to factor (b) evidence

Morales contends defense counsel should have requested that the trial court instruct the jury on the beyond a reasonable doubt standard that is applicable only to factor (b) evidence and on elements of specific crimes under factor (b). (AOB 513-516.) As discussed in Section IV.D.1, *ante*, Mr. Mazurek did not present any factor (b) evidence, only factor (a) evidence and one prior felony conviction under factor (c). Thus, any instructions related to factor (b) were unnecessary in this case and defense counsel was not ineffective for not requesting them.

4. Defense counsel did not perform deficiently in closing argument

Morales contends defense counsel provided ineffective assistance by failing to respond to Mr. Mazurek's alleged misstatements of the evidence

and descriptions of the circumstances of the crime in closing argument. (AOB 517-518.) Not so. Defense counsel's argument was the last the jury heard before starting deliberations. Thus, defense counsel likely made a tactical decision not to bring up any of the evidence he objected to or that could further harm Morales, and instead focus on the mitigating evidence in his favor. For instance, defense counsel discussed Morales's age, childhood, and remorse. Defense counsel also admitted that the crime was terrible, but argued that Morales's behavior was a reaction learned from his father, and asked for mercy. (14RT 3190-3214.)

Again, while Morales's current counsel may disagree with trial counsel's tactical choice in hindsight, that does not make his counsel's decision at the time unreasonable. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 437 [counsel must be shown to have *no* rational tactical purpose].) As this court has explained, "[C]ounsel cannot be deemed ineffective when they elect to pursue a reasonable tactic at the penalty phase." (*People v. Osband* (1996) 13 Cal.4th 622, 736.)

5. Even assuming deficient performance, Morales cannot show prejudice

Even assuming defense counsel performed deficiently in the ways Morales alleges, Morales cannot show prejudice. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

As discussed in Section IV.D.2.c, *ante*, any improper argument or evidence relating to Morales sexually assaulting Elia would not have had any bearing on the penalty phase verdict. The powerful evidence regarding the circumstances of the crime—i.e., the shooting of a defenseless woman,

within earshot of her terrified minor children, during the commission of a robbery and burglary, and the callous manner in which her half-naked body was left on the kitchen floor to be discovered by her children—assured the outcome of the penalty phase.

G. There Was No Cumulative Error Requiring Reversal of the Death Judgment

Morales contends his death judgment should be reversed because of the cumulative effect of the errors just discussed, especially when combined with the errors alleged in the guilt phase as discussed in Section III, *ante*. (AOB 518-531.) He alleges the errors were prejudicial and violated his constitutional rights to a fair penalty trial. (AOB 518-531.)

This court has recognized that multiple trial errors may have a cumulative effect. (*Hill*, *supra*, 17 Cal.4th at pp. 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

On the other hand, if the reviewing court rejects all of a defendant's claims of error, it should also reject the contention of cumulative error. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Similarly, where "nearly all of [a] defendant's assignments of error" are rejected, this court has declined to reverse based on cumulative error. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 837 [finding no cumulative error where effect of few demonstrated was harmless]; *People v. Cooper* (1991) 53 Cal.3d 771, 839 [rejecting cumulative error argument where there was "little error to accumulate"].) These same principles apply to claims seeking to overturn a death judgment by combining alleged guilt

and penalty phase errors. (See *People v. Williams* (2015) 61 Cal.4th 1244, 1291; *People v. Bonilla* (2007) 41 Cal.4th 313, 360.)

As discussed above, there were no errors to accumulate. And even if errors occurred, they were harmless. Therefore, Morales's claims of cumulative error must be rejected. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606; *People v. Bolin*, *supra*, 18 Cal.4th at p. 335.) Morales was entitled to a fair trial—not a perfect trial—and a fair trial is exactly what he received. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1057.) The judgment should be affirmed in its entirety.

V. THE TRIAL COURT ACTED WITHIN ITS BROAD DISCRETION IN DENYING MORALES'S PETITION FOR ACCESS TO SEALED PERSONAL JUROR IDENTIFYING INFORMATION

A. Overview

Morales contends the trial court violated state law and the federal constitution by denying his petition to obtain juror identifying information to investigate possible juror misconduct. (AOB 532-577.) Morales argues that the case must be remanded to the trial court with direction to hold a hearing regarding the release of the juror identifying information. This claim is meritless because Morales failed to show good cause for the release of juror identifying information; Morales failed to make a preliminary showing of possible juror misconduct warranting further investigation. Accordingly, the court did not abuse its discretion when it denied his petition.

B. Petition for Disclosure of Juror Information

The jury began penalty phase deliberations on November 4, 2004. (28CT 8041.) Deliberations resumed on November 5, 2004 at 10:14 a.m. (28CT 8044.) Around 11:00 a.m., the jury sent two notes to the court indicating a possible deadlock. The first note from the jury foreperson

read, "We the jury are at dead lock with a dicision [*sic*]. One juror has made it known that they will not budge. Please advise." (28CT 8042; 14RT 3222.) The second note from another juror said, "We need help. We cannot come to a decision. The jurors are getting frustrated and angry." (14RT 3222.) The jury recessed at 11:10 a.m. and resumed deliberations at 11:25 a.m. (28CT 8044.)

In the meantime, the trial court began contacting the parties to return to court to address the jury's notes. (14RT 3222-3224.) Defense counsel arrived at court around 11:35 a.m., but the court could not get in contact with Mr. Mazurek before noon due to problems with the district attorney's phone lines. (14RT 3223.) So the court released the jurors for their lunch break with all parties to reconvene at 1:30 p.m. (28CT 8044; 14RT 3223.)

When court reconvened around 1:45 p.m., the jury indicated it wanted an additional hour to deliberate, and deliberations resumed. (28CT 8044; 14RT 3223.) The jury came back with a verdict before the court could address the notes. (14RT 3223.) All parties were present in court at 2:33 p.m., and the jury returned its death verdict. (28CT 8044-8045; 14RT 3225-3227.) The jury was polled and each juror responded "yes" when asked if death was their true and correct verdict. (14RT 3226-3227.)

The court sent the jury back to the jury room and advised the jurors they could, but were not required to, stay and discuss the case with the attorneys. (14RT 3227-3228.) The court then ordered the sealing of its record of personal juror identifying information. (14RT 3228.)

Morales filed a motion for disclosure of juror information for purposes of preparing a motion for new trial. (28CT 8094-8103.) Defense counsel's attached declaration alleged that: (1) all of the jurors except Jurors Five and Ten remained after the verdict to discuss the case with counsel; (2) the jurors indicated that Juror Five had been in favor of life without the possibility of parole; (3) Juror Two mentioned the deliberations

became "heated" but no one yelled at Juror Five; (4) Juror Seven stated that Jurors Five and Ten were "smoking buddies"; (5) Juror Seven also said that Juror Five "was concerned about giving the defendant mercy and that was her reasoning for not voting for death"; (6) Juror Seven explained that Juror Five changed her mind after lunch, saying "Mercy is giving Johnny the death penalty, Johnny doesn't have anybody, he doesn't have a mother and no other family to talk to, so giving him the death penalty is giving him mercy"; (7) Juror Three said Juror Five stated, "Death is the mercy way; Death is mercy; Johnny has no family to visit him; It's easier for him to have death." (28CT 8096-8100.) The motion argued that the defense needed to speak to Jurors Five and Ten to investigate whether juror misconduct occurred. (28CT 8102.)

The prosecution opposed Morales's motion, arguing defense counsel's declaration contained inadmissible hearsay regarding the jurors' mental processes and failed to establish good cause for disclosure of juror identifying information. (29CT 8138-8149.) Morales filed a reply arguing again that he needed the jurors' identifying information to investigate possible juror misconduct. (29CT 8170-8180.)

In response to a request from defense counsel, on August 1, 2005, the court gave an indicated ruling denying the petition. (1SCT 163.) The court formally denied the petition at a hearing on August 12, 2005, finding that most of the information submitted in support of the petition was inadmissible because it "relates solely to mental process and subjective reasoning of the juror regarding the penalty deliberations." (14RT 3274-3275.) The court cited *People v. Danks* (2004) 32 Cal.4th 269 (*Danks*), which held that a court could not consider a juror's statement that one of the reasons she voted for death was because the defendant "did not have much to live for." The court found that the statement in *Danks* paralleled the statements provided in defense counsel's declaration. (14RT 3275.)

The court further explained, "There was no indication that the jury forced a vote before the jury decided the evidence. There's no indication that the jury used coercive tactics to force the juror to vote for the death penalty. The jurors were polled, all jurors expressed agreements with the verdict." (14RT 3274.)

C. The Trial Court Properly Denied Morales's Petition to Gain Access to Sealed Personal Juror Information

The only evidence Morales presented to the trial court to support his request for disclosure of personal identifying information for Jurors Five and Ten was that two other jurors reported Juror Five explained she changed her vote from life to death because death would show Morales mercy since he had no family to visit or talk to him. (28CT 8099-8100.) Morales also speculated that Juror Ten may have insight into Juror Five's deliberation process because they were smoking buddies and left court together. (28CT 8100.) As discussed below, the trial court did not abuse its discretion when it found this evidence failed to provide a prima facie case for disclosure of juror contact information because it was unlikely to lead to admissible evidence of juror misconduct.

"'[S]trong public policies protect discharged jurors from improperly intrusive conduct in all cases.' [Citations.] The uncontrolled invasion of juror privacy following completion of service on a jury is, moreover, a substantial threat to the administration of justice." (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1092.) Thus, after a jury's verdict is recorded in a criminal proceeding, personal juror identifying information is sealed. (Code Civ. Proc., § 237, subd. (a)(2).)

A defendant or defendant's counsel may petition the court for access to jurors' sealed personal identifying information "for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).) While this language is broad, it does not allow the

defendant to "engage in merely a fishing expedition." (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) Instead, the petition must be "supported by a declaration that includes facts sufficient to establish good cause" to release the information. (Code Civ. Proc., § 237, subd. (b).)

"Good cause" in this context requires a showing sufficient to "'support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial.'" (*People v. Munoz* (2019) 31 Cal.App.5th 143, 165, quoting *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.) "Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported." (*People v. Cook* (2015) 236 Cal.App.4th 341, 346.)

A trial court's decision to deny a defendant's motion for disclosure of personal identifying information of trial jurors is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Avila* (2006) 38 Cal.4th 491, 604.) Under this highly forgiving standard, this court must uphold the trial court's discretionary decision unless it was arbitrary, capricious, patently absurd, or exceeded the bounds of reason. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1180, 1237, abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192 (*Rangel*).)

1. Juror Five's mental processes and subjective reasoning do not provide admissible evidence of juror misconduct

"[W]hen considering evidence regarding the jurors' deliberations, a trial court must take great care not to overstep the boundaries set forth in

Evidence Code section 1150."[31] (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418.) "The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations." (*Id.* at pp. 418-419.) "The statute distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning process of the individual juror, which can be neither corroborated nor disproved,'" thus preventing a single juror from "'upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent.'" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261 (*Steele*).)

While Evidence Code section 1150 applies to hearings on a motion for new trial alleging juror misconduct and does not directly govern petitions for access to a juror's personal identifying information, it remains relevant even at the petition stage. This is because to satisfy the good cause standard, "the defendant [] has to prove that talking to the jurors is reasonably likely to produce *admissible* evidence of juror misconduct." (*People v. Johnson* (2013) 222 Cal.App.4th 486, 493, italics added.) Indeed, Morales admits that good cause may be shown by otherwise inadmissible evidence *as long as it is likely to lead to the discovery of admissible evidence*, since locating *admissible* evidence is the whole point of talking to the jurors. (AOB 547-548, 554-555.)

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[31] Evidence Code section 1150 provides, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).)

But here, even if Juror Five agreed to talk to defense counsel and confirmed the other jurors' statements about her reasoning, none of the statements would be admissible to show juror misconduct or provide grounds for a new trial. (*People v. Lindberg* (2008) 45 Cal.4th 1, 52 [court was precluded from considering evidence describing the mental processes by which jurors reached their penalty verdict during a motion for new trial].) "[W]hen a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150." (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 419; *Steele*, *supra*, 27 Cal.4th at p. 1261 [cannot impeach a verdict with evidence of the jurors' mental processes].)

The trial court correctly found that the statements provided in defense counsel's declaration paralleled statements considered by this court in *Danks*. (14RT 3274-3275.) In *Danks*, this court held that in determining whether misconduct occurred, it could not consider portions of declarations revealing what verdict a juror was leaning toward, the reasons a juror voted for the death penalty, or other matters related solely to a juror's mental process and subjective reasoning. (*Danks*, *supra*, 32 Cal.4th at p. 302.) One of the statements at issue in *Danks* was one juror's statement that she voted for the death penalty in part because the defendant "didn't have much to live for." (*Id.* at pp. 300, 302.) The trial court here found that statement to be almost the same as statements in defense counsel's declaration, which suggested Juror Five voted for the death penalty because Morales had no family to visit or talk to him. (14RT 3275; 28CT 8099-8100.) For the same reasons the statements in *Danks* could not support a finding of juror misconduct, the statements in counsel's declaration, even if corroborated by Juror Five, also would not be admissible to support a motion for new trial based on juror misconduct.

Morales argues that although a juror's statement may be inadmissible for purposes of showing the juror's subjective thought process, the statement may provide a basis for investigating juror misconduct. In making this argument, Morales relies heavily on *People v. Haskett* (1990) 52 Cal.3d 210 (*Haskett*), arguing that the statements at issue in *Haskett* are "analytically indistinguishable" from those at issue in this case. (AOB 570.) However, *Haskett* is inapposite because the case was in a completely different procedural posture when the issue of juror misconduct arose.

Haskett involved a claim that the trial court coerced a juror into returning a sentence of death when conducting a mid-deliberation inquiry into the juror's alleged refusal to deliberate and alleged consideration of an improper mitigating factor. (*Haskett*, *supra*, 52 Cal.3d at pp. 235-240.) After receiving a complaint from the jury that one of the jurors was refusing to discuss the case and was disregarding the court's instructions, the trial court conducted a limited inquiry of the accused juror to ensure that he was not refusing to perform his duties. (*Id.* at pp. 236-237.) The trial court was careful not to delve into the juror's mental processes and limited its questions to whether the juror was following the court's instructions and whether he was willing to continue to deliberate. (*Id.* at pp. 236-237.) Thus, *Haskett* did not address a post-verdict motion for the release of juror information, let alone a post-verdict allegation of juror misconduct, nor did it permit inquiring into a juror's mental process.

Nevertheless, Morales relies on a footnote in *Haskett* as support for his argument that the trial court should have allowed his counsel to conduct a post-verdict inquiry into Juror Five's deliberations. (AOB 570.) The footnote responded to a dissent argument that the trial court's examination of the accused juror was improper because it invaded the juror's mental processes. (*Haskett*, *supra*, 52 Cal.3d at p. 240, fn. 11.) The footnote explained that Evidence Code section 1150 "applies only 'upon an inquiry

as to the validity of the verdict,'" and that the trial court's inquiry was limited to whether misconduct occurred, not the effect of misconduct on jurors. (*Ibid.*)

Here, in contrast, Morales argues that the trial court should have allowed his counsel to inquire, post-verdict, into *why* Juror Five changed her vote from life to death. The alleged misconduct involves Juror Five disregarding instructions *in reaching her verdict.* Thus, unlike *Haskett*, the requested inquiry in this case would implicate Juror Five's mental processes, evidence which would be barred from consideration in a new trial motion under Evidence Code section 1150.

In *Steele*, *supra*, 27 Cal.4th 1230, this court considered a new trial motion including declarations from two jurors indicating that they believed, despite the trial court's instruction to the contrary, that the defendant might someday be released from prison even if sentenced to life without parole. (*Id.* at pp. 1260-1261.) The two jurors explained that had they really thought life without the possibility of parole meant what it said, they would not have voted for the death penalty. (*Id.* at p. 1259.) This court held that "[t]he trial court properly refused to consider these statements regarding the jurors' thought processes," even though their thoughts conflicted with the court's instructions. (*Ibid.*) "The statements of the jurors regarding their understanding of the meaning of a life sentence and what they would have done had they believed differently come squarely within the prohibition against impeaching a verdict with evidence of the jurors' mental processes." (*Id*. at p. 1261.) Similarly, Juror Five's understanding of mercy and how it could be considered falls directly within the proscriptions of Evidence Code section 1150.

In addition to *Haskett*, Morales relies on *People v. Jones*, *supra*, 17 Cal.4th 279 and *In re Stankewitz* (1985) 40 Cal.3d 391 in support of his position that Juror Five's statements warrant an inquiry into juror

misconduct. However, these cases are distinguishable because they involve potential juror misconduct *other* than a juror's thought processes.

People v. Jones concerned a trial court's decision to deny a motion for new trial on the basis of jury misconduct or, in the alternative, to compel disclosure of a juror's contact information. (17 Cal.4th at p. 317.) The basis for the motion was a juror's post-verdict statement to the press that the defendant "doesn't deserve to go to prison, take classes and have conjugal visits. . . . We need a deterrent. We need to make a statement." (*Id.* at p. 316.) This court found that the trial court misapprehended the scope of Evidence Code section 1150 when it concluded that the juror's alleged statements would "clearly and improperly go to the mental processes by which the verdict was reached and the contents of juror deliberation." (*Ibid*.) This court explained that "even if the juror's posttrial statements were not themselves misconduct, arguably they provided a basis for permitting defendant to investigate *whether the jury discussed the improper subject* of deterrence during deliberations." (*Ibid*., italics added.) Nevertheless, this court held that the trial court did not abuse its discretion in denying the motion because the trial court could have reasonably believed that the juror's statement reflected her personal opinion on the matter—that is, "she might have privately considered the same when deliberating, in which case subdivision (a) of Evidence Code section 1150 would have barred further inquiry." (*Id*. at p. 317.)

In *Stankewitz*, this court found jury misconduct where a former police officer on the jury explained to the other jurors his understanding of the law on robbery, which conflicted with the court's instructions. (*In re Stankewitz*, *supra*, 40 Cal.3d at pp. 398-401.) This court found that had the juror "merely kept his erroneous advice to himself, his conduct might be the type of subjective reasoning that is immaterial for purposes of impeaching a verdict." (*Id.* at pp. 399-400.) But because the juror stated

his understanding of the law "again and again" to the other jurors and "vouch[ed] for its correctness," the fact that he made the statements could be received to determine whether misconduct occurred. (*Id.* at pp. 398-400.)

Here, Juror Five's explanation to the jury for why she changed her vote does not suggest in any way that the members of the jury previously discussed using mercy as a reason for selecting the death penalty. There is no evidence whatsoever that misconduct in the form of the jury discussing mercy as an aggravating factor occurred. Juror Five's statements reveal nothing but her personal reasoning process for changing her mind about the penalty verdict. Therefore, the trial court did not abuse its discretion in denying Morales's petition for access to juror identifying information.

2. Speculation cannot provide good cause for disclosure of juror identifying information

Morales speculates that Juror Five may have been exposed to an improper influence over the lunch recess, which may have caused her to change her vote from life to death. (AOB 572, 574-575.) Morales further speculates that Juror Ten may have some insight into Juror Five's decision to change her vote simply because they left court at the same time or took smoking breaks together. (AOB 572, 575.) However, speculation on how the jury arrived at its verdict cannot establish good cause for release of juror identifying information. (*People v. Wilson*, *supra*, 43 Cal.App.4th at p. 852; *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.)

Morales's argument relies heavily on *People v. Hensley* (2014) 59 Cal.4th 788 (*Hensley*). (AOB 573-575.) In *Hensley*, this court found jury misconduct after one of the jurors consulted with his pastor during penalty deliberations. (*Hensley*, at p. 818.) During deliberations, the jury indicated it needed further instructions on mercy, empathy, and how to weigh mitigating and aggravating evidence. (*Id.* at pp. 818-819.) Upon

questioning, the foreperson clarified that the note concerned a problem certain jurors, not all jurors, were having. (*Id.* at p. 819.) The trial court adjourned for the night and said it would give further instructions the next day. (*Ibid.*) The next morning, the jury indicated it no longer needed clarification and reached a verdict less than half an hour later. (*Ibid.*) Suspecting deliberations had occurred outside the jury room, the court allowed the verdict to be read, but not recorded, and ordered the jury to return for the afternoon session for further questioning. (*Id.* at pp. 819-820.)

That afternoon, the court talked to the foreperson, who explained that the question raised the day before was for one juror only and that the juror had told the foreperson that morning that he had answered the question for himself. (*Hensley*, *supra*, 59 Cal.4th at p. 820.) The court then interviewed that juror, who admitted he talked to his pastor about mercy and sympathy after court the day before. (*Id.* at pp. 820-822.) The trial court denied defendant's motion for a mistrial, found no jury misconduct, entered the verdict, and discharged the jury. (*Id.* at pp. 822-824.) On appeal, the Attorney General conceded, and this court found, the juror committed misconduct. (*Id.* at p. 825.) This court also found prejudice and reversed the penalty verdict. (*Id.* at pp. 825-828.)

As reflected in this account, the facts of *Hensley* are substantially different than those presented here. In *Hensley*, the court suspected misconduct had occurred based on its understanding that multiple jurors had raised the question the day before and then had resolved the issue prior to deliberations taking place the following day. It was only after the court commenced an inquiry that the court learned that only one juror had raised the question. This juror then told the court about talking to his pastor about mercy and sympathy.

Morales argues that the circumstances surrounding Juror Five's change in position were "equally susceptible of an inference that 'deliberations' may have occurred outside of the jury room over the recess, to warrant defense counsel's investigation into that possibility." (AOB 574.) But here, there was never an indication that more than one juror had suddenly changed positions absent further deliberations. That an individual juror changes her own mind or answers her own question during a break in deliberations does not raise the concern that deliberations occurred outside of the jury room. Indeed, Morales concedes that Juror Five's changed verdict could be the result of private introspection over the recess. (AOB 575.)

Because Juror Five's statements and the surrounding circumstances do not in any way suggest that Juror Five was exposed to some kind of external influence, Morales's request for identifying information for Juror Five and Juror Ten is nothing but a fishing expedition. Notably, defense counsel said nothing to the court about suspected interference after the verdict was read and the jury was polled. (14RT 3227-3231.) Nor did the court state any concerns. (14RT 3227-3231.) Morales's argument is based solely on unsupported speculation and fails to establish good cause for the release of the juror identifying information. (*People v. Cook*, *supra*, 236 Cal.App.4th at p. 346 ["Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported"].)

3. Morales failed to provide any other evidence to support a reasonable belief that jury misconduct occurred or that further investigation would lead to admissible evidence of jury misconduct

As the trial court found, there was no evidence of coercive tactics, duress, or inappropriate pressure on Juror Five. (14RT 3274.) According to counsel's declaration, Juror Two stated that although conversations were

"heated," "no one yelled at [] or abused" Juror Five. (28CT 8098.) Heated discussions can be expected during jury deliberations and do not constitute misconduct. (*People v. Thompson* (2010) 49 Cal.4th 79, 141.) "[I]n the interest of free expression in the jury room," expressions of frustration, temper, and strong conviction "normally should not draw the court into intrusive inquiries." (*People v. Engelman* (2002) 28 Cal.4th 436, 446.)

Additionally, all jurors were polled and all, including Juror Five, indicated that death was their "true and correct verdict." (14RT 3226-3227.) Thus, Morales failed to present any good cause sufficient to support a reasonable belief that jury misconduct occurred, and his request for remand to release the jurors' personal information should be denied. (*People v. Munoz*, *supra*, 31 Cal.App.5th at p. 165; AOB 576-577.)

VI. A DEATH DETERMINATION AND RELEVANT AGGRAVATING FACTORS NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Morales contends that because California's penalty phase proceeding is a trial on issues of fact within the meaning of California Penal Code section 1042, state and federal law require that the propriety of the death verdict and the aggravating factors be proven beyond a reasonable doubt by a unanimous jury. (AOB 578-616.) This court has repeatedly rejected the argument that the ultimate determination of death must be found beyond a reasonable doubt and that a unanimous jury must find the existence of aggravating factors beyond a reasonable doubt. Morales has failed to provide a persuasive reason for this court to revisit its previous holdings.

Morales acknowledges this court has concluded *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny do not apply during California's penalty phase. However, he contends that because *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616] (*Hurst*) overruled *Hildwin v. Florida* (1989) 490 U.S. 638 and *Spaziano v. Florida* (1984) 468 U.S. 447,

now is an appropriate time for this court to reconsider its holdings regarding application of both article I, section 16 of the California Constitution and the Sixth Amendment to the penalty phase of a capital trial. (AOB 579, 581-582, 596.)

But this court has repeatedly determined that *Hurst* does not alter its prior holdings regarding the constitutionality of California's death penalty statute. (*People v. Case* (2018) 5 Cal.5th 1, 50; *People v. Henriquez* (2017) 4 Cal.5th 1, 45 (*Henriquez*); *People v. Jones* (2017) 3 Cal.5th 583, 619; *Rangel*, *supra*, 62 Cal.4th at p. 1235.) For instance, in *Henriquez*, this court held that "[t]he death penalty is not unconstitutional 'for failing to require proof beyond a reasonable doubt that aggravating factors exist, outweigh the mitigating factors, and render death the appropriate punishment. . . . [Citation.] Nor is the jury required to find unanimously and beyond a reasonable doubt that aggravating factors outweigh mitigating factors." (*Henriquez*, 4 Cal.5th at p. 45, internal quotation marks omitted.) This court explained that "[t]his conclusion is not altered by the decisions in *Apprendi* . . . *Ring v. Arizona* (2002) 536 U.S. 584 . . . and *Hurst* . . . ." (*Ibid.*) Further, this court held that "[t]he federal Constitution does not require that the jury agree unanimously on which aggravating factors apply." (*Ibid.*)

Hurst's overruling of *Hildwin*[32] and *Spaziano*[33] does not provide a reason for this court to reconsider its prior holdings. In *Hurst*, the United States Supreme Court held, "Time and subsequent cases have washed away

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[32] In *Hildwin*, the Supreme Court held that the Sixth Amendment permitted the trial court to find an aggravating circumstance. (*Hildwin v. Florida*, *supra*, 490 U.S. at pp. 640-641.)

[33] In *Spaziano*, the Supreme Court held that a trial court's imposition of a death sentence after the jury recommended a life sentence did not violate the Sixth or Eighth Amendments or the double jeopardy clause. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 465.)

the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." (*Hurst*, *supra*, 136 S.Ct. at p. 624.) But California does not permit a sentencing judge to find an aggravating circumstance. As this court has held, California's "sentencing scheme is materially different from that in Florida" and a California penalty jury does more than return a "merely advisory" verdict. (*Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16.) Thus, *Hurst's* overruling of *Hildwin* and *Spaziano* does not change anything with respect to this court's previous holdings.

Morales argues that this court should set aside the *Apprendi* framework and analyze the issue of jury rights at the penalty phase under Penal Code section 1042 and article I, section 16 of the California Constitution.[34] Morales reasons that the existence of aggravating factors and the ultimate penalty determination are "issues of fact" and therefore, the constitutional jury trial protections of unanimity and proof beyond a reasonable doubt attach. According to Morales, the prior decisions of this court rejecting the application of unanimity and proof beyond a reasonable doubt to penalty phase determinations were based on "uncritical acceptance of litigation positions *taken by capital defendants* hoping to mount facial attacks to the California death penalty under the 8th Amendment." (AOB 580.) Morales thus urges this court to reexamine the logic behind its rejection of the unanimity and beyond a reasonable doubt burden as to

[34] Section 1042 provides: "Issues of fact shall be tried in the manner provided in Article I, section 16 of the Constitution of this state." This provision of the state constitution provides for the right to a trial by jury, when the right may be waived, and the number of persons required to be on the jury.

aggravating evidence and the ultimate penalty determination. (AOB 608-615.)

Morales's bold assertion that this court's prior decisions were based on an "uncritical acceptance" of capital defendants' litigation positions is unfounded. This court's repeated holdings that the ultimate penalty determination need not be proven beyond a reasonable doubt and that a jury need not unanimously find aggravating factors beyond a reasonable doubt, are based on this court's reasoned analysis of the nature of the penalty phase determinations.

As explained by this court, "The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict reached at the guilt phase." (*People v. Moon* (2005) 37 Cal.4th 1, 40.) The ultimate determination regarding the appropriate penalty and the subordinate determination of the balance of evidence of aggravation and mitigation "do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment." (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758.) The jury "merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto* (2003) 30 Cal.4th 226, 263.)

No single factor determines which penalty is appropriate, and "[w]hile each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) "This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors." (*Ibid*.) Because there is no requirement that the jury agree on

which factors were used to reach their decision, it is "therefore unnecessary that the entire jury find the prosecutor met his burden of proof on the 'other crimes' evidence before a single juror may consider this evidence.'" (*People v. Miranda* (1987) 44 Cal.3d 57, 99.)[35] Any requirement that the jury reach a unanimous decision as to each incident of uncharged criminal activity "would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

This court has fully considered and rejected Morales's arguments. Nothing in Penal Code section 1042, the California Constitution, or common law supports a different result.

Indeed, in *Kansas v. Carr* (2016) 577 U.S. ___ [136 S.Ct. 633] (*Carr*), the United States Supreme Court validated this court's conclusions that the normative and moral nature of the penalty phase determinations renders the beyond a reasonable doubt standard unworkable. As *Carr* explained, it is possible to apply a standard of proof to the "'eligibility phase'" of a capital sentencing proceeding, "because that is a purely factual determination." (*Id.* at p. 642.) In contrast, it is doubtful whether it would even be "possible to apply a standard of proof to the mitigating factor determination (the so-called 'selection phase' of a capital-sentencing proceeding)," because "[w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call): what one juror might consider mitigating another might not." (*Ibid.*; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 456 [California's sentencing factor regarding "'[t]he age of the defendant at the time of the crime'" may be either a mitigating or an aggravating factor in the same case: the defendant may argue for age-based

[35] Morales emphasizes the lack of an instruction that factor (b) aggravating evidence must be found unanimously. (AOB 615.) However, no factor (b) evidence was presented.

mitigation, and the prosecutor may argue for aggravation because the defendant was "'old enough to know better'"].) In *Carr*, the Supreme Court also observed that "the ultimate question of whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," and "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it." (*Carr*, at p. 642.)

In sum, this court has repeatedly held that neither state nor federal law requires that the ultimate penalty determination or aggravating factors be proven beyond a reasonable doubt by a unanimous jury. Morales has not provided any convincing reasons why this court should reconsider its prior decisions.

VII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Morales challenges the constitutionality of California's death penalty statute, acknowledging that his claims have been previously rejected by this court. (AOB 617-632.) He summarily presents these arguments in an abbreviated form to preserve them for review under the procedure authorized by *People v. Schmeck* (2005) 37 Cal.4th 240.[36] Morales presents no new arguments or persuasive reasons to revisit these issues. Therefore, this court should reaffirm is prior holdings finding California's

[36] Under *Schmeck*, a defendant may present and preserve for review "routine or generic claims" repeatedly rejected by this court by doing no more than (i) identifying the claim in the context of the facts, (ii) noting that this court previously has rejected the same or a similar claim in a prior decision, and (iii) asking the court to reconsider that decision. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) Likewise, rather than burden this court with arguments that have repeatedly been presented in past cases, respondent will simply cite to recent cases which have rejected the claims and arguments raised by appellant.

death penalty statute, relevant instructions, and sentencing scheme constitutional.

A. Section 190.2 Is Not Impermissibly Broad

Morales contends that section 190.2, which contains 33 special circumstances, makes almost all first degree murders eligible for the death penalty and is thus impermissibly broad. (AOB 617-618.) There is no reason to revisit this court's prior decisions, which hold that "'[s]ection 190.2 adequately narrows the class of murder for which the death penalty may be imposed [citation], and is not overbroad, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits imposition of the death penalty for an unintentional felony murder [citation].'" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 489, quoting *People v. Harris* (2005) 37 Cal.4th 310, 365; see also *People v. Montes* (2014) 58 Cal.4th 809, 898-899; *People v. Jackson* (2014) 58 Cal.4th 724, 773; *People v. Jones* (2012) 54 Cal.4th 1, 85; *People v. Thomas* (2011) 51 Cal.4th 449, 506.)

B. Section 190.3, Factor (a) Does Not Result in the Arbitrary and Capricious Imposition of the Death Penalty

Morales argues that factor (a) of section 190.3 is unconstitutional because there is insufficient limitation on what constitutes a "circumstance of the crime" the jury can consider. (AOB 618-619.) But this court has explained, "Section 190.3, factor (a), does not, on its face or as interpreted and applied, permit arbitrary and capricious imposition of a sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution." (*People v. Linton* (2013) 56 Cal.4th 1146, 1215, quoting *People v. Brasure* (2008) 42 Cal.4th 1037, 1066.) Indeed, even the United States Supreme Court has observed that "[t]he circumstances of the crime are a traditional subject for consideration by the

sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.) Thus, this court's decisions that factor (a) properly allows each case to be judged on its facts and each defendant to be judged on the particulars of his offense should not be disturbed. (*People v. Brown* (2004) 33 Cal.4th 382, 401; *Linton*, at p. 1215.)

C. The Death Penalty Statute and Jury Instructions Set Forth the Appropriate Burden of Proof

Morales makes seven separate claims contending that California's death penalty statute and jury instructions fail to set forth the appropriate burden of proof. (AOB 619-626.) This court has rejected all of these claims and its decisions should not be disturbed.

1. A death sentence need not be premised on findings made beyond a reasonable doubt

Morales contends that his death sentence is unconstitutional because the jury was not required to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty. (AOB 619-620.) This court has held otherwise in numerous decisions. (See *Rangel*, *supra*, 62 Cal.4th at p. 1235; *People v. Johnson* (2016) 62 Cal.4th 600, 655-656; *People v. Sattiewhite*, *supra*, 59 Cal.4th at pp. 489-490.) Morales also invites this court to reconsider its prior holdings in light of *Apprendi*, *supra*, 530 U.S. 466 and *Ring v. Arizona*, *supra*, 536 U.S. 584. But this court has already done so in recent cases and the outcome remains unchanged. (See *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 928.)

The Sixth Amendment does not require the jury to determine beyond a reasonable doubt that the aggravating factors outweigh those in mitigation because "[d]etermining the balance of evidence of aggravation and

mitigation and the appropriate penalty do not entail the finding of facts but rather, 'a single fundamentally normative assessment [citations] that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman* (2014) 60 Cal.4th 1, 106, quoting *People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) Further, "sentencing is an inherently moral and normative function, and not a factual one amenable to burden of proof calculations." (*People v. Winbush* (2017) 2 Cal.5th 402, 489.) Even the United States Supreme Court has acknowledged the moral and normative nature of the weighing determination, expressing doubt that it is even possible to apply a standard of proof to such a determination. (See *Carr*, *supra*, 136 S.Ct. at p. 642.) Thus, Morales's claim should be rejected.

2. The Constitution does not require an instruction on the burden of proof or lack thereof

Morales argues that under the Sixth, Eighth, and Fourteenth Amendments, he was constitutionally entitled to a jury instruction setting forth the state's burden of proof or clarifying that there was no burden of proof. (AOB 620-621.) Time and again, this court has held that the federal Constitution does not require any burden of proof, nor does it require trial courts to instruct juries that there is no burden of proof. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 57; *People v. Dement* (2011) 53 Cal.4th 1, 55; *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Bennett* (2009) 45 Cal.4th 577, 632.) Morales does not present any new arguments warranting reconsideration of this issue.

3. The Constitution does not require that a death verdict be premised on unanimous jury findings

Relying on *Ring v. Arizona*, *supra*, 536 U.S. 584, Morales contends that his death sentence violates the Sixth, Eighth, and Fourteenth Amendments because it was not premised on unanimous jury findings regarding the aggravating factors. (AOB 621-622.) This court has held

that neither the state nor federal Constitutions require the jury to "make *unanimous* findings concerning the particular aggravating circumstances." (*People v. Linton*, *supra*, 56 Cal.4th at p. 1215; see also *People v. Burney* (2009) 47 Cal.4th 203, 268 [lack of unanimity as to aggravating factors does not violate equal protection principles]; *People v. Valencia* (2008) 43 Cal.4th 268, 311 [jury unanimity not required as to specific aggravating circumstances or unadjudicated criminal activity under factor (b)].)

Nothing in *Ring* or its progeny has any bearing on this court's decisions on this issue. (*People v. Romero and Self*, *supra*, 62 Cal.4th at pp. 56-57; *People v. Ward* (2005) 36 Cal.4th 186, 221-222.) Therefore, Morales's invitation to the court to reconsider its prior decisions should be declined.

4. The instructions were not impermissibly vague or ambiguous

Morales argues that the penalty determination turned on an impermissibly vague and ambiguous standard—i.e., whether the aggravating circumstances were "so substantial" in comparison with the mitigating circumstances that a death sentence was warranted. (AOB 622-623.) According to Morales, the phrase "so substantial" does not sufficiently limit the sentencer's discretion so as to avoid the risk of arbitrary and capricious sentencing. This court has consistently held that the "so substantial" language is not inadequate or misleading. (*People v. Salazar* (2016) 63 Cal.4th 214, 256; *People v. Romero and Self*, *supra*, 62 Cal.4th at p. 56; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1357; *People v. Williams*, *supra*, 61 Cal.4th at pp. 1287-1288; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1091-1092; *People v. Johnson* (2015) 61 Cal.4th 734, 786.) Morales presents no grounds for reconsideration of the issue.

5. Due Process does not require that the instructions inform the jurors that if they determine the evidence in mitigation outweighs that in aggravation, they are required to return a sentence of life without the possibility of parole

Morales argues due process required the trial court to instruct the jurors that if they determined the mitigating circumstances outweighed the aggravating circumstances, they were required to return a sentence of life without the possibility of parole. (AOB 623-624.) Such an instruction would only serve to clarify the instructions already given, and thus, Morales was required to request it. His failure to do so forfeits the claim. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Moreover, this claim was rejected in *People v. Capistrano* (2014) 59 Cal.4th 830, 882, *People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1247, *People v. Suff* (2014) 58 Cal.4th 1013, 1078, and *People v. Rogers* (2013) 57 Cal.4th 296, 349-350, and should be rejected here as well.

6. The trial court was not required to instruct the jury regarding the standard of proof for mitigating factors or the lack of a unanimity requirement as to the mitigating factors

Morales contends the jury instructions were constitutionally flawed because they failed to inform the jury regarding the standard of proof as to the mitigating circumstances, leaving the jury with the impression that the defendant bore some particular burden in proving facts in mitigation. (AOB 624-625.) He also contends the instructions were unconstitutional because they did not tell the jury that unanimity was not required for the consideration of mitigating circumstances. (AOB 624-625.) These same arguments were rejected in *People v. Salazar*, *supra*, 63 Cal.4th at p. 256, *People v. Adams* (2014) 60 Cal.4th 541, 580, and *People v. Riggs* (2008) 44 Cal.4th 248, 328, and should be rejected here as well.

7. The Constitution does not require instructions on the presumption of life

Morales contends the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated his Eighth and Fourteenth Amendment rights. (AOB 625-626.) This court has repeatedly held otherwise. (*People v. Salazar*, *supra*, 63 Cal.4th at p. 256; *People v. Scott* (2015) 61 Cal.4th 363, 407; *People v. Boyce* (2014) 59 Cal.4th 672, 724.) Morales presents no new argument warranting reconsideration of the issue.

D. The Jury Need Not Make Written Findings

Morales contends the trial court's failure to require written or other specific findings by the jury deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments, as well as his right to meaningful appellate review. (AOB 626-627.) But this court has consistently held to the contrary: "The lack of a requirement that the jury make a written statement of its findings and its reasons for the death verdict does not deprive a capital defendant of the rights to due process, equal protection, and meaningful appellate review that derive from the Fifth, Eighth, and Fourteenth Amendments." (*People v. Taylor* (2010) 48 Cal.4th 574, 662; see also *People v. Nelson* (2011) 51 Cal.4th 198, 225 ["Nothing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation"]; *People v. Thompson*, *supra*, 49 Cal.4th at p. 134 [Supreme Court decisions interpreting Sixth Amendment's jury trial guarantee did not alter this court's conclusions regarding the constitutionality of not requiring written findings]; *People v. Gamache* (2010) 48 Cal.4th 347, 406.) Reconsideration of this issue is not warranted here.

E. The Instructions on Mitigating and Aggravating Factors Were Constitutional

1. The use of restrictive adjectives does not act as a barrier to considering mitigating evidence

Morales argues that potential mitigating factors were unconstitutionally limited by the adjectives "extreme" and "substantial." (AOB 627.) This court has rejected this precise claim. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 614 [use of "extreme" and "substantial" does not act as a barrier to the consideration of mitigating evidence].) As further explained by this court, potentially mitigating factors are not unconstitutionally limited by the adjectives "extreme" and "substantial" because section 190.3, factor (k), as expanded in *People v. Easley* (1983) 34 Cal.3d 858, allows consideration of ""'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'"" (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305; see also *People v. Sanchez* (2016) 63 Cal.4th 411, 487-488; *People v. Rountree* (2013) 56 Cal.4th 823, 863; *People v. Beames* (2007) 40 Cal.4th 907, 934.) Morales's identical claim should be rejected here.

2. Deletion of inapplicable sentencing factors was not required

Morales contends the failure to delete inapplicable sentencing factors from the jury instructions likely confused the jury and prevented it from making a reliable determination of the appropriate penalty. (AOB 627.) This claim has been repeatedly rejected and Morales offers no reason for reconsideration of this issue. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1036; *People v. Bramit* (2009) 46 Cal.4th 1221, 1248; *People v. Cook* (2007) 40 Cal.4th 1334, 1366.)

3. The trial court was not required to instruct that certain mitigating factors were relevant solely as possible mitigators

Morales contends that several of the factors set forth in CALCRIM No. 763—factors (d), (e), (f), (g), (h), and (j)—were relevant solely as possible mitigators, and that the trial court was required to instruct the jury accordingly. (AOB 628.) This court should reject Morales's claim for the same reasons it has done so in the past. (See *People v. Casares* (2018) 62 Cal.4th 808, 854; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 ["The aggravating or mitigating nature of the factors is self-evident within the context of each case"]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268.)

F. Intercase Proportionality Review Is Not Required by the Constitution

Morales claims California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review to guarantee against arbitrary imposition of the death penalty. (AOB 628-629.) Intercase, or comparative, proportionality review is not required by the federal Constitution, and this court has consistently declined to engage in it. (*People v. Winbush*, *supra*, 2 Cal.5th at p. 490; *Pulley v. Harris* (1984) 465 U.S. 37, 43-54; *People v. Boyce*, *supra*, 59 Cal.4th at p. 725; *People v. Gonzales* (2011) 51 Cal.4th 894, 957.)

G. California's Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Morales argues that California's death penalty scheme violates the equal protection clause by providing fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. (AOB 629.) This court has repeatedly rejected this claim, finding that capital defendants and noncapital defendants are not

similarly situated and, accordingly, may be treated differently without violating either equal protection guarantees or the Eighth Amendment. (*People v. Lucas* (2014) 60 Cal.4th 153, 333; *People v. Linton*, *supra*, 56 Cal.4th at p. 1216; *People v. Debose* (2014) 59 Cal.4th 177, 214; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

H. California's Capital Sentencing Scheme Does Not Fall Short of International Norms

Morales contends that California employs the death penalty as a regular form of punishment, which violates constitutional provisions and falls short of international norms and evolving standards of decency. (AOB 629-630.) This court has consistently determined that the death penalty does not violate the Eighth Amendment, international law, or "evolving standards of decency." (See *People v. Johnson*, *supra*, 62 Cal.4th at p. 657; *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Jennings* (2010) 50 Cal.4th 616, 689.)

Nevertheless, Morales urges this court to reconsider its previous decisions in light of *Roper v. Simmons* (2005) 543 U.S. 551, 554, in which the United States Supreme Court cited evolving international standards as "respected and significant" support for its holding that the Eighth Amendment prohibits imposition of the death penalty against persons who committed their crimes as *juveniles*. (AOB 630.) However, *Roper* has not persuaded this court to revisit its determination that California's death penalty scheme, as it pertains to defendants who committed capital crimes as adults, does not violate international law and norms. (*People v. Hung Than Mai* (2013) 57 Cal.4th 986, 1058; *People v. McCurdy*, *supra*, 59 Cal.4th at p. 1112.) Morales provides no reasons to revisit this issue.

I. California's Death Penalty Statute and Instructions Are Constitutional Despite Not Requiring the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

Morales again contends that California's death penalty statute and instructions violate the federal Constitution because they do not require the jury's weighing determination to be found beyond a reasonable doubt. (AOB 630-632.) As discussed in Sections VI and VII.C.1, *ante*, this court has repeatedly found that a death sentence need not be premised on findings made beyond a reasonable doubt.

Despite this, Morales contends that this court's prior decisions should be revisited in light of *Hurst*, *supra*, 136 S.Ct. 616, a United States Supreme Court decision invalidating Florida's capital sentencing scheme. (AOB 631.) As discussed extensively in Section VI, *ante*, this court has already determined that *Hurst* did not alter its prior holdings regarding the constitutionality of California's death penalty statute. (*People v. Case*, *supra*, 5 Cal.5th at p. 50; *Henriquez*, *supra*, 4 Cal.5th at p. 45; *People v. Jones*, *supra*, 3 Cal.5th at p. 619; *Rangel*, *supra*, 62 Cal.4th at p. 1235.) As explained by this court, the "California sentencing scheme is materially different from that in Florida." (*Rangel*, at p. 1235, fn. 16; see also *People v. Jackson* (2016) 1 Cal.5th 269, 374 [explaining how California's sentencing scheme differs from Florida's].)[37]

Moreover, *Hurst* did not address the standard of proof required for determining whether aggravating factors outweigh mitigating factors. And as discussed in Section VI, even after *Hurst*, the Supreme Court acknowledged the moral and normative nature of the weighing

[37] Under Florida's capital sentencing scheme, the trial court had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-622.)

determination and expressed doubt that it was even possible to apply a standard of proof to the weighing determination. (*Carr*, *supra*, 136 S.Ct. at p. 642.)

Thus, *Hurst* has no effect on this court's repeated rulings, both before and after *Hurst*, that the federal Constitution does not require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

CONCLUSION

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

Dated: May 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached respondent's brief uses a 13-point Times New Roman font and contains 50,301 words.

Dated: May 6, 2020

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY E-MAIL

Case Name: ***People v. Morales***
No.: **S137307**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system.

On May 6, 2020, I electronically served the attached Respondent's Brief by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case are unable to receive electronic correspondence via this Court's TrueFiling system, on May 6, 2020, I served via Email:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2020, at San Diego, California.

Kimberly Wickenhagen	s/ Kimberly Wickenhagen
Declarant	Signature

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/6/2020 by April Boelk, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MORALES (JOHNNY)**
Case Number: **S137307**
Lower Court Case Number:

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Lloyd, Amanda (239682)
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Department of Justice, Office of the Attorney General-San Diego

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