Louis Ramon Montes
NAME
V-47245
PRISON IDENTIFICATION/BOOKING NO.
Kern Valley State Prison
ADDRESS OR PLACE OF CONFINEMENT

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOUIS RAMON MONTES
FULL NAME (*Include name under which you were convicted*)
Petitioner,

v.

T.OCHOA et al. (CAL)
NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER
Respondent.

CASE NUMBER:

CV ED CV 07-1386-CAS (PLA)
To be supplied by the Clerk of the United States District Court

☒ Second AMENDED

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

evidentiary hearing and counsel rquested.

PLACE/COUNTY OF CONVICTION
PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(*List by case number*)
CV
CV

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
5. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.
6. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:

1. ☒ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue
   a. Place of detention Kern Valley State Prison
   b. Place of conviction and sentence San Bernardino County, Victorville Dist.

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked)*.
   a. Nature of offenses involved *(include all counts)*: 1st Deg. murder w/special circumstance-lying in wait, enhancement (all counts) use of deadly weapon car jacking, 2nd deg. robbery.
   b. Penal or other code section or sections: 187(a), 190.2(a)(17), 190.2(a)(15), 12022(b)(1), 215(a), 211
   c. Case number: FVI-012901
   d. Date of conviction: 12-17-03
   e. Date of sentence: 07-30-04
   f. Length of sentence on each count: LWOP + 12 years + 8 years (stayed)
   g. Plea *(check one)*:
      ☒ Not guilty
      ☐ Guilty
      ☐ Nolo contendere
   h. Kind of trial *(check one)*:
      ☒ Jury
      ☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☒ Yes ☐ No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: E 036 356
   b. Grounds raised *(list each)*:
      (1) Jury Instructions

(2) Exclusion of Evidence

(3) D.A. Misconduct

(4) IAC: Trial Counsel

(5) Sentencing error

(6) Sentencing error (7) sentencing error

c. Date of decision: 04-12-06

d. Result affirmed w/directions

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☒ Yes ☐ No

If so give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

a. Case number: S143350

b. Grounds raised *(list each)*:

(1) Jury Instructions

(2) D.A. Misconduct

(3) Exclusion of Evidence

(4) IAC: Trial Counsel

(5) Sentencing Error

(6)

c. Date of decision: 07-19-06

d. Result denied

5. If you did not appeal:

a. State your reasons n/a

b. Did you seek permission to file a late appeal? ☐ Yes ☐ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: California Supreme Court

(2) Case number: S163917

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 05-20-08

(4) Grounds raised *(list each)*:

(a) Sentencing Error "Cunningham claim"

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: ~~10~~ ON OR AROUND 10-22-08 (I SENT THIS COURT MY ONLY COPY)

(6) Result Denied

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: n/a

(2) Case number: n/a

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: n/a

(4) Grounds raised *(list each)*:

(a) n/a

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: n/a

(6) Result n/a

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

c. (1) Name of court: n/a

(2) Case number: n/a

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: n/a

(4) Grounds raised *(list each)*:

(a) n/a

(b)

(c) n/a

(d)

(e)

(f)

(5) Date of decision: n/a

(6) Result n/a

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

7. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: State errors denied a fair trial

(1) Supporting FACTS: see attached document

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

b. Ground two: D.A. Misconduct

(1) Supporting FACTS: see attched document

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

c. Ground three: Exclusion of Evidence

(1) Supporting FACTS: see attached document

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

d. Ground four: IAC: Trial Counsel

(1) Supporting FACTS: see attached document

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

e. Ground five: Sentencing Error

(1) Supporting FACTS: see attached document

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

8. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: n/a

9. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: United States District Court, Central District of CA

(2) Case number: ED CV 07-1386-CAS (PLA)

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 10-14-07

(4) Grounds raised *(list each)*:

(a) Jury Instructions

(b) D.A. Misconduct

(c) Exclusion of Evidence

(d) IAC: Trial Counsel

(e) Sentencing Error

(f)

(5) Date of decision: n/a

(6) Result ordered to file 2nd Amended Petition

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: n/a

(2) Case number: n/a

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: n/a

(4) Grounds raised *(list each)*:

(a) n/a

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: n/a

(6) Result n/a

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

10. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☒ No

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: n/a

(2) Case number: n/a

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: n/a

(4) Grounds raised *(list each)*:

(a) n/a

(b)

(c)

(d)

(e)

(f)

11. Are you presently represented by counsel? ☐ Yes ☒ No

If so, provide name, address and telephone number: n/a

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 12-04-08
Date

Signature of Petitioner

ATTACHMENT

ARGUMENT

I.

AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL AND STATE LAW IS RAISED BY THE ISSUE WHETHER THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN REFUSING ACCOMPLICE INSTRUCTIONS WHERE THE CHARGED MURDER WAS COMMITTED TO FACILITATE THE CRIME IN WHICH THE TESTIFYING WITNESSES CONSPIRED TO PARTICIPATE

A defendant may not be convicted on the basis of the uncorroborated testimony of an accomplice. (Pen. Code, § 1111.) The trial court must instruct sua sponte on the need for corroboration of accomplice testimony whenever there is testimony of a witness who the jury could conclude was an accomplice. (People v. Gordon (1973) 10 Cal.3d 460, 468-69; People v. Burns (1987) 196 Cal.App.3d 1440, 1448, fn. 1.) The court must also instruct on the sufficiency of corroborative evidence. (People v. Bevins (1960) 54 Cal.2d 71, 76.) Finally, the court must instruct sua sponte that the accomplice's testimony should be viewed with caution. (People v. Guiuan (1998) 18 Cal.4th 558, 564, 569.) The pattern instructions are CALJIC Nos. 3.10, 3.11, 3.12, 3.13, and 3.18. The instructions are required "unless there is no dispute as to either the facts *or the inferences* to be drawn from them." (People v. Tewksbury (1976) 15 Cal.3d 953, 960 (emphasis added).)

A coconspirator is deemed an accomplice not only as to the object of the conspiracy but also as to the natural and probable consequences of that conspiracy. (People v. Prieto (2003) 30 Cal.4th 226, 249-50; People v. Stankewitz (1990) 51 Cal.3d 72, 90; People v. Superior Court (Quinteros)

(1993) 13 Cal.App.4th 12, 21.)

The trial court refused to provide accomplice instructions as to Noelle K. and Daniel O. on the ground that even though there was evidence that both were coconspirators to the robbery at the pawn shop, they were not involved in the charged crime of murder. (CT (2) 301; RT (3) 769:21-26.) Montes argued on appeal that this was error because the murder was plainly linked to the pawn shop robbery, as follows:

> (a) The carjacking of April's car was a preparatory step to the robbery of the pawn shop because the robbers needed a car for that robbery (RT (1) 209:13-22 (accomplice Moore); (2) 562:21-563:4 (Daniel));
>
> (b) The murder of the driver of a car is a natural and probable consequence of a carjacking (cf. People v. Prettyman (1996) 14 Cal.4th 248, 262-63 (jury may find murder to be natural and probable consequence of robbery)); and
>
> (c) There was overwhelming evidence that Noelle and Daniel were coconspirators in the plot to rob Noelle's father, the owner of the pawn shop.[1]

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[1] See, e.g., RT (3) 653:9-24; (3) 660:3-661:16 (Noelle herself hatched the plot for the pawn shop robbery); (2) 424:6-8 (Noelle hated her father); (2) 541:17-542:2; (2) 567:13-26 (Daniel stole a license plate to put on the murder victim's car to facilitate the getaway from the pawn shop); (2) 566:24-567:5 (Daniel was to receive a share of the loot); (2) 568:6-21; (2) 557:5-16 (Daniel and Noelle went to the pawn shop on the day set for the robbery, knowing that it would take place); (3) 671:8-17 (Noelle cased the pawn shop and showed Whitson where the safe was); (2) 416:9-17; (2)

(. . . continued)

(AOB issue 1.)

The Court of Appeal disagreed. The court reasoned that "[a]lthough Noelle and Daniel conspired with defendants to rob Allen's pawn shop and murder Allen, there was no evidence that Noelle or Daniel understood or had any reason to believe that April or anyone else would be murdered or that April's car or anyone else's car was going to be forcibly taken for use in the pawn shop robbery." (Opn. at 19.) The problem with this analysis is that it is irrelevant whether Noelle or Daniel knew that April would be carjacked. A conspirator is liable for the criminal conduct undertaken by a fellow conspirator in preparation for the ultimately intended crime, so long as the conduct takes place after the defendant-conspirator has joined the conspiracy. (See, e.g., People v. Hardy (1992) 2 Cal.4th 86, 188 (it is "the long-settled law of conspiracy that "a conspirator is vicariously liable for the unintended acts by coconspirators if such acts are in furtherance of the object of the conspiracy, or are the reasonable and natural consequence of the object of the conspiracy"); People v. Scott (1964) 224 Cal.App.2d 146, 152 ("each member of a conspiracy is responsible for the acts of other members done in furtherance of the agreed plot even though not present").)

It is thus not necessary that the conspirator have advance knowledge as to precisely how his fellow conspirators intended to facilitate the ultimate object of the conspiracy. As long as Noelle and Daniel were members of the conspiracy at the time of the carjacking – a fact that the opinion does not contest – they bore the burden that all conspirators bear: responsibility

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431:7-16; (2) 459:19-460:3 (Noelle understood that her role was to go behind the counter and grab the surveillance video).

for what their coconspirators do in furtherance of the conspiracy. There was ample evidence that some of the coconspirators (even if not Noelle or Daniel) carjacked April in order to use her car for the robbery. Indeed, accomplice Moore, who testified for the prosecution in return for a plea-bargained sentence of no more than three years, squarely testified to this fact. (RT (1) 209:13-22; see (1) 204:9-23; (1) 230:4-9 (terms of plea bargain).) Noelle and Daniel were therefore criminally liable for the carjacking. And because the jury could readily find that the murder of the carjacking victim was a natural and probable consequence of the carjacking itself (see Prettyman, supra), it could also find that Noelle and Daniel were guilty of the murder – the charged offense.

Review is warranted for several reasons. ***First***, further guidance on the liability of coconspirators is necessary. The opinion's assumption that Noelle and Daniel were not liable for the carjacking or murder unless they knew it was to take place beforehand is at odds with what this Court has characterized as the "long-settled law of conspiracy." (Hardy, supra.) A new opinion by this Court would go far to ensure that the law remains settled.

Second, the opinion's analysis has the perverse effect of exculpating criminals who should be punished. If Noelle and Daniel had been codefendants with Montes, under the opinion's analysis they could not be convicted of the carjacking or murder because they did not have advance knowledge. They could be convicted only of the attempted robbery or conspiracy to commit robbery. Review is therefore necessary to ensure that members of a criminal conspiracy will be fully punished in accordance with long-settled law.

Third, review is warranted because the error, which deprived Montes

of the benefit of state law requiring accomplice instructions, violated Montes's fundamental federal constitutional right to due process under the Fourteenth Amendment. (See Hicks v. Oklahoma (1980) 447 U.S. 343, 346 (defendant is entitled to the benefit of state law).) The error also denied Montes the fundamental right to a fair trial under the due-process clause, given the importance of Noelle and Daniel's testimony to the conviction. (See generally Estelle v. McGuire (1991) 502 U.S. 62 (denial of fundamentally fair trial violates Fourteenth Amendment).)

II.

AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL AND STATE LAW IS RAISED BY THE ISSUE WHETHER THE PROSECUTOR COMMITS MISCONDUCT BY PLACING HIS PERSONAL REPUTATION ON THE LINE IN SUPPORT OF A CONVICTION

It is misconduct for the prosecutor to personally vouch for his case. (United States v. Young (1985) 470 U.S. 1, 18-19.) Thus, it is misconduct for him to "intimate that he would not prosecute an innocent man" (People v. Pineiro (1982) 129 Cal.App.3d 915, 924) or to "lay his own credibility on the line" (United States v. Stamas (1st Cir. 1971) 443 F.2d 860, 866). Here, the prosecutor did precisely that. In his rebuttal summation he declared:

> Grover – excuse me, Mr. Porter [counsel for codefendant Whitson], I've known him for more than a couple of years, wants to beat up on everybody. The officer is mistaken. This one is mistaken. I've got some conspiracy going. I've got some plot going. *I've been on this side for 32 years, and I'm not about to jeopardize my reputation for one case.*

(RT (3) 915:23-28 (emphasis added).) In stating that he was "not about to jeopardize my reputation for one case," the prosecutor improperly "lay his own credibility on the line." (Stamas, supra, 443 F.2d at p. 866; see also Floyd v. Meacham (2d Cir. 1990) 907 F.2d 347, 354 (it is misconduct for the prosecutor to "invite[] the jury to view its verdict as a vindication of the prosecutor's integrity rather than as an assessment of guilt or innocence based upon the evidence presented at trial").)

Montes argued on appeal that this was error. (AOB issue 3.) The Court of Appeal disagreed, reasoning that "the jurors must have understood that the prosecutor was merely responding to Mr. Porter's own suggestion that the prosecutor or his witnesses had fabricated the case against defendants." (Opn. at 26-27.) This is both factually erroneous and irrelevant. It is factually erroneous because Whitson's counsel never impugned the prosecutor's integrity. To the contrary, he conceded that the prosecutor could be considered a "nice man," that he put on a "nice case," and that "[w]hat he put on here made sense." (RT (3) 909:9-10.) At no point did Whitson's counsel accuse the prosecutor of fabricating evidence or committing any other unethical or illegal practice.

The court's reasoning is irrelevant because even if Whitson had impugned the prosecutor's integrity, this would not have justified the prosecutor's own misconduct. It is well settled that the prosecutor is not given a free pass to commit misconduct just because he is responding to purported misconduct by opposing counsel. (See 5 B. Witkin, California Criminal Law (3d ed. 2000) § 599, p. 857 ("serious misconduct cannot be justified on the grounds of invitation or retaliation"); People v. Bain (1971) 5 Cal.3d 839, 849 ("A prosecutor's misconduct cannot be justified on the ground that defense counsel 'started it' with similar improprieties").) This principle should apply all the more where the initial misconduct is not even attributable to defendant's own counsel but is rather the sole responsibility of the attorney for another defendant over whom Montes had no control.

The opinion also reasoned that reversal was unnecessary because that "the prosecutor's remarks were brief." (Opn. at 27.) Another division of the same District Court of Appeal has recently exposed the fallacy of equating brevity with harmlessness:

> Nor are we sure the fact questioning is "relatively brief" carries a lot of weight. If the prosecutor had asked defendant only one question about her membership in Al Qaeda, it would be hard to defend as "relatively brief."

(People v. Carrillo (2004) 119 Cal.App.4th 94, 103, fn. 3.)

Whether the prosecutor committed misconduct raises an important question of law warranting review for two reasons. ***First***, as the Court of Appeal recently observed, "[a]ppellate courts are the last resort against prosecutorial misconduct." (People v. Lopez (2006) 138 Cal.App.4th 674 [41 Cal.Rptr.3d 585, 590-91] (reversing for prosecutorial misconduct in summation, including improper vouching).) When an appellate court ratifies a prosecutor's argument that the jury should convict the defendant because of the prosecutor's own reputation, this "last resort" becomes illusory. Review is therefore necessary to ensure that the appellate courts will detect and expose obvious misconduct such as this.

Second, review is warranted because the error constituted a violation of Montes's fundamental federal constitutional rights. In putting his own and, by implication, the Government's, reputation on the line, the prosecutor made it easy for the jury to resolve the deep conflicts in the evidence in favor of a conviction, which in turn "so infected the trial with unfairness as to make the resulting conviction a denial of due process" under the Fourteenth Amendment. (Darden v. Wainright (1986) 477 U.S. 168, 181.) Further, in injecting his own reputation into the case, the prosecutor in effect adduced evidence outside the record, which the defense had no opportunity to rebut. This constituted a violation of Montes's Sixth Amendment rights to trial by jury and to confrontation. (See generally Douglas v. Alabama (1965) 380 U.S. 415.)

III.

AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL AND STATE LAW IS RAISED BY THE ISSUE WHETHER THE ERRONEOUS EXCLUSION OF EVIDENCE THAT THE MAIN PROSECUTION WITNESS HAD COMMITTED A CRIMEOF MORAL TURPITUDE MAY BE DEEMED HARMLESS IN A CLOSE CASE

The court may receive impeachment evidence of a crime of moral turpitude, such as burglary. (People v. Wheeler (1992) 4 Cal.4th 284, 295-96; In re Hurwitz (1976) 17 Cal.3d 562, 567-68.) Over Montes's objection, the trial court excluded evidence that accomplice Moore had committed a burglary as a juvenile. (RT (1) 200:27-201:17.) Montes argued on appeal that this was prejudicial error. (AOB issue 2.) The Court of Appeal agreed that it was error to exclude the evidence. (Opn. at 23.) The court held, however, that the error was harmless, reasoning:

> Although Moore was the only witness present at the time of April's murder, his testimony was corroborated by the DNA evidence. Moreover, it is highly unlikely that the jurors would have found Moore's testimony less credible had they known he had been arrested for burglary as a juvenile. Further, Noelle and Daniel testified that defendants admitted murdering April, and their testimony was remarkably consistent with Moore's testimony.

(Opn. at 24.)

The opinion's analysis erroneously conflates Montes with Whitson. There was no DNA evidence of Montes, but only of Whitson. (RT (2)

614:9-16; (2) 624:6-626:9.) Thus, there was no physical corroboration of Moore's testimony *as to Montes*.

The opinion also minimizes the impact of the excluded evidence. (Opn. at 24.) As the opinion concedes, however, Moore was the only testifying witness who was present at the murder, and hence the only eyewitness tying Montes to the crime. In this light, the fact that he had a long-standing criminal history for a crime of moral turpitude could hardly be deemed inconsequential. This was already a precariously balanced case on Moore's overall credibility in light of his generous plea bargain, so that the tipping point at which one or more jurors would decide not to credit him could not be confidently predicted.[2] For example, Moore brazenly asserted at trial that he would not lie even if it would help him. (RT (1) 272:3-5.) If the jurors had known that Moore was a man who had entered another person's home or business or car to steal that person's belongings, they probably would have snickered at his assertion that he would not lie to help himself.

Finally, the opinion refers to defendants' admissions to Noelle and Daniel. (Opn. at 24.) Montes, however, was a braggart who "talked big but never followed through with it." (RT 91) 208:23-209:4; (1) 231:24-232:2.) Further, his admission was highly suspect because it was inconsistent with

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[2] Moore, having obtained a three-year cap on his sentence instead of punishment for first-degree murder, had a powerful incentive to cast the blame on someone else and portray himself as the innocent bystander. At the time of trial he had not yet been sentenced, and he knew that it was the prosecutor who would decide whether he was telling the "truth" at trial so that he could take advantage of the extraordinary plea bargain. (RT (1) 237:27-238:2; (1) 250:3-251:5.)

the medical evidence on a critical point.[3]

The prejudice is particularly apparent in light of Montes's argument of cumulative prejudice. (See AOB at 62-63.) Cumulative prejudice is evaluated under the *Chapman* reasonable-doubt standard because at least one issue (in fact, all four issues) involves a federal constitutional violation. (See United States v. Rivera (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6.) Given the slim evidence linking Montes to the crime – the testimony of a plea-bargained accomplice and the boastings of a young man that were inconsistent with the physical evidence – it can hardly be said beyond a reasonable doubt that the cumulative impact of the errors was harmless under *Chapman*, even considering only the two errors acknowledged by the Court of Appeal (this issue and the erroneous admission of Montes's criminal history, discussed below). (The opinion discusses cumulative prejudice at p. 25.)

Whether the court's analysis of prejudice is correct raises an important question of law because the error constitutes a violation of Montes's rights to trial by jury, confrontation, and due process under the Sixth and Fourteenth Amendments. (See generally Delaware v. Van Arsdall (1986) 475 U.S. 673; Olden v. Kentucky (1988) 488 U.S. 227.)

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[3] The testimony and admissions indicated that the assailants dragged the body to the ditch and *then*, when they saw the victim was still alive and conscious, Montes struck her with the rock. (See RT (1) 218:10-21; (1) 219:3-220:3 (Moore); (2) 542:24-543:25 (Daniel).) According to the pathologist, however, the injury with the rock was likely caused *before* the dragging; by the time the body was dragged, the victim had already died or was on the verge of dying. (RT (1) 319:15-320:7; (1) 323:6-326:8.) This suggests that Moore, Whitson, and Montes were making up a story or misrepeating what they had heard second hand.

IV.

AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL AND STATE LAW IS RAISED BY THE ISSUE OF THE CIRCUMSTANCES UNDER WHICH ADMISSION OF EVIDENCE OF A PRIOR CONVICTION MAY BE DEEMED HARMLESS

Evidence of uncharged crimes is inherently prejudicial. (People v. Ewoldt (1994) 7 Cal.4th 380, 404.) Here, when codefendant Whitson's mother testified for the prosecution, she revealed that Whitson and Montes had met in a "juvenile camp," which she made clear was not a voluntary summer camp but rather a juvenile detention facility. (RT (1) 152:23-153:1.) This implied that Montes had committed a crime that was serious enough to warrant incarceration. Montes joined in a motion for a new trial on the ground that trial counsel was ineffective in failing to object to such prejudicial evidence. (CT (2) 478-89; RT (3) 955:7-12.) The court denied the motion, reasoning that any error or omission was harmless because "[t]he evidence is overwhelming as to the guilt of the defendants." (RT (3) 957:24-958:4.)

Montes argued on appeal that this was error. (AOB issue 4.) The Court of Appeal disagreed. (Opn. at 24-25.) The court acknowledged that admission of the evidence was error (Opn. at 25), but reasoned that the error was harmless. First, "[t]he jury did not hear why defendants had been placed in juvenile camp or that either defendant had a criminal history." (Opn. at 25.) Second, the evidence on the charged crimes was "very strong and remarkably consistent." (Opn. at 25.) It was therefore "highly unlikely that the jurors' knowledge that defendants met while in 'juvenile camp' affected the verdicts." (Opn. at 25.)

Both prongs of the opinion's reasoning are flawed. First, although the jury did not specifically "hear" why Montes was in a juvenile camp, most jurors would have inferred that it was because he had committed a crime. As noted above, Whitson's mother made it clear that they did not go to "camp" voluntarily; this was not a "summer camp" but one in which they were "placed." (RT (1) 152:19-153:1.) She even identified the camp by name (Heart Bar (RT (1) 152:22)), and it is a fair assumption that many jurors in San Bernardino County would have known that this was a detention facility for delinquent boys. Of course, one does not get sent to a detention facility without having been convicted of a crime. (Cf. United States v. Wesley (6th Cir. 2005) 417 F.3d 612, 622 ("reference to defendant's prior *incarceration* presents a classic danger of unfair prejudice – that the jury may decide guilt based on the fact that the defendant has a prior *conviction*") (emphasis added).)

The real prejudice, however, is in what the jury was not told. Jurors were left to speculate as to what vicious crime this youth could have committed that would have warranted separation from his family and imprisonment as a juvenile delinquent. (Cf. People v. Rollo (1977) 20 Cal.3d 109, 119 (noting the inevitability of such speculation by jurors).)

As for the opinion's conclusion that the evidence was "very strong" (Opn. at 25), this may apply to Whitson but certainly not to Montes. (See discussion in section 3 above.) Further, under cumulative prejudice analysis on the basis of the *Chapman* standard, it is a matter of speculation when one or more jurors would have reached the tipping point. The jury demonstrated that this was already a close case even with the multifarious errors. Jurors found it necessary to interrupt their deliberations for a readback of the testimony of the key prosecution witness, accomplice

Moore. (See CT (1) 266.) At least part of the jury must have been skeptical even of the scientific evidence, for the jury asked for a readback of the testimony of the DNA expert. (CT (1) 272.)

The error warrants review because it constitutes a violation of Montes's fundamental federal constitutional rights, namely, the right to the effective assistance of counsel under the Sixth Amendment and the right to a fair trial untainted by irrelevant, inflammatory evidence under the due-process clause of the Fourteenth Amendment. (See generally Strickland v. Washington (1984) 466 U.S. 668; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, 1384-86.)

V.

AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IS RAISED BY THE ISSUE WHETHER THE COURT MAY IMPOSE AN UPPER TERM OR CONSECUTIVE TERM ON THE BASIS OF FACTS THAT THE JURY DID NOT FIND TO BE TRUE BEYOND A REASONABLE DOUBT

This Court has held that California's sentencing scheme does not violate the right to trial by jury under the Sixth Amendment even if the trial court imposes the upper term or a consecutive term on the basis of facts that the jury has not found to be true beyond a reasonable doubt. (People v. Black (2005) 35 Cal.4th 1238, interpreting Blakely v. Washington (2004) 542 U.S. 296.) The U.S. Supreme Court, however, has recently granted certiorari on this question, at least with respect to imposition of the upper term. (Cunningham v. California (2006) 126 S.Ct. 1329 (question presented: "Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments").)

Montes argued on appeal that the trial court erred in imposing the upper term on count 2 (carjacking) and on the firearm enhancement for that count, and in making count 2 consecutive. (AOB issue 6.) This is because the single aggravating factor cited by the court – "the violence involved in this crime" (RT (3) 964:3-6) – was a qualitative judgment that the jury would not necessarily have found to be true beyond a reasonable doubt. The Court of Appeal rejected this argument because it was bound by Black. (Opn. at 30-31.)

Black was wrongly decided. (See Black, 35 Cal.4th at pp. 1264-73 (Kennard, J., dissenting as to upper terms); State v. Natale (2005) 184 N.J. 458, 482 (upper terms); Pen. Code, § 669 (setting concurrent terms as the default in the absence of aggravating factors).) Pending the U.S. Supreme Court's Cunningham opinion, this Court should revisit this important question of federal constitutional law (Sixth and Fourteenth Amendments) that affects every case involving upper or consecutive terms.

PROOF OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY

(Fed. R. Civ. P. 5; 28 U.S.C. § 1746)

I. Louis Ramiun Montes, declare:

I am over 18 years of age and a party to this action. I am a resident of Kern Valley State Prison, in the county of Kern State of California. My prison address is: P.O. Box 5102, Delano, CA 93216

On 12-04-08 (DATE)

I served the attached: 2nd Amended Petition for Writ of Habeas Corpus by a Person in State Custody (DESCRIPTION OF DOCUMENT)

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

United States District Court, Central District of California
312 N. Spring St. Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Executed on 12-04-08 (DATE)

(DECLARANT'S SIGNATURE)