No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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IVAN LEE VASQUEZ, *Petitioner*

vs.

THE STATE OF CALIFORNIA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In the case at bar, a group of trial spectators wearing jackets bearing the message, "Bikers Against Child Abuse," encircled, counseled, and prayed with the teenage witness in the hallway, accompanied her into the courtroom, and observed the proceedings. In finding no constitutional violation, a California court of appeal disagreed with the majority of a Florida court of appeal, which had found the trial presence of Bikers Against Child Abuse "inherently prejudicial," in violation of the Sixth and Fourteenth Amendments. *Long v. State*, 151 So.3d 498 (Fla. Dist. Ct. App. 2014) (citing, *e.g.*, *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986), *Norris v. Risley*, 918 F.2d 828, 830 (9th Cir. 1990)). The questions presented are:

1. May trial spectator conduct, in the form of content-based messaging, be "'so inherently prejudicial as to pose an unacceptable threat'" to the fair-trial and confrontation rights guaranteed by the Sixth and Fourteenth Amendments?
2. If the presence of trial spectators declaring themselves, "Bikers Against Child Abuse," is not "inherently prejudicial," must the Government nevertheless prove it is harmless beyond a reasonable doubt, by demonstrating, inter alia, it could not have intimidated the jury or unfairly bolstered a witness's credibility in a manner that could affect the outcome of the trial?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the California Supreme Court and the California Court of Appeal were the State of California and Petitioner Ivan Lee Vasquez, as stated in the caption.

RELATED PROCEEDINGS

The following proceedings are directly related to the instant case:

- *People of California v. Vasquez*, Orange County Superior Court No. 14NF4103, judgment entered on August 25, 2017;
- *People of California v. Vasquez*, California Court of Appeal, District Four, Division Three, No. G055378, unreported opinion filed on March 20, 2019.
- *People of California v. Vasquez*, California Supreme Court No. S255456, Petition for Review denied on June 12, 2019.
- *In re: Ivan Lee Vasquez*, California Court of Appeal, District Four, Division Three, No. G056205, Petition for Writ of Habeas Corpus, summarily denied on July 26, 2018.
- *In re: Ivan Lee Vasquez*, California Supreme Court, No. S255467, Petition for Writ of Habeas Corpus, still pending as of August 19, 2019.

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Petitioner Ivan Lee Vasquez respectfully prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal, Fourth District, Division Three, convicting Petitioner of a lewd act upon a minor, for a sentence of 8 years in prison and lifetime registration as a sex offender. As set forth in his accompanying motion, Petitioner requests leave to proceed *in forma pauperis*, as he is indigent and counsel was appointed to represent him in the California courts.

OPINION BELOW

The unreported opinion of the court of appeal affirming the judgment appears as Appendix A. The unreported order of the California Supreme Court denying review appears as Appendix B.

JURISDICTION

This Petition arises from a final judgment rendered by the Court of Appeal of the State of California, Fourth District, Division Three, regarding Petitioner's appeal of his conviction and sentence. An unreported opinion in the appeal affirming the judgment was filed by that court on March 20, 2018. The California Supreme Court denied a Petition for Review of the opinion on June 12, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Petition is timely pursuant to Supreme Court Rules 13 and 30.1.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, section 1, provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

An Information was filed against Petitioner on December 15, 2014, alleging a felony violation of California Penal Code section 288(a) (lewd act upon child), as Count 1. (CT 165.)[1] It was further alleged that Count 1 involved substantial sexual conduct, pursuant to Penal Code section 1203.066(a)(8), and that Petitioner served a prior prison sentence, pursuant to section 667.5(b), for a violation of section 261.5(d) (unlawful intercourse with person under 16). (CT 166.)

A jury trial commenced on April 26, 2017. The sixteen-year-old complaining witness, A.P., was the first to take the stand. She described getting to know Petitioner, who was renting a room at her grandfather's home, when she was 13 and staying with her grandfather, because of her behavior

[1] "CT" refers to the Clerk's Transcript of the trial proceedings, lodged with the California Court of Appeal. Only one count was charged.

problems. (1RT 111, 113-14, 197-99; 2RT 270, 327-28, 331.)[2] When the prosecutor began to ask A.P. questions about physical relations with Petitioner, A.P. asked for a break to go outside. (1RT 124.) When she returned from the break, A.P. requested that a support person accompany her on the witness stand. (1RT 125.)

Trial counsel renewed his objection to this request, first presented in his motion in limine, and further raised his concern with what he had observed during the break, namely: "Bikers Against Child Abuse" "doing prayer circles" around A.P., and his belief that an "intimidation tactic" was taking place. (1RT 127.) The trial court noted the prayer circles were happening "in the hallway during the break," and:

> a number of people came into the courtroom and accompanied the witness [A.P.] when she entered the courtroom. Some of them I saw when I was out in the hallway before we began proceedings this morning.
>
> They're wearing some sort of jean jacket type of what one might use in the biker vernacular "colors" on the back of the jacket, what I saw was an acronym, and I think it was something like "B.A.C.A." and then at the bottom of it said "Bikers Against Child Abuse." I didn't see any identification on the front portion of their jackets to indicate that position.
>
> The court has been observing them during proceedings. They have been quiet, they have not obviously attempted to hold up any signs or photographs or create any disturbances.

[2] "RT" refers to the Reporter's Transcript of the trial proceedings, lodged with the California Court of Appeal.

(1RT 127-28.) The court indicated it was willing to give the jury an admonition to not be swayed by this, depending on whether trial counsel "tactically" wanted to call attention to it, but "if they are encircling the witness or praying with her in the hallway, I don't know that I have any constitutional authority to tell them to stop doing that." (1RT 128.)

Trial counsel indicated he wanted the jury to be admonished, "because they are out in the hallway with them and they are observing all of these behaviors," and he was concerned because of the prayer circle and:

> every time [A.P.] steps up they encircle her and they start talking to her and, you know, they start -- the part that I heard was about how she should be answering. Not the substance, but, "don't say 'uh-huh,' say 'yes,' because the court reporter" … . [M]y concern is more sort of these action of encircling her sort of with their backs sort of facing out and the jury members walking by, you know, and them coming every time she comes in, every time she leaves they leave.

(1RT 129-30.) The prosecutor stated, "we are asking that the individuals, Bikers Against Child Abuse, when there are breaks or recesses will actually move further down the hall or possibly around the corner so they're kind of out of the view of any jurors." (1RT 131.) The court declined to interfere with the spectators or give an immediate admonition to the jury, and it also permitted a court-appointed victim advocate to accompany A.P. to the witness stand for the rest of her testimony. (*See* 1RT 126-31.)

A.P. then testified that Petitioner had sex with her daily for almost two months. (1RT 153-55.) However, A.P. had originally denied to her family and social workers that any sexual contact occurred. (1RT 181-82, 186, 223.)

When she eventually did tell a social worker they had sex months later, A.P. had said it was just five times, and she only did so after Petitioner had told her to stop calling him, and she asked a screener, "who do I need to talk to ruin this guy's life." (1RT 186-90, 225-26; 3RT 515-19.)

After A.P.'s testimony had concluded the next day, the court admonished the jury as follows:

> you will recall that during [A.P.'s] testimony there were a goodly number of spectators in the audience all wearing what looked like biker colors and on the backs of them it was very obvious to all of us that it was a logo captioned "Bikers Against Child Abuse." Both of the attorneys have asked that I admonish you that obviously that has nothing to do with this case. We don't want you to be swayed one way or the other because of their presence. Courtrooms in America are open, anybody can come in and watch trial proceedings. We don't normally tell them what clothes to wear or not wear. I just want to make sure that all jurors are reminded of their obligation to base the verdict on the evidence and on the court's instructions and not be swayed by passion, prejudice, or sympathy one way or the other because of unrelated things such as that.
>
> If all jurors agree to follow that admonition please raise your hands. All jurors have indicated in the affirmative.

(2RT 291-292.) The court asked the attorneys if they were "satisfied with the informal admonition," and they both indicated they were. (2RT 292.)

The jury found Petitioner guilty and the special allegation true, and Petitioner admitted the prison prior. (1CT 52-53.) On August 25, 2017, the court sentenced Petitioner to eight years in prison, for the upper term on Count 1, while striking the prison prior, and ordered him to register as a sex

offender, pursuant to California Penal Code section 290. (1CT 55-56.) Petitioner filed a timely Notice of Appeal on August 28, 2017. (1CT 57.)

Petitioner argued to the California Court of Appeal, Fourth District, Division Three, that his rights to due process and a fair trial, under the Sixth and Fourteenth Amendment of the United States Constitution, were violated by the conspicuous presence and messaging of "Bikers Against Child Abuse" in the courtroom and hallways, and by the presence of a court-appointed victim support person at the witness stand. (AOB in No. G055378).[3] In support of the first issue, Petitioner cited *Norris v. Risley*, 918 F.2d 828, 833-34 (9th Cir. 1990), which had found the presence of trial spectators wearing "Women Against Rape" buttons was "so inherently prejudicial as to pose an unacceptable threat" to fair-trial rights under the Sixth and Fourteenth Amendments, and *Long v. State*, 151 So.3d 498 (Fla. Dist. Ct. App. 2014), which had found the presence of Bikers Against Child Abuse at a Florida trial inherently prejudicial, citing *Norris*. (AOB 22-29.) Applying this Court's analysis in *Estelle v. Williams*, 425 U.S. 501, 503-05 (1976), the Ninth Circuit had reasoned: "the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Norris*, 918 F.2d at 831; *see also Long*, 151 So.3d at 501-02 ("[T]he bikers chose to appear … in clothing which was intended 'to

[3] "AOB" refers to Petitioner's Opening Brief, filed with the court of appeal.

communicate a message to the jury' … [that] appellant was a sexual abuser and that sexual abuse was to be condemned by a guilty verdict.")

Petitioner filed a related Petition for a Writ of Habeas Corpus on April 17, 2018, under Case No. G056205, alleging his Sixth Amendment right to the effective assistance of counsel was violated by his counsel's failure to present exculpatory evidence, which the Court of Appeal summarily denied on July 26, 2018.

On March 20, 2019, the Court of Appeal issued an unreported opinion in G055378, affirming the conviction, while finding petitioner's constitutional claims lacked merit. (Pet. App. A.) The Opinion cited cases which had found no prejudice arose from non-textual spectator displays, such as crying or images of the victim, and sided with the dissent in *Long* to find the trial court's admonishing the jury necessarily removed any prejudice created by the Bikers Against Child Abuse. (Pet. App. A, 13-16.) The Opinion ignored altogether the manner in which its cited jurisprudence had distinguished content-based messaging, like that here and in *Norris*, which courts have found created inherent prejudice. The Opinion further stated it found "any purported spectator misconduct here was harmless beyond a reasonable doubt," ostensibly citing *Chapman v. California*, 386 U.S. 18 (1967). (Pet. App. A, 16.) However, in noting only that it had presumed the jury followed the trial court's admonishment, the court of appeal did not apply *Chapman's* actual test, which considers the entire proceedings to determine whether the Government has

met its burden to prove the guilty verdict "was surely unattributable" to the Bikers' messaging. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Petitioner filed a Petition for Review of the appellate opinion in the California Supreme Court on April 26, 2019, which that court denied without comment on June 12, 2019. (App. B.) Petitioner additionally filed a new Petition for Writ of Habeas Corpus in the California Supreme Court on April 27, 2019, re-alleging the same claim of ineffective assistance of counsel from his prior petition in the court of appeal, and it is still pending in that court, as of August 19, 2019.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEAL'S OPINION CREATES A SPLIT OF DECISION REGARDING THE INHERENTLY PREJUDICIAL IMPACT OF TRIAL SPECTATORS' TEXTUAL MESSAGING SUGGESTING A DEFENDANT IS GUILTY OF THE CRIME CHARGED.

At least three state courts of appeal have considered the prejudicial impact of the presence of self-proclaimed Bikers Against Child Abuse at trials where the defendants are charged with abusing minors, resulting in diverse outcomes. In *Long v. State*, 151 So.3d 498 (Fla. Dist. Ct. App. 2014), two out of three appellate court justices found "an unacceptable risk was created that the [guilty] verdict reached was, at least in part, a result of the pre-trial encounter with the insignia-laden bikers." *Id.* at 501-03 (citing, e.g., *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Estes v. Texas*, 381 U.S. 532, 560-61 (1965) (Warren, C.J., concurring); *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990); U.S. Const. amends. VI & XIV). A Missouri

appellate court found no prejudice, where the bikers were not permitted to where their insignia inside or around the courthouse. *State v. Hartman*, 479 S.W.3d 692, 702-704 (Mo. Ct. App. 2015). In the instant case, the California court of appeal adopted the reasoning of the dissenting judge in *Long*, who had deferred to the trial judge's finding no prejudice where the Bikers did not wear their insignia inside the courtroom, *Long*, 151 So.3d. at 508-10 (Rowe, J., dissenting), and distorted the analysis of Ninth Circuit precedent, which had found essentially indistinguishable content-based messaging by spectators had rendered a trial inherently prejudicial. (*See* Pet. App. A, 14-15 (distinguishing *Norris*, 918 F.2d at 830, for its lack of admonition, but which *Norris* never mentions).) As discussed further below, this split of decision requires this Court's attention and resolution, as this Court has recognized it has never addressed the constitutional implications of private-actor spectator conduct, *Carey v. Musladin*, 549 U.S. 70, 76 (2006), and the members of Bikers Against Child Abuse chapters across the nation will continue to fulfill their mission to accompany young witnesses to the trials of the accused.

In *Norris*, 918 F.2d 828, which the *Long* majority had found "instructive," 151 So.3d at 502, the Ninth Circuit had applied this Court's analysis of court practices implicating the presumption of innocence and confrontation rights, such as defendants' wearing prison attire at trial, and holding "[a] courtroom practice or arrangement is inherently prejudicial if 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.*

at 830 (quoting *Estelle v. Williams*, 425 U.S. at 505). *Norris* had found the presence of spectators wearing buttons declaring, "Women Against Rape," "so inherently prejudicial as to pose an unacceptable threat" to fair-trial rights under the Sixth and Fourteenth Amendments. *Id.* at 830-34.

The Ninth Circuit had reasoned: "the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence," which "is an integral part of the right to a fair trial." *Norris*, 918 F.2d at 831. *Norris* also found a Confrontation Clause violation, explaining:

> Unlike the state's direct evidence, which could have been refuted by any manner of contrary testimony to be judged ultimately on the basis of each declarant's credibility, the buttons' informal accusation was not susceptible to traditional methods of refutation. Instead, the accusation stood unchallenged, lending credibility and weight to the state's case without being subject to the constitutional protections to which such evidence is ordinarily subjected.

Id. at 833.

Correcting the trial court's "belief that first amendment rights controlled," which had led it to take "no action against a group of citizens similarly strongly opposed to a finding that Norris was not guilty," *Norris* explained, "the importance of a fair trial outweighs spectators' first amendment rights." 918 F.2d. at 832. "Where fair trial rights are at significant risk, … the first amendment rights of trial attendees can and must be curtailed at the courthouse door." *Id.* (citing, *e.g.*, *Richmond Newspapers,*

Inc. v. Virginia, 448 U.S. 555, 564 (1980)); *see also Carey v. Musladin*, 549 U.S. at 79 (Stevens, J., concurring) ("In my opinion, there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.")

Likewise, the Florida appellate court determined in *Long*:

> Inherent prejudice has been shown here. By displaying their insignia, the bikers intended to do more than be present as support for the victim. . . . [T]he bikers chose to appear, as the morning trial was set to commence, in clothing which was intended "to communicate a message to the jury." That message was the appellant was a sexual abuser and that sexual abuse was to be condemned by a guilty verdict. . . . As the trial court stated below, the bikers engaged in "reckless advocacy"—advocacy of a certain outcome to be reached by the jury regardless of what the State proved at trial.

151 So.3d at 501-02 (citations omitted).

As discussed in Part II, *infra*, this Court has not directly addressed how private-actor conduct might render proceedings fundamentally unfair. Without this Court's guidance, courts nationwide have run the gambit regarding the prejudicial impact of spectator conduct. As this Court recognized in *Carey v. Musladin*, 549 U.S. at 76-77:

> Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment of defendants' spectator-conduct claims. Some courts have applied *Williams* and *Flynn* to spectators' conduct. *Norris v. Risley,* 918 F.2d, at 830-831 (applying *Williams* and *Flynn* to hold spectators' buttons worn during a trial deprived the defendant of a fair trial); *In re Woods,* 154 Wash.2d 400, 416-418, 114 P.3d 607, 616-617 (2005) (applying *Flynn* but concluding that ribbons worn by spectators did not prejudice the defendant). Other courts have declined to

> extend *Williams* and *Flynn* to spectators' conduct. *Billings v. Polk,* 441 F.3d 238, 246-247 (C.A.4 2006) ("These precedents do not clearly establish that a defendant's right to a fair jury trial is violated whenever an article of clothing worn at trial arguably conveys a message about the matter before the jury"); *Davis v. State,* 223 S.W.3d 466, 474-475, … (Tex.App.2006) ("Appellant does not cite any authority holding the display of this type of item by spectators creates inherent prejudice"). Other courts have distinguished *Flynn* on the facts. *Pachl v. Zenon,* 145 Or.App. 350, 360, n. 1, 929 P.2d 1088, 1093-1094, n. 1 (1996) (in banc). And still other courts have ruled on spectator-conduct claims without relying on, discussing, or distinguishing *Williams* or *Flynn*. *Buckner v. State,* 714 So.2d 384, 388-389 (Fla.1998) *(per curiam); State v. Speed,* 265 Kan. 26, 47-48, 961 P.2d 13, 29-30 (1998); *Nguyen v. State,* 977 S.W.2d 450, 457 (Tex.App 1998); *Kenyon v. State,* 58 Ark.App. 24, 33-35, 946 S.W.2d 705, 710-711 (1997); *State v. Nelson,* 96-0883, pp. 9-10 (La.App. 12/17/97), 705 So.2d 758, 763.

Nevertheless, a general trend has emerged of most courts' drawing a dividing line between textual-message-based displays and victim-imagery or emotional reactions. In cases where the displays contained textual messaging or content advocating for a specific finding or result, then inherent prejudice is generally found. *See, e.g.*, *Long*, 151 So.3d at 501-02; *Norris*, 918 F.2d at 831; *State v. Franklin,* 327 S.E.2d 449, 454-55 (W. Va. 1985) (citizens wearing Mothers Against Drunk Driving buttons, handed out by sheriff, found inherently prejudicial); *but see State v. McNaught,* 713 P.2d 457, 580-81 (Kan. 1986) (finding *defendant* had "failed to show that he was prejudiced in any way by the wearing of MADD and SADD buttons by spectators in the courtroom"); *People v. Lucero*, 750 P.2d 1342, 1350-52 (Cal. 1988) (finding single spectator outburst contesting argument and evidence did not require reversal, citing admonition & broad trial court discretion, and with no constitutional analysis).

Where the spectators had non-verbal displays, such as crying or wearing buttons with pictures of the victims, they were found not inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. at 571 (presence of four uniformed officers in front row did not "brand respondent in [jurors'] eyes 'with an unmistakable mark of guilt'"); *U.S. v. Farmer*, 583 F.3d 131, 149-50 (2d Cir. 2009) (T-shirts with images not inherently prejudicial, where record indicated images not clear); *Buckner v. State,* 714 So.2d 384 (Fla.1998) (finding "no reasonable possibility of different outcome" because jurors saw spectators holding up images of victim); *State v. Lord*, 165 P.3d 1251, 1258 (Wash. 2007) (distinguishing the "overt message" in buttons in *Norris* from the "ambiguous message that would be reasonably understood as a show of sympathy and support for the victim's family" contained in buttons with photographs of victim); *see* Pet. App. A, 13-14, citing *People v. Winbush*, 387 P.3d 1187, 1234 (Cal. 2017) (deferring to trial court's judgment that family members' tears were not inherently prejudicial, without addressing constitutional claim); *People v. Myles*, 274 P.3d 413, 438-39 (Cal. 2012) (finding no error from victim's wife's crying and nodding in apparent agreement with prosecutor, without constitutional analysis); *People v. Houston*, 29 Cal. Rptr. 3d 818, 842-43 (Cal. Ct. App. 2005) (buttons and placards with victims' likeliness); *but see Musladin v. LaMarque*, 403 F.3d 1072, 1077-78 (9th Cir. 2005), overruled on other grounds in *Carey v. Musladin*, 549 U.S. at 76-77, (finding victim images conveyed message of guilt).

The Opinion below bucks this trend and disregards altogether the textual-messaging of the Bikers Against Child Abuse. Its discussion of *Norris*, 918 F.2d 828, manages to omit the remarkably-similar statement on the "Women Against Rape" buttons, while suggesting the only relevant distinction between *Norris's* reversal and *Houston's* affirmance was the lack of an admonition in *Norris*. (Pet. App. A, 13.) However, *Norris* never mentions an admonition one way or another, and while the California appellate court in *Houston* had considered the trial court's admonition important, like most of the decisions above, it had also specifically distinguished displays which contain "text" that could suggest "the defendant was guilty as charged of that crime" or that the person depicted was a victim. *Houston*, 29 Cal. Rptr. 3d at 847-48 ("look[ing] past the 'general sentiment' reflected in the buttons and placards … to 'determine the specific message [conveyed] in light of the particular facts and issues before the jury'").

In any event, the Opinion's focus on admonitions has no place in the inherent prejudice analysis. *Cf. Holbrook v. Flynn*, 475 U.S. at 570, quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965) ("If 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' . . . little stock need be placed in jurors' claims to the contrary.") The *Long* majority recognized this, by finding polling and an admonition did not counter inherent prejudice. 151 So.3d at 500-01 (after polling jury, court excused one juror whose response was "equivocal," but

did not excuse another, who responded that the Bikers' presence would not cause him to "favor the State against the defendant in any way," but he "would be disappointed if they were in the parking lot when we were going home"). "Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook v. Flynn*, 475 U.S. at 570, quoting *Estelle v. Williams,* 425 U.S. at 505.

Other than *Long* and the instant case, the only other case involving Bikers Against Child Abuse, which Petitioner has found, maintained the textual distinction to some extent, by finding no inherent prejudice where "the trial court specifically informed the prosecutor to instruct BACA members that they could not wear their vests, buttons, or have any other items with child-abuse prevention messages in the courtroom, inside the courthouse, or around the courthouse and instructed the court martial to enforce that prohibition." *State v. Hartman*, 479 S.W.3d 692, 703-704 (Mo. Ct. App. 2015).

Thus, the Opinion has created a new split within what had been a mostly-functional demarcation by the courts in their treatment of spectator conduct involving textual messages of guilt and victim memorials. Unlike the other two decisions, where the Bikers apparently did not bring their textual messages inside the courtroom, the behavior of the Bikers here should have been found especially prejudicial, as it involved prayer circles and coaching the

witness in the hallway, *and* wearing their jackets inside the courtroom, where "it was very obvious to all of us that [they bore] a logo captioned "Bikers Against Child Abuse." (2RT 291.) This Court should grant the writ to cure the split of decision and settle this important open issue with national import.

II. THIS CASE IS A PERFECT VEHICLE FOR ADDRESSING CONTENT-BASED MESSAGING BY PRIVATE-ACTOR SPECTATORS, WHICH THIS COURT HAS RECOGNIZED DESERVES ATTENTION, BUT IT HAS NOT YET ADDRESSED.

The Ninth Circuit extended its inherent-prejudice analysis of spectator conduct to include buttons bearing victim images, on habeas corpus in *Musladin v. LaMarque*, 403 F.3d 1072 (9th Cir. 2005). This Court ultimately reversed *Musladin,* finding it had not yet addressed "the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here," and thus the state court's having found no fair-trial violation was not "contrary to or an unreasonable application of clearly established federal law," as required for habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) ("the effect on a defendant's fair-trial rights of the spectator conduct to which [defendant] objects is an open question in our jurisprudence"); 28 U.S.C.A. § 2254(d)(1).

This Court had distinguished its holdings in *Williams* and *Flynn* as addressing the inherently prejudicial impact of *government*-sponsored practices. *Carey v. Musladin*, 549 U.S. at 75; *but see id.* at 81 (Kennedy, J. concurring) ("it seems to me the case as presented to us here does call for a

new rule, perhaps justified as much as a preventative measure as by the urgent needs of the situation."); *id.* at 82 (Souter, J., concurring) (finding "no serious question that" the established "'unacceptable risk ... of impermissible factors coming into play'" test "reaches the conduct of spectators").

Because this Court did not resolve the merits of the issue, cases addressing spectator conduct have generally not let *Musladin's* limited finding affect its analysis of whether the particular messaging by spectators violated defendants' fair-trial rights. *See*, *e.g.*, *Long v. Florida*, 151 So.3d 498, 503 (Fla. Dist. Ct. App. 2014); *but see id*. at 508, fn.3 (Rowe, J., dissenting) (finding majority's reliance on *Norris* "misplaced" in light of *Carey v. Musladin*). As a result, the issue remains as open as it had in 2006, with courts driving over each other's dividing lines. *See* Part I, *supra*,

The instant case presents a compelling vehicle for this Court to directly address spectator messaging head on. The textual messaging here was at least as clear as the "Women Against Rape" buttons in *Norris*, which the Ninth Circuit found had delivered a message that the defendant was guilty of the crime charged. 918 F.2d at 831, 833. But here, the message was backed by the implied threat generally associated with biker gangs and depicted in the organization's patch, presumably the "insignia" worn in *Long* and also potentially worn by the Bikers here, which contains a fist and a skull and crossbones, as well as the statement, "Bikers Against Child Abuse." *See*, *e.g.*, Bikers Against Child Abuse, Arizona Chapter Information, *at*

http://arizona.bacaworld.org/ (last visited on Aug. 15, 2019) (linking https://www.youtube.com/watch?v=tuF3WqJUMKc&feature=youtu.be (promotional video describing representations in B.A.C.A. patch at 6:53, including ""the fist is our commitment to fight child abuse")). It is not surprising that one of the jurors in *Long* indicated he was not comfortable with the idea of meeting the Bikers Against Child Abuse members in the parking lot after the trial. 151 So.3d at 500. Thus, this case would allow this Court to address the particularly-serious spectator displays which combine messaging about guilt with impermissible intimidation tactics. *See Carey v. Musladin*, 549 U.S. at 80 (Kennedy J., concurring) (recognizing "trials must be free from a coercive or intimidating atmosphere" as a fundamental principle of due process, and the victim-image buttons there did not rise to that level).

The case also provides a useful mechanism for remedying courts' erroneous applications of the inherent prejudice test, as well as the federal harmless-error test contained in *Chapman v. California*, 386 U.S. 18 (1967). The Opinion's misplaced focus on the giving of an admonition as a means for distinguishing *Norris* portends its misapprehension of both *Norris* and this Court's inherent precedent analysis, since an admonition cannot remedy a constitutional violation which is inherently prejudicial. *See* Part I, *supra*, citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986). If *Norris* is correct that spectators' declaring themselves "Women Against Rape" is inherently prejudicial, then spectators declaring themselves "Bikers Against Child Abuse"

is likewise inherently prejudicial, and a belated admonition by either court could not have remedied that prejudice.

If, instead, this Court were to find that *Chapman* harmless-error analysis applies to spectators' textual messaging of implied guilt, then the Opinion also demonstrates lower courts' misapprehension of that test, by only citing the admonition and a "presumption" that it was followed, suggesting the defendant bore the burden of proving prejudice, and ignoring the *possible* impact of the Bikers' message and conduct as bolstering the credibility of a witness whose credibility was subject to question, and whose testimony was necessary to establish the elements of the charged offense. *Compare Chapman*, 386 U.S. at 24, 26, & *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), *with* (Pet. App. A, 16), *State v. McNaught,* 713 P.2d 457, 580-81 (Kan. 1986) (erroneously finding *defendant* had "failed to show that he was prejudiced in any way by the wearing of MADD and SADD buttons by spectators in the courtroom").

Thus, this Court should grant the writ, because this case is the correct vehicle for addressing an issue it has already recognized to be an open question, which lower courts have struggled to address without this Court's guidance. *Carey v. Musladin*, 549 U.S. at 76-77.

III. THE CONSTITUTIONAL VIOLATIONS WHICH OCCURRED HERE ARE LIKELY TO REOCCUR NATIONWIDE.

Bikers Against Child Abuse is an international organization, with a presence in 18 countries, including the approximately 200 chapters located

throughout 47 of the 50 United States. *See* Bikers Against Child Abuse Chapters, *at* https://bacaworld.org/chapters/ (last visited on Aug. 15, 2019). According to its Mission Statement:

> We desire to send a clear message to all involved with the abused child that this child is part of our organization, and that we are prepared to lend our physical and emotional support to them by affiliation, and our physical presence. We stand at the ready to shield these children from further abuse. We do not condone the use of violence or physical force in any manner, however, if circumstances arise such that we are the only obstacle preventing a child from further abuse, we stand ready to be that obstacle.

Bikers Against Child Abuse, Mission, *at* https://bacaworld.org/mission/ (last visited on Aug. 15, 2019).

Bikers Against Child Abuse highlight their court-appearance program as a key component of their mission. *See id.* A promotional video linked through some of the B.A.C.A. chapter webpages contains a dramatization of a court appearance, wherein the child witness explains to the court that he is not scared to testify against the defendant, because "my friends are a lot scarier than he is." *See*, *e.g.*, Bikers Against Child Abuse, Arizona Chapter Information, *at* http://arizona.bacaworld.org/ (last visited on Aug. 15, 2019) (linking *Bikers Against Child Abuse International*, https://www.youtube.com/watch?v=tuF3WqJUMKc&feature=youtu.be) at 5:03.

Notwithstanding any potential benefit and comfort the Bikers' mission provides to the children they serve, it appears from their website that court appearances like that which occurred in the instant case and in *Long v. State*, 151 So.3d 498 (Fla. Dist. Ct. App. 2014), may be occurring throughout the

country, with significant constitutional implications. With the Bikers wearing insignia displaying fists and declaring they are against child abuse, these court appearances combine both a message that the "burly" Bikers believe the defendant is a child abuser and that they are committed to fighting such abuse and doing whatever is necessary to protect the child witness they accompany. *Long*, 151 So.3d at 500. The possibility for juror intimidation in such a scenario is inescapable. *See id.* at 502, 504 (quoting *Cox v. Louisiana,* 379 U.S. 559, 562, (1965)) ("A fair trial is, fundamentally, a trial free from "influence or domination by either a hostile or friendly mob…. mob law is the very antithesis of due process"); *Carey v. Musladin*, 549 U.S. 70, 80 (2006) (Kennedy J., concurring) (quoting *Cox*, 379 U.S. at 562) ("The rule against a coercive or intimidating atmosphere at trial exists because 'we are committed to a government of laws and not of men.'")

Thus, this Court should grant the writ, because the problem it allows it to address is even more serious and widespread than that in *Musladin* or *Norris*. Without this Court's guidance, lower courts will continue to be divided in allowing Bikers Against Child Abuse, and potentially other organizations, to combine improper messages regarding guilt with universal symbols of intimidation and violence, in violation of defendants' rights to due process, confrontation, and a fair trial.[4] U.S. Const. amends. VI & XIV.

[4] The Bikers' conspicuous praying with and coaching the complaining witness here, and in other cases, may present closely-related compelling spectator-conduct issues also requiring this Court's attention.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted.

Dated: August 19, 2019

Respectfully submitted,

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Ivan Lee Vasquez

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

--ooOoo--

IVAN LEE VASQUEZ, *Petitioner*

vs.

THE STATE OF CALIFORNIA, *Respondent*

--ooOoo--

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

APPENDIX A

Unreported Opinion of the California Court of Appeal,
Fourth District, Division Three

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. IVAN LEE VASQUEZ, Defendant and Appellant.	G055378 (Super. Ct. No. 14NF4103) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Ivan Lee Vasquez of one count of a lewd act upon a child (Pen. Code, § 288, subd. (a)).[1] Defendant claims his rights to due process and a fair trial were violated by the presence of victim support persons at trial. We disagree and affirm the judgment.

FACTS

The Underlying Crime

In February 2014, when A.P. was 13 years old, she spent the days, and eventually moved in, with her grandfather in Anaheim. A.P. was having behavior problems at home and her grandfather wanted to help out.[2] Defendant rented a room from A.P.'s grandfather. Defendant and A.P. would converse in the kitchen, in the living room where A.P. slept, or in defendant's room.

A week or two after A.P. started spending the days at her grandfather's house, she was chatting with defendant in the doorway of his room and asked if she could borrow a jacket. He told her to come in and sit down, handed her the jacket, put his arms around her, and then placed his hands on her breast for about five minutes, before saying "sorry." A.P. never told anyone else about this touching incident until trial.

Two days later, A.P. and defendant were talking in the kitchen, and he picked A.P. up, pushed her against the wall in the hallway to readjust his grip, took her into his room, pulled off her pants and underwear, and had sex with her. No one else was

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[1] All further statutory references are to the Penal code.

[2] A.P.'s behavioral problems included getting kicked out of the Boys and Girls Club for threatening another child, outbursts, tantrums, and physical destruction. She had been expelled from schools and was known to exaggerate and seek attention. She also made allegations of physical abuse against her father, which he denied and the Orange County Social Services Agency found to be unsubstantiated.

home. A.P. told defendant to stop more than once, and kicked him, trying to get him off. A.P. did not tell her father or grandfather about what happened because she did not want them to hurt defendant.

The next day, as A.P. and defendant were talking in the hallway, defendant again picked A.P. up, put her on his bed, removed her pants, and had sex with her. This happened every day until A.P. moved out. After the first five times, A.P. stopped telling defendant to stop, because she believed it would not stop.

They would have sex at different times of day throughout the house. Sometimes they had sex late at night, when defendant's former fiancé was asleep in his room, or during the day in the bathroom. They always had sex the same way, with just their pants removed. She never saw his penis. A.P. did not remember any other details about the sex, including whether defendant used a condom, or ejaculated, or whether he touched her breast or vagina. She only remembered defendant having tattoos on his arm and legs, and did not identify a tattoo on his pelvis.

A.P. said she loved defendant and wrote him love letters. A.P. eventually told defendant's fiancé what was happening, who then told A.P.'s grandfather. A.P.'s father then took her back home. Two days later, A.P.'s father took her to Orangewood Children's Home, stating he could no longer care for A.P. due to her tantrums and violence toward her younger siblings. A.P. posted various, upsetting messages on defendant's former fiancé's social media accounts, including: "'I hope [defendant] leaves you and, you know, he's been there for me more than your fat ass has ever been there for me and I hope he goes to prison because I have ways of sending him there.'"

Shortly after coming to Orangewood Children's Home, A.P. told a social worker about one of the love letters she wrote to defendant. A.P. did not tell the social worker that defendant touched her because her father was in the room. The social worker discussed the case with another social worker, who said A.P. had admitted she lied about

the allegations and just had a crush on defendant. In September 2014, after arguing with defendant, A.P. told a social worker she had a sexual relationship with him.

The social worker interviewed A.P. on video, with police officers from the Anaheim Police Department watching behind a two-way mirror. A.P. told the social worker defendant raped her and that the pair had sex daily for two months.

Officers then placed a pretext phone call with A.P. to defendant. During the call, A.P. told defendant she had run away. A.P. asked defendant, "[d]o you want to be with me again?" and defendant responded, "[w]hen uh, when you become that age then yeah." A.P. then said, "I actually want to have sex with you again. Do you want to have sex with me?" and defendant responded, "[a]lways." When A.P. said a second time, "I want to have sex with you again," defendant responded, "Okay . . . When?" When A.P. asked defendant "[w]hy'd you have sex with me" he responded "[b]ecause we both wanted to." Defendant was arrested the day after the pretext call.

An information charged defendant with one count of a lewd act upon a child. (§ 288, subd. (a).) It further alleged the count involved substantial sexual conduct, pursuant to section 1203.066, subdivision (a)(8), and that defendant had served a prior prison sentence (§ 667.5, subd. (b)).

The Trial

A jury trial began in April 2017. When the prosecution began asking A.P. about her sexual relations with defendant, she asked for a break. When she returned from the break, A.P. requested for the first time that a support person accompany her on the witness stand. Prior to A.P.'s request, the parties had presumed the support person would remain in the audience. Indeed, defendant had moved in limine to exclude support persons. After some off-the-record discussion, the court stated: "[Defendant] has renewed his objection that was raised during 402 hearings. And although I am sensitive to [his] concern, the code does not appear to give me any discretion in this matter." The

court admonished the support person, a court-employed victim advocate, not to "coach the witness or . . . have communication with her without permission of the court." The court further determined "although the victim advocate may sit near the witness on the witness stand, [the court] asked the attorneys to position the victim advocate's chair to the side and behind the witness so that the witness will not be [tempted] to constantly look [over] her shoulder and look for some sort of guidance." When the court asked defense counsel if he agreed "that it appears to be a mandatory obligation that the court has to allow the victim advocate to accompany the witness," he responded: "I think given those guidelines as the court set out I am reluctantly comfortable with that."

During the same recess, defense counsel expressed his concern with "all these Bikers Against Child Abuse sort of people encircling [A.P.] and doing prayer circles, and it has come to the point where it is – it may be great support for [A.P.], it's also coming to a point where I think it's also sort of this intimidation tactic that's also sort of going on." The court clarified the prayer circles were happening "in the hallway during the break," and not in the courtroom. However: "a number of people came into the courtroom and accompanied the witness [A.P.] when she entered the courtroom. Some of them I saw when I was out in the hallway before we began proceedings this morning. [¶] They're wearing some sort of jean jacket type of what one might use in the biker vernacular 'colors' on the back of the jacket, what I saw was an acronym, and I think it was something like 'B.A.C.A.' and then at the bottom of it said 'Bikers Against Child Abuse.' I didn't see any identification on the front portion of their jackets to indicate that position. [¶] The court has been observing them during proceedings. They have been quiet, they have not obviously attempted to hold up any signs or photographs or create any disturbances."

The court indicated it was willing to give the jury an admonition to not be swayed by this, depending on whether defense counsel "tactically" wanted to call attention to it, but "[i]f they are encircling the witness or praying with her in the hallway, I don't know that I have any constitutional authority to tell them to stop doing that." Defense counsel indicated he wanted the jury to be admonished, "[b]ecause . . . they are out in the hallway with them and they are observing all of these behaviors." He was concerned because of the prayer circles: "[E]very time [A.P.] steps up they encircle her and they start talking to her and, you know, they start — the part that I heard was about how she should be answering. Not the substance, but, 'don't say "uh-huh," say "yes," because the court reporter' — basically reiterating what [the prosecution] said. [¶] But my concern is more sort of these action of encircling her sort of with their backs sort of facing out and the jury members walking by, you know, and them coming every time she comes in, every time she leaves they leave."

The court declined to give an admonishment at that point, stating, "I think it might be more prudent for me to consider the admonition upon defense request at the end of this witness's testimony, because I think that will give both counsel an opportunity to observe further whether there is any untoward behavior. At this point I haven't seen or heard anything from the defense that would indicate improper or untoward behavior." The prosecution then told the court, "we are asking that the individuals, Bikers Against Child Abuse, when there are breaks or recesses will actually move further down the hall or possibly around the corner so they're kind of out of the view of any jurors."

Later in the trial, the court admonished the jury as follows: "you will recall that during [A.P.'s] testimony there were a goodly number of spectators in the audience all wearing what looked like biker colors and on the backs of them it was very obvious to all of us that it was a logo captioned 'Bikers Against Child Abuse.' [¶] Both of the attorneys have asked that I admonish you that obviously that has nothing to do with this case. We don't want you to be swayed one way or the other because of their presence.

Courtrooms in America are open, anybody can come in and watch trial proceedings. We don't normally tell them what clothes to wear or not wear. I just want to make sure that all jurors are reminded of their obligation to base the verdict on the evidence and on the court's instructions and not be swayed by passion, prejudice, or sympathy one way or the other because of unrelated things such as that. [¶] If all jurors agree to follow that admonition please raise your hands. [¶] All jurors have indicated in the affirmative." The court asked the attorneys if they were "satisfied with the informal admonition," and they both indicated they were.

The jury returned a guilty verdict on the sole count, found the special allegation true, and defendant admitted the prison prior. The court struck the prison prior pursuant to section 1385, subdivision (c) and sentenced defendant to eight years in prison. Defendant did not move for a new trial. This appeal followed.

DISCUSSION

Defendant claims his rights to due process and a fair trial were violated because of the presence of a court appointed support person and of a group of spectators wearing "Bikers Against Child Abuse" on the bottom of their jackets at trial. His claims lack merit. We affirm the judgment.

Presence of Support Person

In prosecutions for violations of section 288, every prosecuting witness "shall be entitled, for support, to the attendance of up to two persons of his or her own choosing" while the witness testifies. (§ 868.5, subd. (a).) "Only one of those support persons may accompany the witness to the witness stand." (*Ibid*.)

Defendant's first argument on appeal concerns the presence of the support person that accompanied A.P. to the witness stand. Defendant contends his Sixth

Amendment right of confrontation and his due process rights were violated because A.P. was permitted to have a support person present at the witness stand while she testified without requiring the prosecution to make a specific showing such a support person was needed.[3]

Confrontation and Due Process

In considering constitutional challenges to the provisions of section 868.5, courts have generally found the mere presence of a victim advocate at the stand does not necessarily violate the defendant's constitutional rights. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214 (*Myles*).) In evaluating a due process claim, the court should consider "individualized variables" including the relationship of the support person to the witness, the location of the support person in relation to the witness, and whether the support person engages in any conduct which might influence the witness or the jury. (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1731-1732.) A defendant's rights are only violated if "the support person improperly interferes with the witness's testimony, so as to adversely influence the jury's ability to assess the testimony." (*People v. Spence* (2012) 212 Cal.App.4th 478, 514.)

Defendant argues "[t]he presence of a support person at the witness stand unfairly bolstered the witness's credibility." He relies on *People v. Adams* (1993) 19

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[3] Defendant also asserts the trial court erred because it believed it had no discretion under section 868.5, subdivision (a) to deny the request for a support person at the witness stand. Surely, the court has discretion to control the way the support person behaves and to preclude presence at the witness stand if the support person's conduct threatens a fair trial. But as we will discuss, nothing of the sort happened here. In the absence of any conduct threatening a fair trial, section 868.5, subdivision (a), by its terms, grants the prosecuting witness the right to have two support persons in the courtroom, but limits to one the number of support persons at the witness stand. The court correctly followed the command of the statute where the conduct of the support person was assuredly benign. Thus, even if the court believed it had the discretion to deny presence at the witness stand, it may well have been an abuse of discretion to do so in this case.

Cal.App.4th 412 (*Adams*), which stated the presence of a support person at the witness stand "has an effect on jury observation of demeanor" (*id*. at p. 441), which is an aspect of the Sixth Amendment right of confrontation. (*Id*. at pp. 437, 443.) *Adams* relied on United States Supreme Court authority, which involved not support persons but rather whether victims are permitted to avoid face-to-face confrontation with defendants by testifying behind screens or on closed circuit television. (*Maryland v. Craig* (1990) 497 U.S. 836, 856 (*Craig*) [remand for case-specific finding of necessity for closed circuit television]; *Coy v. Iowa* (1988) 487 U.S. 1012, 1022 (*Coy*) [screen violated confrontation clause, remand for prejudice determination].) *Adams* determined the trial court was required to make a showing of need before allowing the victim's father, who, according to defendant, abused the victim, to go to the witness stand as the victim's support person. (*Adams*, *supra*, 19 Cal.App.4th at pp. 443-444.) The victim's father was also a testifying witness. (*Id.* at pp. 426, 428.)

The dangers to a defendant's confrontation right presented in *Adams*, *Craig*, and *Coy* are not present here. A.P. testified in person, allowing for face-to-face confrontation. Her support person, a court-appointed victim advocate, was not a testifying witness. Furthermore, the record is devoid of any inkling the presence of A.P.'s support person impacted the jury's perception of A.P. or otherwise influenced her testimony. In fact, the court took precautions to place the support person behind A.P., so as to minimize her impact and to avoid the temptation for A.P. to look at the support person while testifying.

Showing of Need for Support Person

Defendant further relies on *Adams* for the proposition that a showing of need is required prior to allowing a victim advocate to sit with a testifying victim, and that a defendant's confrontation and due process rights are violated in the absence of such a showing. (*Adams*, *supra*, 19 Cal.App.4th at pp. 443-444.)

Adams is distinguishable on these facts for at least two reasons. First, the *Adams* support person was also a prosecuting witness, meaning that the applicable procedure was found in section 868.5, subdivision (b), not subdivision (a). Section 868.5, subdivision (b) requires the prosecution to show that a witness serving as a support person "is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness." Section 868.5, subdivision (a), applicable where the support person is not a testifying witness, does not require a showing of need, i.e., that will be helpful to the prosecuting witness. Because the *Adams* trial court did not require the showing under section 868.5, subdivision (b), that error made the discussion of constitutional issues pertaining to section 868.5, subdivision (a), dictum. As discussed above, A.P.'s support person was not a testifying witness, but a court-appointed victim advocate. Second, in *Adams*, unlike here, the record suggested the victim's testimony could be influenced by her father's presence, based on the fact that the father was accused of physically abusing the victim in the past. (*Adams*, *supra*, 19 Cal.App.4th at p. 434.)

Contrasting the *Adams* conclusion, many courts have found, based on the plain wording of the statute, that no showing of need is required when the support person is not a witness. (See, e.g., *People v. Patten* (1992) 9 Cal.App.4th 1718, 1727; *People v. Johns* (1997) 56 Cal.App.4th 550, 554-555.) Indeed, when the court suggested to defendant that under the circumstances it did not have discretion to refuse to allow A.P. the presence of a support person, counsel to defendant said he was "reluctantly comfortable with that." Defendant did not request a hearing on need or renew his objection to the support person. The court was not required to make a finding of need under these circumstances.

Finally, any alleged error regarding the support person was harmless under any standard. (See, e.g., *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1172.) The court instructed the jury pursuant to CALCRIM No. 200, "You must decide what the facts are. It is up to all of you and you alone to decide what happened based only on the

evidence [that has been] presented to you in this trial. [¶] Do not let bias, sympathy, prejudice, or public opinion influence your decision." Jurors were also instructed pursuant to CALCRIM No. 222 that evidence consisted of "the sworn testimony of witnesses, any exhibits admitted into evidence, and anything else I tell you to consider as evidence." The court gave CALCRIM No. 226 which advised jurors, in part, "You alone must judge the credibility or believability of the witnesses . . . . You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice that you may have." These instructions prevented any potential prejudice from the presence of the support person during A.P.'s testimony. (*Myles*, *supra*, 53 Cal.4th at p. 1215.) Moreover, there is no indication the support person did anything which might be misconstrued or deemed improper. Thus even if defendant was entitled to a hearing on need, which he did not request, or if the prosecution was required to make a showing of need for the support person, nothing in the record suggests that the failure to hold a hearing or to show need was prejudicial. Any error in allowing the victim support person to be present at the witness stand was therefore harmless.

Presence of Bikers Against Child Abuse

Defendant asserts the "conspicuous presence of 'Bikers Against Child Abuse'" violated his constitutional rights to due process and a fair trial.

"'[A] criminal defendant has the right to be tried in an atmosphere undisturbed by public passion.'" (*Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 831 (*Norris*).) "A spectator's behavior is grounds for reversal only if it is '"of such a character as to prejudice the defendant or influence the verdict,"' and the trial court has broad discretion in determining whether spectator conduct is prejudicial." (*People v. Winbush* (2017) 2 Cal.5th 402, 463 [trial court within discretion to deny defense request to exclude family members of murder victim silently crying during guilt phase of capital trial]; *Myles*, *supra*, 53 Cal.4th at p. 1215 [no error in presence of murder victim's wife

who "nodding in agreement with prosecution witnesses and crying in court while being comforted by support persons"].)

In *People v. Lucero* (1988) 44 Cal.3d 1006, the defense requested a mistrial after an emotional outburst came from the mother of a victim that addressed the evidence and the arguments of defense counsel. (*Id.* at pp. 1021-1022.) The trial court admonished the jury to disregard the outburst. (*Ibid*.) The California Supreme Court ruled: "The isolated outburst in this case was followed by a prompt admonition. For this reason, and because of the broad discretion afforded the trial court in cases of spectator misconduct, we find no abuse of discretion in the denial of defendant's motion for mistrial." (*Id*. at p. 1024.) The facts in *Lucero* concerned specific allegations of spectator misconduct bearing on the evidence introduced at trial. Even so, our high court determined the trial court's prompt admonition cured the misconduct. Here, the spectators merely sat quietly and wore clothing with "Bikers Against Child Abuse" on the back. Because the court admonished the jury to disregard their presence, under *Lucero*, the court did not abuse its discretion.

Similarly, in *People v. Houston* (2005) 130 Cal.App.4th 279 (*Houston*), the defendant claimed his rights to due process and a fair trial were violated by spectators wearing buttons and placards bearing the likeness of the murder victim. (*Id*. at p. 309.) The trial court admonished the jury that it should not consider the displays for any purpose. (*Ibid*.) The court denied a request for an evidentiary hearing, finding that it had admonished the jury regarding the issue, that the spectators had not committed misconduct, and nothing in the record indicated the jury was prejudiced by the spectators' conduct. (*Id*. at p. 311.)

Defendant relies heavily on *Norris*, *supra*, 918 F.2d 828. The *Houston* court distinguished *Norris*, cited by defendant. In *Norris*, the Ninth Circuit Court of Appeals found inherent prejudice in displays of buttons by courtroom spectators in the absence of admonitions to the jury. (*Norris*, at p. 830.) The *Houston* court distinguished

Norris, noting that in *Norris* the trial court had not admonished the jury to disregard the display. (*Houston*, *supra*, 130 Cal.App.4th at p. 316.) Here, unlike *Norris*, the court properly admonished the jury to disregard the Bikers Against Child Abuse spectators.

Defendant also relies heavily on a Florida decision, *Long v. State* (Fla.Dist.Ct.App. 2014) 151 So.3d 498 (*Long*).[4] In *Long*, "several individuals appeared briefly outside the courtroom, in the presence of four jurors, wearing vests adorned with the words 'Bikers Against Child Abuse' and then a number of those individuals attended the trial not wearing the vests." (*Id.* at p. 507 (dis. opn. of Rowe, J.).) The trial court questioned the jurors about the incident, excused one juror whose response was equivocal, and instructed the bikers not to wear their insignia in the courtroom and not to congregate near the jury. (*Id.* at p. 506 (dis. opn. of Rowe, J.).) The Florida District Court of Appeal determined that "actual or inherent prejudice resulted from the presence of the bikers at the trial." (*Id*. at p. 501 (lead opn. of Van Nortwick, J.) The dissenting opinion in *Long* is instructive: "The record is undisputed that the bikers did not engage in any conduct inside the courtroom to disrupt the trial. The record reflects that none of the bikers wore vests or other identifying insignia inside the courtroom. The trial court took precautionary measures and questioned the venire regarding the effect, if any, of their brief observation of the bikers in their vests outside the courtroom. The three jurors who remained on the jury after questioning all denied that their observations of the bikers would affect them. Finally, the court instructed the jurors not to permit sympathy or prejudice to affect their verdict. Simply put, there is absolutely no evidence in the record that the jurors in this matter were in any way influenced by the presence of the bikers before and during the trial. Indeed, the trial court, who was in the best position to monitor the atmosphere of the courtroom, found no actual or inherent prejudice as a result of the presence of the bikers in the hallway before trial or as a result of the presence

[4] We note *Long* is not binding on this court.

of the unidentified bikers in the courtroom during the trial." (*Id.* at p. 510 (dis. opn. of Rowe, J.).) The dissenting opinion in *Long* is persuasive. We decline to adopt the rationale of the majority opinion in *Long*.

The spectators in the present case had "Bikers Against Child Abuse" only on the bottom and the back of some of their jackets, so presumably the name of the group was not visible while the spectators were sitting in the courtroom. The group did not comment or engage in inappropriate behavior during trial. The trial court timely admonished the jury, who acknowledged it would follow the trial court's admonition. The court also instructed the jury, "You must not allow anything that happens outside of this courtroom to affect your decision." The prosecutor directed the group to engage with the victim down the hall and around the corner from where the jurors were sitting after the group's interactions with the victim were brought to the court's attention. After initially bringing the issue to the court's attention, no additional concerns were raised by either party, court staff, or any juror.

Furthermore, any purported spectator misconduct here was harmless beyond a reasonable doubt. (*Chapman v. State of California* (1967) 386 U.S. 18, 24.) The court admonished the jury to ignore the Bikers Against Child Abuse spectators and the record is devoid of any spectator misconduct. We presume the jury followed the court's admonitions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Under these facts, the mere presence of the Bikers Against Child Abuse spectators did not prejudice the jury's decision. "A defendant is entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1953) 344 U.S. 604, 619.) Defendant fails to present adequate grounds to reverse his conviction.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.

APPENDIX B

The California Supreme Court's Denial
of the Petition for Review of the Unreported Opinion

Court of Appeal, Fourth Appellate District, Division Three - No. G055378

S255456

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

IVAN LEE VASQUEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice