SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. LORENZO NEWBORN et al, Defendants and Appellants.	S058734 Los Angeles County Superior Court No. BA092268

APPELLANT NEWBORN'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of Los Angeles County
Hon. J. D. Smith, Judge Presiding

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DEATH PENALTY

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STATEMENT OF THE CASE

On March 15, 1994, appellant Newborn was indicted by the Los Angeles County Grand Jury for three counts of murder and six counts of attempted murder as follows:

Indictment No. BA092268 charged Newborn, Aurelius Bailey, Herbert McClain, Solomon Bowen, and Karl Holmes with the October 31, 1993 murder of Steven Coates, accompanied by personal firearm use allegations against

Newborn, Bailey, and Holmes, as well as a lying-in-wait special circumstance. Count 2 charged the October 31, 1993 murder of Reggie Crawford with the identical enhancement allegations. Count 3 charged the murder of Edgar Evans with the same enhancement allegations, plus a multiple murder special circumstance allegation. Count 4 alleged an attempted murder of Antwan Ayers; count 5 alleged the attempted murder of Lawrence Ayers; count 6 alleged the attempted murder of Kenneth Coates; count 7 alleged the attempted murder of Antone Prince; count 8 alleged the attempted murder of Lloyd Summerville; count 9 alleged the attempted murder of Robert Price; count 10 alleged conspiracy to commit murder, accompanied by seven overt acts:

1. That the five defendants met at the Huntington Memorial Hospital and discussed retaliation for the murder of Fernando Hodges.

2. During that conversation, an unnamed coconspirator in the presence of the five said, "Let's go get the guns."

3. At Huntington Memorial Hospital, a decision was made by the five to target Crip gang members.

4. At Pasadena Avenue and Blake Street, on October 31, 1993, unnamed coconspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip.

5. At approximately 10:30 p.m., the five caravanned in four cars to the area near the intersection of Emerson and Wilson

streets, and parked their cars in order to ambush numerous individuals believed to be Crips.

6. Newborn, Holmes, and Bailey left the cars and positioned themselves in bushes at or near 577 Wilson Street in order to ambush the intended victims.

7. Newborn, Holmes, and Bailey shot the victims while Bowen and McClain waited in getaway cars parked on Emerson Street. III CT 631-642.

On April 22, 1994, Carl Jones was appointed to represent Newborn; Elizabeth Harris was appointed to represent McClain, and Thomas Nishi was appointed to represent Holmes. III CT 754.

The parties proceeded with numerous pretrial motions, including cross-motions for severance of trial based on incriminating extra-judicial statements, IV CT 812, 821. On July 8, 1994, the severance motions were denied without prejudice. However, in June 1995, the trial court granted the prosecution's motion to first try Newborn, McClain and Holmes, with the trial of Bailey and Bowen to follow. IV CT 999-1000.

Jury selection began for Newborn, McClain and Holmes on July 20, 1995, V CT 1129, and on August 24, a Batson/Wheeler motion by the defense was heard and denied. V CT 1202. After jury selection was completed, V CT 1203, the court heard several in limine motions. The court granted the joint

defense request that speaking objection made during trial would be deemed to include state and federal constitutional grounds. V CT 1271.

The prosecution called its first witness on October 10, 1995, V CT 1272, and eventually rested on November 14, 1995, VI CT 1426. Defense witnesses testified on from November 15 through 27, CI CT 1429, 1453, and all parties rested on November 30. CI CT 1456.

The case was submitted to the jury on December 6, CT 1460. The jury deliberated for more than two weeks, asked for the re-reading of important testimony, including various parts of Newborn's alibi testimony, as well as for clarification of certain jury instructions. VI CT 1478, 1479. On December 22, the jury found Newborn guilty of the first-degree murder of Stephen Coates in count 1, but found the personal firearm use allegation to be not true. CT 1590. Identical verdicts were returned as to the murders of Reggie Crawford and Edgar Evans in counts 2 and 3. Each of the murder verdicts was accompanied by a true finding on the lying in wait special circumstance allegation, VI CT 1591, as well as a true finding on the multiple murder special circumstance allegation. VI CT 1593.

Newborn was also found guilty of the attempted first-degree murders of Antwan Ayers, Kenneth Coates, Antone Prince, and Lloyd Summerville in

counts 4 – 8, again accompanied by a not true finding on the personal firearm use allegation. VI CT 1594-1597. Finally, Newborn was found guilty of conspiracy to commit murder, and only overt act #3 was found true ["That at Pasadena Avenue and Blake Street, on October 31, 1993, at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen, and unnamed conspirators fired numerous rounds from a 9mm gun at or hear the residence of an individual believed to be a Crip." VI CT 1598.

McClain was convicted of the first-degree murders alleged in counts 1 – 3, accompanied by lying in wait special circumstance allegations, but no firearm use findings. VI CT 1600 et seq. The lying in wait and multiple murder special circumstance findings were found true. He was also found guilty of the four attempted murders that Newborn had been convicted of, plus the attempted murder of Robert Price alleged in count 9 against McClain alone, accompanied by a personal firearm use as to count 9. McClain was also convicted of conspiracy, again with a true finding only as to overt act #3.

Holmes was convicted of first-degree murders alleged in county 1 – 3, accompanied by true findings on the personal firearm use enhancements, and true findings on the lying in wait and multiple murder special circumstances. He was also found guilty of five counts of attempted murder [Antwan Ayers,

Lawrence Ayers, Kenneth Coates, Antone Prince, and Lloyd Summerville], with true findings on the personal firearm use allegations. He was convicted of the conspiracy to commit murder in court 10, also with overt act #3 found true. IV CT 1611 et seq.

Following various motions, the penalty trial began on January 22, 1996, IV CT 1815, but the jury was unable to reach a verdict as to any of the defendants, and a mistrial was declared on February 9, 1996. IV CT 1888.

McClain's counsel was permitted to withdraw for medical reasons, and the penalty re-trial was continued over the objections of Newborn and Holmes so that replacement counsel could prepare. VII CT 1981. Voir dire eventually began on August 12, 1996, VIII CT 2056, with McClain representing himself. The trial began on October 2, 1996, VIII CT 2137, and the case was submitted to the jury on October 22. The jury reached a verdict as to one defendant, presumably not Newborn, because the jury subsequently requested a read-back of his mother's testimony in mitigation. VIII CT 2228.

On October 30, 1996 death verdicts were reached as to all three defendants, VIII CT 2284, and were announced in court the following day. VIII CT 2290.

On January 21, 1997, the trial court denied defendants' motions for new trial, denied their motions to modify under Penal Code section 190.4(e), and sentenced all to death. IX CT 2351, et seq. Newborn's commitment is found at IX CT 2439.

STATEMENT OF FACTS

A. The Prosecution's Case.

1. The shooting of Fernando Hodges on the evening of October 31, 1993.

Aleta Bergstrom, a Pasadena paramedic, testified that on October 31, 1993, at 7:17 p.m., she responded to an emergency call at the Community Arms apartment complex. There, she and her partner, Chuck Legg, found a male "near death, dying of multiple gunshot wounds" near the basketball court. 14 RT 1141. They attempted CPR, but he had blood coming from bullet holes in his head. 14 RT 1143. She identified photographs of the individual, Fernando Hodges, whom they took to Huntington Memorial Hospital, arriving at about 7:45 p.m. 14 RT 1145.

At the hospital, she saw other people arriving in the visitor's parking lot across from the ambulance entrance, including "young males dressed in baggy attire," all of whom "seemed to be upset, like maybe they were accompanying

our patient, or friends or family of our patient." 14 RT 1145. She advised hospital security, which is standard practice "if we suspect it is a gang-related problem." 14 RT 1146.

Derrick Carter testified that he is a Pasadena police detective and a gang violence specialist. 14 RT 1153. He was called on October 31, 1993 to investigate the shooting of Fernando Hodges, and he eventually arrived at the Community Arms, where he saw Fernando Hodges being treated next to the basketball court. As a gang expert, he initially focused on the Raymond Avenue Crips as likely perpetrators. 14 RT 1160. Detective Carter had had numerous prior contacts with Fernando Hodges, who belonged to the P-9 gang. Detective Carter was also familiar with Robert Lee Price, who was affiliated with the Raymond Avenue Crips and who had been shot three days before. 14 RT 1162. He was shown a photograph of five individuals, People Ex. X-4, and he identified two of them as Hodges and appellant Newborn. Carter also identified Alonzo Hamilton, Ivan Warren, and Carlos Clayton in the photograph.

Carter also examined People's Exhibit 6, a photograph of a bandana with numerous names on it, nine of which he identified as members of the P-9 gang. Detective Carter identified Alonzo Hamilton as appellant Newborn's brother,

also affiliated with the P-9 gang. Laward Looney was another P-9 gang associate, as were "T Crazy" (Tyrone Anderson) and Cornell Daniels. 14 RT 1170.

Detective Carter said the P-9 gang members and the Raymond Avenue Crips had previously made an attempt to get along, but currently the "Raymond Avenues still consider P-9s Bloods." He testified that the P-9 gang originated on Park Street, and marked on the map the Park Street location, the Community Arms complex, and the Huntington Hospital. 14 RT 1172.

Detective Carter testified that in his experience as a gang expert, he understood the phrase "let's ride on someone" or "let's ride" to mean "to basically attack them." He also understood the phrase "putting in some work" to mean "to go out, represent your gang and attack rival gangs." He opined that assuming a P-9 gang member had been shot, and that a Raymond Avenue Crip was suspected, that the P-9s would "ride on someone," i.e., the Raymond Street Crips, in retaliation. 14 RT 1174.

Detective Carter acknowledged that it was not rare that people who were not gang members associated with P-9 gang members because "Pasadena is a small community," and "sometimes it's family." 14 RT 1178.

2. The Gathering at the Huntington Memorial Hospital after the Hodges' Shooting.

Robert Taylor, a security officer at Huntington Memorial Hospital, testified that he was serving an 11:00 a.m. to 11:00 p.m. shift on October 31, 1993. 15 RT 1190. At 7:38 p.m., he received notice of a shooting and a "code yellow," which means "incoming trauma." He went to the emergency room area where he found out that it was a gunshot wound, that the shooting was gang-related, and that there were additional visitors coming along with the gunshot victim. 15 RT 1191.

By 7:45 p.m., he saw people gathering inside the emergency room area—"what appeared to be family members and friends come into the waiting room asking about the patient." 15 RT 1193. A second group gathered outside the emergency room, and some of the family members and friends went out to them and conversed. One person seemed to be "in charge," i.e., "the focal point," by which he meant that "it is like everybody would gather around him and then they would talk and then some people would leave and others would come and talk to him." 15 RT 1194. He could not recall whether the person who appeared to be in charge came into the emergency room area. The majority of individuals who spoke with this person remained outside and never came into

the emergency room. This involved 20 to 30 people, and "the large majority of them had coats and sweatshirts that were hooded." 15 RT 1195.

On cross-examination, he stated that the individual he described as the "focal point," was an "older person." 15 RT 1208. Taylor described most of the individuals as being in the age range of 18-25, but that the older person who seemed to be in charge "could be in their 40s." 15 RT 1214.

Taylor acknowledged that he told the police that the group outside "appear[ed] like military troops waiting for orders." 15 RT 1216. By this, he meant that they seemed "organized, orderly, and well disciplined." While this gave him an "uneasy feeling," he did not make a log entry or otherwise memorialize it. 15 RT 1217.

Horace Carlyle testified that on October 31, 1993, he was also a security officer at Huntington Memorial Hospital, and was in charge of the security officer's daily log. 15 RT 1246. He said the camera depicted in Ex. X-G is "worthless" because "it doesn't record anything," is "stationary," and "at the time this incident occurred there was a plant in the way." 15 RT 1248. He said that the camera existed for the sole reason of "intimidation." There were a couple of video monitors that were unmanned except for Saturday and Sunday, but those monitors did not record anything. 15 RT 1276; 1285.

In the log, there was a note at 8:45 p.m., "crowd control due to GSW in room 6. Family and friends in the waiting area. Code 4." 15 RT 1250. During the evening, family members tried to "crash through the barrier door into the treatment area," and Carlyle "very kindly asked them not to do it." He was turning people away who claimed to be family members because he "had to make sure if the patient was safe." 15 RT 1252. Carlyle also saw one group of people wearing baggy attire that "were probably some type of gang relationship," and other people who were "just the normal people who come to the shootings, you know, friends, relatives, would-be friends." 15 RT 1254. The younger people "were very unified," were "quiet," and left by 9:00 p.m. or so. 15 RT 1255.

LaChandra Carr testified that she was acquainted with the defendants. 18 RT 1802. During the evening hours of October 31, 1993, she was at her grandmother's house when she paged Solomon Bowen, whom she was dating. 18 RT 1806. Bowen picked her up at her grandmother's house, 18 RT 1807, told her that Fernando Hodges had been killed, and asked if she wanted to go to the hospital with him. She said no, as she barely knew Hodges, 18 RT 1812, and Bowen dropped her at his house.

She then testified that "actually he wouldn't let me go," acknowledging that she had just said that she did not want to go, but explained "if I did want to go, he wasn't going to let me." 18 RT 1813. She stayed in Bowen's house with his mother, talked on the telephone, and watched television. She never saw him again that night. Her parents picked her up the following morning from Bowen's house and took her home. 18 RT 1816.

She acknowledged that she had testified before the Grand Jury that she was at Huntington Memorial Hospital that night, and that she saw some of the defendants there. 19 RT 1837. She was shown photographs of several people, and acknowledged in her grand jury testimony that Bowen, Newborn, Holmes, and Bailey were at the hospital, while McCain was not. When asked whether she was at the hospital, she answered "the truth is I really wasn't there," and explained her grand jury testimony by saying "I knew they were there from Solomon [Bowen] when he called me from the hospital." 19 RT 1839.

Carr said she was not afraid of testifying, but did not want to have anything to do with it, and that she can "only tell you what I hear." 19 RT 1840. She acknowledged telling the police that "My mama's house is not getting blown up and my brothers and sisters are not dying for nobody." RT 1841. She

said that appellant Newborn had never harmed her and "never did nothing to me." 19 RT 1852.

She also acknowledged telling the police in December 1993 that her then boyfriend Solomon Bowen was having trouble because of Fernando Hodges' death, because it was Solomon who had dropped Hodges off at the Community Arms Projects just before he was killed. 19 RT 1867.

3. Testimony regarding the charged crimes on October 31, 1993.

a. The surviving victims.

Lloyd Summerville testified that he was 14 years old at the time of testifying and was 12 on October 31, 1993. He recalled the day because some friends were killed after a birthday party at the house of a friend named Stephanie. 15 RT 1289. He went to the party with the Ayers brothers and left with them, as well as Mickey Polk, Robert Derieus, Eddy, Reggie, Steven, Kenny, and Antwan. 15 RT 1291. The group walked to the corner of Villa and Wilson and stopped at George's Market. Some members of his group were "playing on the phone." The market was closed. They stayed there for about 10 minutes.

Something unusual happened when "Reggie almost got hit by a car." 15 RT 1292. Reggie was standing right by the crosswalk and when a car came by, he jumped back onto the curb. He made a gesture with his palms up, conveying "what's happening" to the male Hispanics inside the car. 15 RT 1293. After that car passed, he saw four or five other cars pass that were "packed full" of Black males going straight down Villa Street.

At some point, Mickey and Robert split off in one direction, and Lloyd and the rest went in a different direction. 15 RT 1298. They walked north up Wilson. Reggie Crawford had a black bandana around his head, as did some of the others.

As he traveled up Wilson, he heard shots, although he did not recognize them as shots at first. 15 RT 1300. "It was like a single boom and then a whole bunch of shots started firing." He saw little blue sparks pass by his foot and began to run southbound. He ran to a house that had a gate, as did Antwan Ayers. Lloyd hid behind the brick barbeque pit. Antwan Ayers came up to him and said that he had been shot, but Lloyd did not believe him because he had been able to hop a very tall gate. Lloyd then went back to see what was going on, and saw a lady in a car with her boyfriend, screaming. 15 RT 1303. He

heard some 20 popping or booming sounds, and saw his friends on the ground shot.

Kenny Coats was screaming, "They shot my brother," 15 RT 1308, and Eddy Evans was shot and bleeding as well. 15 RT 1309. Lloyd ran to someone's house and asked to use the phone to call the police, which he did, and then called his mother. 15 RT 1310. Lloyd testified that he saw injuries to Antwan Ayers' hand, injuries to Lawrence Ayers' leg, and an injury to Anton Prince's thigh.

Antwan Ayers testified that he is 15, and that he attended Stephanie's birthday party on October 31, 1993. He echoed Summerville's testimony that a group of several youths left the party, stopped at George's Market, fooled around with telephones, 16 RT 1463, and walked up Wilson with a smaller group. He had a blue banana that night, and someone else had a black one. 16 RT 1466. While walking on Wilson, Reggie Crawford saw a girl that he knew in a car with her boyfriend, and they spoke. 16 RT 1468. They walked a little farther, and Steven Coats' mother pulled up, chatted, and the group walked on. Antwan then "heard a shot and then we just heard a lot of shots that sounded like firecrackers going off, like a pack of firecrackers." 16 RT 1471. He thought it was firecrackers, but noticed a lot of sparks coming from his left side.

He did not realize that it was gunfire until he saw Steve Coats fall, then Reggie fall, at which point he started running. He ran two houses back and hopped a gate, where he found Lloyd Summerville.

After a minute or so, he walked back and saw two of his friends, Reggie and Steven, lying on the sidewalk. He took the black bandana off Reggie's head as well as his own bandana, and put them in a bush. 16 RT 1475. Antwan showed a scar on his right hand from where a bullet went in and where he had surgery. He did not see who fired the gun or any cars that drove by.

Lawrence Ayers testified that he was currently 16 years old, had attended Stephanie's birthday party with his brother and a number of friends, 18 RT 1754, and were walking up Wilson when he heard sounds coming from the bushes and ducked down. He saw sparks, first thought they were firecrackers, then realized that they were gunshots and ran. 18 RT 1760. After he ran away, he heard more gunshots. He came out of his hiding place and saw a person standing with light-colored clothing. It was too dark for him to determine the race or sex. 18 RT 1763. He had apparently been hit in the second round of shots, and was struck in his left calf. 18 RT 1765. He did not see who did the shooting and could not identify any car involved. 18 RT 1766.

Kenneth Coats testified that he was 15 and also attended the party on Halloween 1993 with a number of his friends. They walked to the party, trick-or-treating along the way. 31 RT 3225. After they left the party, stopped at George's Market, and at one point saw four cars roll by, slowing down as they passed the boys. 31 RT 3229. The occupants of the cars "gave us like a mad dog or a hard stare looking at us." 31 RT 3236. He thought he saw one occupant make a "P-9" hand sign. 31 RT 3258

As they were walking up Wilson, they heard somebody say "Now, Blood," and then shots rang out. 31 RT 3248. He saw Eddie Evans holding his stomach and crawling away. 31 RT 3251. He and Lawrence Ayers ran and hid in some bushes, saw a family of skunks nearby, and ran down the street. 31 RT 3252. He then went back to the scene of the shooting, where there was screaming and commotion.

At the time of the shooting, he did not see any faces, but did see an outline of someone who was tall and had braids. 31 RT 3255. As he was picking up Lawrence Ayers, he saw the gunman running up toward Orange Grove. Kenneth described a second individual as being short and husky, but without a lot of hair. 31 RT 3266.

b. Other eyewitnesses.

Roger Boon testified that on Halloween 1993, he was at a friend's house passing out candy on Wilson Street. 18 RT 1770. He heard a series of rapid gunshots, and then a series of slower ones that sounded like they were coming from a second weapon. 18 RT 1773. He was standing on a sidewalk in front of his friend's house and saw muzzle flashes up the street, about a block and a half away. A few seconds after the shots rang out, he saw headlights from a car driving in his direction, and motioned to all his friends to go back into their house. 18 RT 1774. After the first car got within a half block of him, he noticed there was a second one following at approximately 15 miles an hour, and "they seemed to be together, in close formation." The first car was "probably like a Nissan, definitely a foreign car," "like a 240ZX or something." 18 RT 1778. The other car was also foreign, a four-door model. He thought the second car was gray or two-toned in color, and that the first one was maroon or dark red.

Boon stood on the sidewalk and watched the cars go by even though he figured they might have been involved in the shooting. The first car had two people in front and three in the back. In the second car, he only noticed two people. 18 RT 1782. It appeared that the driver of the first car gave him a thumbs-up sign as he drove by. 18 RT 1783. Mr. Boon returned the thumbs-up

sign, and facetiously said "thanks for not killing me. Have a nice day." 18 RT 1784.

He then turned to see if his friends were all right, and then heard people shouting and screaming down the street. 18 RT 1786. He and his friend Kim drove six or seven houses down to see what was going on, saw two people lying on the ground, and attempted to tend to the wounded. He had some firearms training and estimated that of the total 12 gunshots he heard, some came from a 9-millimeter and some from a .38. 18 RT 1795. He was subsequently shown photographs of various individuals but was not able to identify anyone. 18 RT 1798.

Kimberly Rea testified that on Halloween 1993, she was visiting a friend, Bill Voorhes, on Wilson Street, along with Roger Boon and others. 22 RT 2177. She and her friends had been giving out candy to Halloween trick-or-treaters and sometime before 11:00, she and her friends were standing around their cars getting ready to go home. They heard shots fired from down the street, "a real steady boom, boom, boom, boom, boom, boom from one gun and then like half a second and then another gun started." She noted that "you could tell the difference between the two." 22 RT 2179. She looked down the street, did not see any flashes of light or anything, and moved back to the sidewalk. She then

saw the headlights go out on one car that pulled over to the side, and then the headlights came on in two cars that were moving toward her. She was situated about two and a half or three blocks from where the shooting occurred, and saw some shadows moving around but could not discern any individuals. 22 RT 2183.

As the two cars approached, Bill Voorhes said, "This is kind of dumb. We don't know if these are the shooters or not. Why don't we go inside." 22 RT 2185. However, she and Roger stood on the sidewalk and watched the cars go by. One guy in the car saw them and gave a thumbs-up sign out the window. All she could tell was that it was a Black male. She did not get a good look at the first car but did with the second. The second car was tan or silver, a "blocky, four-door, like a Toyota maybe." 22 RT 2188. The cars passed, two left at the next street, and then she heard screams from down the street. She and Roger hopped into her car and drove to the scene of the shooting, where she tried to help. 22 RT 2190.

Gabriel Pina testified that on Halloween 1993 at around 10:00 p.m., he was walking his dog on Mentor Street, going northbound. 25 RT 2636. This was between Emerson and Orange Grove. He was accompanied by his girlfriend, Lillian Gonzalez.

While walking northbound on Mentor, he heard cars turn, and saw them proceeding northbound at a high rate of speed for the area, maybe 45 to 50 miles an hour. 25 RT 2639. There were four cars "all in one line and going northbound." 25 RT 2640. He thought the cars only had drivers and no passengers. 25 RT 2642. The cars made a right onto Orange Grove. Pina made a right-hand turn onto Orange Grove and looked to see if he could still see the cars, but could not. He walked across Orange Grove and then turned right onto Catalina, where he noticed some cars parked with people standing outside the cars. As he was walking along, he saw one of the cars drive toward him, a newer model with tinted windows and a two-door import. 25 RT 2646. The car pulled up next to them, paused, and then reversed down the street to where it originally started from, close to Emerson. The car then approached them going northbound and at that time, he noticed the driver looking out the front windshield. The car windows were darkly tinted, so to see someone inside "you would have to either roll down the window or look where the car is not tinted, and that was the front windshield." 25 RT 2647. The driver leaned forward over the steering wheel to look at Pina and Gonzales, and Pina looked back down from some 15 or 16 feet away. 25 RT 2648. The driver was "lit...up

pretty good by the street light." Pina could not recognize the driver in court, however. 25 RT 2649.

He then saw a group of cars on Catalina with people standing around and after some conversation, the people got into the cars. Someone honked a horn and said "hey come on." 25 RT 2655. Two of the cars crossed Emerson toward Wilson. He then heard shots from "a little gun and a big gun." 25 RT 2658. Pina told Gonzalez to go home with the dog. He then got in his own car and drove back to the crime scene. 25 RT 2662.

Sometime afterward, he was watching a television program about the Halloween murders and that some suspects had been captured. He looked at the television to see if anyone looked familiar, and he did recognize one face from the first lead car. He was unable to describe the hair features in words. 25 RT 2652. He was shown Ex. 17A and B and recognized photograph #5 in 17B and #2 in 17A. 25 RT 2653. He also looked at Ex. 20 and believed that he saw the person depicted in photograph E (McClain) peer out of a car. 25 RT 2654.

After Pina saw the television program, he went to the Pasadena Police Department where he was shown the photograph packs. 25 RT 2664.

He identified Karl Holmes as the person he saw running westbound on Emerson after the shots had ended. The person ended up getting into the

second vehicle. 25 RT 2665. He tentatively identified McClain as the person he saw peering over the steering wheel on Catalina. 25 RT 2666. He described his hobby of flying model glider airplanes, which requires visual acuity to keep track of them in flight. 25 RT 2679.

Pina expressed a concern about retribution for his testimony.

Lillian Gonzales testified that on October 31, she was with her boyfriend, Gabriel Pina, when they went for a walk sometime after 10:00 from his house on Mentor Street near Orange Grove. 22 RT 2219. As they were talking north on Mentor, she saw two cars speed by and make a right turn on Orange Grove. All the occupants were Black. 22 RT 2222. A few minutes later, as she was walking southbound on Catalina, two cars pulled up against the curb, honked their horn, and called some other people that were walking out of a driveway. She thought they were two of the same cars that she had seen on Mentor. One driver stepped out of a car and said "Come on. Let's go. Hurry up." 22 RT 2225. Coming out of the driveway was a small group of Black males. One of the people who got out of a car was dressed in all white, perhaps a costume. 22 RT 2229. The people all got into cars and drove away. Shortly after that, she heard gunfire that sounded like it was coming from Wilson and Emerson. 22 RT 2231. She looked toward Wilson and saw a Black male get into what she

thought was a Nissan Sentra. The person was wearing a trench coat and was running from Wilson. She said to Gabriel, "let's go," and they headed back toward Mentor Street. 22 RT 2234. As of Halloween 1993, she acknowledged that she was extremely nearsighted. 22 RT 2263.

Joe Colletti testified that on October 31, 1993, he lived at 1023 Emerson in Pasadena. 19 RT 1902. He was alone at home watching television when he heard gunfire sometime between 10:00 and 10:30. He looked out from his front porch, did not see anything, and returned to his house. 19 RT 1904. He "kind of shrugged it off, thinking somebody had shot a round of shots in the air," but after he was back in his house he heard screams. He walked back through his living room and looked out the window facing Emerson and saw a group of people, somewhere between four and six, walking on the north side of Emerson. They had turned the corner at Catalina, walked north, and got into a car that was parked there. 19 RT 1905. It appeared to him to be a smaller car, and "there was more people than what would normally fit in the car." The car turned and proceeded west on Emerson. He estimated that about a minute passed between hearing the shots and seeing the group pass by. 19 RT 1906. He recalled that one of the persons seemed to be dressed in something that was white or a very, very light color. 19 RT 1911.

Detective Korpal was recalled and testified that he interviewed Mr. Colletti at abound 6:45 on the morning following the shootings. 19 RT 1912. There were areas of inconsistencies between Colletti's testimony and his statement on November 1, 1993. In his statement, Colletti said he heard noises on the west side of his home, and looked out his window to see if anyone was around his truck in the driveway. He heard voices that he thought were from Black men. He then saw a small dark car back up onto Catalina Street and drive eastbound on Emerson out of his view. 19 RT 1913. Following that, there was a lull and then gunshots.

James Mathis testified that at about 10:15 on Halloween 1993, he was driving on Mountain Street in Pasadena when he stopped at a light at Marengo. Four cars coming north up Marengo approached the intersection as the light turned yellow. However, the four cars sped around the corner after the light had turned red without stopping. 20 RT 2001. All four cars had more than two passengers, all of whom were young Black males. Three of the cars were small foreign types, like a Toyota Camry or Honda Accord. The fourth car was a white Camaro with an "Iroq" or "Z28" on the side. Mathis testified that the occupants of the various cars were "kind of jumping around in the cars and

looking between the different cars and acted like they were all together." 20 RT 2002.

c. Forensic evidence.

Dwight Van Horn testified that he is a Firearms Examiner for Los Angeles Sheriff's Department. 26 RT 2795. He examined a number of live rounds, shell casings, and projectiles in this case. He found several .38 special caliber wad cutter ammunition, made by PMC Company. 26 RT 2802. He also identified item #78, part of People's Exhibit 61, found at a different crime scene, as also a 38 special wad cutter by PMC Company.

He determined that Exhibits 5—18, 21, 84—102, and 130 were all 9-millimeter cartridge cases, and that Exhibit 130 was a 9-millimeter bullet. 26 RT 2804.

The bullet that was recovered from Reggie Crawford was either a .38 or .357 caliber revolver bullet. The bullet recovered from Stefan Coats was the same type, but they were not fired from the same gun. "So even though we have the same general characteristics for these two victims, it was two different guns that killed these two people...it was two different guns responsible for the bullets from two different coroner's envelopes." 26 RT 2809.

The 9-millimeter bullet fragments he examined, items 32, 36, and 58, were fired from the same 9-millimeter handgun. 26 RT 2812. In his opinion, there was one 9-millimeter gun that fired all the casings except one that was pretty banged up. 26 RT 2817.

Karla Taylor testified that she is a Senior Criminalist with the Los Angeles Sheriff Department, assigned to latent fingerprint identification. 27 RT 2858. In November 1993, she examined three long pieces of pipe from a chain link fence near the Emerson/Wilson site. 27 RT 2859. There were no fingerprints on the pipes. She also checked numerous shell casings for fingerprints, found none being usable, but has never found a usable one in the more than 1,000 she checked. 27 RT 2862.

Frederick Hirigoyen testified that he is a field identification technician for the Pasadena Police Department, and was assigned to the scene of the shooting at Pasadena and Blake Street on October 31, 1993. 20 RT 2072. He took a number of photographs of the bullet casings that were found on the ground. 20 RT 2078. He also obtained a projectile from the inside of an air conditioning unit across the street. 20 RT 2080. He identified numerous photographs of items found at the shooting, including .38 special wad cutter ammunition and 9-millimeter shell casings. 20 RT 2083.

David Miranda that he is a Field Identification Specialist with the Pasadena Police Department, which involves crime scene investigation. 24 RT 2495. On Halloween 1993, he was called out to investigate the crime scene on Wilson Avenue in Pasadena. 24 RT 2497. He took some plaster shoe casts along Emerson Street. 24 RT 2500.

Joe Perez, Miranda's crime scene investigation partner, also testified regarding his efforts at the Wilson Avenue crime scene. 24 RT 2506. He photographed some of the victim's injuries and various pieces of evidence.

Kevin Roon testified that he was a Field Investigation Specialist for the Pasadena Police Department, and that he also worked the 500 block of N. Wilson Avenue on October 31. 24 RT 2514. He photographed and picked up numerous shell casings. At the request of Detective Korpal, he tried to locate latent prints on the shell casings and live rounds that he found at the scene through a process known as Super Glue Fuming. 24 RT 2527. He was unable to develop any latent prints. 24 RT 2529.

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4. The shooting near McFee's residence at Pasadena and Blake.

a. Eyewitness testimony.

Willy McFee testified that in the early evening of October 31, 1993, he was at home. 23 RT 2370. He was having a barbeque with his son and other guests, including Charles Baker, Wendell Jefferson, and James Riley. At one point, Charles Baker told him there was someone at the door, and McFee encountered Newborn. 23 RT 2374. Appellant Newborn said, "The reason I stopped, I'm here to see my brother. My brother's car was out there," referring to Wendell. 23 RT 2375. Wendell then went outside accompanied by another person. McFee went back to the kitchen, and Wendell came back in. 23 RT 2377. Wendell told McFee that "They want to speak to you," McFee asked "for what," and Wendell said he did not know.

McFee went outside to talk with appellant Newborn who was accompanied by Bowen. 23 RT 2379. Newborn was asking about a neighbor called Dion, known as Crazy D. 23 RT 2380. McFee said he did not know where Crazy D lived, but did know that Crazy D was reputably a Raymond Crip. Newborn said he was looking for Crazy D because a friend of his had

been killed. Appellant Newborn was "kind of sad, shedding tears and all." 23 RT 2382.

McFee thought that Bowen was being like a bodyguard because he never said a word. He thought both were armed "from the bulge in their clothes." McFee expressed his condolences because he had known Fernando Hodges. 23 RT 2384. McFee said he had a half-brother who had been killed, named Crazy T, told Newborn that he did not gang bang, and Newborn said "okay, that's cool. That's it." 23 RT 2385.

McFee did not believe that Newborn accepted his disclaimer of knowledge of where Crazy D. lived. McFee started back toward the house as Wendell and James were coming out. At that point, "four guys started running down the street." 23 RT 2386.

McFee did not see any of the faces of the four men running, and they were all wearing sweat tops with hoods. 23 RT 2397. As he saw the four people running down the street, McFee called to Wendell and asked what was going on, and Wendell said "they're on a mission," at which time Wendell and James dropped to the pavement. 23 RT 2400.

McFee went into the house and called a friend, Michael Ray, and told him to warn Dion (Crazy D.). 23 RT 2402. Dion was included in the call, and

McFee told him to look out. Shortly afterward, McFee heard gunshots. 23 RT 2402. McFee heard several shots coming from the area of the railroad tracks and several shots coming from Crazy D.'s house. 23 RT 2403.

He also reported a shot fired toward his own house because a bullet lodged in his air conditioner. 23 RT 2404. In the house with him were Charles Baker and a woman named Sheree.

McFee acknowledged two prior drug convictions, and that he was awaiting sentencing on a case that carried a sentence of six to nine years. He denied receiving any money for his cooperation in the case, 23 RT 2411, but acknowledged that District Attorney Myers had told him he would mention his cooperation in this case to his sentencing judge in January 1996. 24 RT 2426.

On cross-examination, McFee was asked whether he was familiar with DeSean Holmes' reputation in the community for telling the truth, and McFee responded "I guess he spoke up and said the truth. I don't know." He then claimed that Holmes had lied about McFee selling drugs out of his home. 24 RT 2433.

McFee denied saying in his April 27, 1995 police interview that the first shots he heard were right in front of his home. 24 RT 2470. He denied ever hearing gunshots in front of his own house. 24 RT 2471.

When asked what his hopes were for his sentencing, McFee stated "For a year and a half my life has been threatened for no apparent reason, for nothing, for something I supposed to have said and I never had said." 24 RT 2490.

Charles Baker testified that he was living at Willy McFee's house at 525 Pasadena Avenue in October 1993. When he heard gunfire during Halloween evening in 1993, he "hit the floor, like everyone else." 29 RT 3037. He thought he heard three different weapons and a total of 30 to 40 rounds. 29 RT 3038.

The following day, he checked the premises and noticed there was a bullet hole in the air conditioning unit that sat on the west side of the house. 29 RT 3041. He noticed other casings as well in his driveway and across the street. A week or so later when Detective Korpal was back in the area, he mentioned the casings he had found and pointed out the hole in the air conditioning unit. 29 RT 3045. On cross, Baker impeached McFee and said that McFee never went outside. 29 RT 3058. He then modified this to say that perhaps Wendell and McFee did go outside for a short period of time. 29 RT 3059.

Detective Korpal was recalled and testified that he returned to the Blake and Pasadena Street area on November 10, 1993 regarding the October 31 shooting. He subsequently contacted the people who lived in the house that had

the air conditioning unit, Mr. McFee, and Mr. Baker. 20 RT 2099. Overall, approximately 19 casings were recovered from the October 31 shooting. 20 RT 2106. Detective Korpal had a conversation with Willy McFee about what had transpired at his house on October 31, 1993. Korpal also said he was familiar with a Crip gang member named Dion Nelson, nicknamed "Crazy D," who lived on that street. 20 RT 2112.

b. Informer DeSean Holmes.

DeSean Holmes appeared with his attorney Don Nardoni. 17 RT 1535. [DeSean Holmes is referred to below either by his full name or by his first name to differentiate him from coappellant Karl Holmes.] DeSean identified several people depicted in People's Exhibit 20, including Dwayne Bailey, Lorenzo Newborn, Solomon Bowen, and Herb McClain. He recalled seeing appellant Newborn as well as McClain and Karl Holmes at a party he had on October 15, 1993. Fernando Hodges was also at the party. 17 RT 1538. He identified the car depicted in People's Exhibit 21 as one driven by guests to his party, and which came into his possession in November 1993.

When asked whether he had ever heard of the P-9 gang, he described it as a gang and a club, but denied knowledge of whether appellant Newborn or McClain belonged to it. He identified S-9 as "another club," with which he

associated. 17 RT 1539. Danny Cooks was associated with S-9, which generally got along with P-9.

In 1995, DeSean Holmes was charged with burglary and eventually pled guilty to burglarizing the residence of Willy McFee. While he was being held in county jail on his burglary charge at Super Max, Wayside facility, he had a conversation with Newborn about the events on Halloween 1993. Newborn recounted an incident in which he went to the McFee house and "got into it" with some other people with whom he socialized. 17 RT 1543. DeSean agreed that he had told the police that Newborn said he was at the McFee residence looking for his brother Wendell, and that he ended up shooting at the people with whom he came, but also asserted that he did not currently recall Newborn saying that. 17 RT 1544-5.

DeSean Holmes testified that he his life had been threatened, and that his mother had received calls that threatened her. 17 RT 1545. DeSean Holmes went to the Altadena Sheriff Station, spoke with Deputy Johnny Brown, and asked Brown to help because he was afraid that Ernest Holly and Danny Cooks were trying to kill him. 17 RT 1546. DeSean told Brown that he had information on some other cases, and a couple of days later met with Detective Korpal at the Temple City Sheriff Department. 17 RT 1547. DeSean Holmes

told him what he knew about the Halloween murders. DeSean Holmes had known Reggie Crawford and his sister, but none of the other boys who were killed on Halloween. 17 RT 1550. After looking at the transcript of his taped statement several times, DeSean Holmes acknowledged that he told the police that Newborn said he "used a 9-millimeter Glock on Blake." 17 RT 1553. DeSean Holmes acknowledged that he has seen Aurelius Bailey with a "raggedy .38." 17 RT 1559.

Regarding the shooting at Willy McFee's, Newborn said he shot from across the street from McFee's house. 17 RT 1565. Newborn also told DeSean that Terrence Brumfield had testified before the Grand Jury that Newborn had taken a gun from him, but Newborn said this did not occur. 17 RT 1566. Holmes claimed he did not recall whether Newborn ever admitted taking Brumfield's gun, and the District Attorney played a portion of an untranscribed tape, People's Exhibit 22, to impeach him. 17 RT 1561.

While in custody with Newborn, DeSean Holmes heard Newborn speak over the telephone with a woman named Nicole, and heard Newborn talk about a list of names of people who were going to testify against him, including Charles Blake, Willy McFee, Darrell Johnson, and Terrence Brumfield. 17 RT 1567. Newborn did not say anything about shooting Crips on Halloween, but

he "mentioned going to this Crips' house, that's about it." 17 RT 1568. Newborn did say that "it was some other peoples' fault"; that he "was depressed because he's in custody because of his homeboys"; and that it was stupid for Fernando Hodges to be hanging out at the Community Arms. 17 RT 1569. Newborn said something to DeSean that "At the time of the shooting, Aurelius was running, bumped into somebody, and the bullets fell out of the gun." 17 RT 1571. Newborn did not say that a gray Ford Tempo was involved in the shooting, but that "they were in rental cars." Newborn said, "They went around the block one time before they did it." Newborn mentioned a girl he hoped to use as an alibi, but did not specify whether it was a truthful alibi or a lie. Newborn said the girl lived in Azusa. 17 RT 1572. DeSean Holmes acknowledged telling the police that Newborn had told him that the girl was a false alibi. Newborn also said that once he got out of custody, "he was going to smash everybody that was on his list." DeSean thought he was on Newborn's list. 17 RT 1573.

On cross-examination, Holmes acknowledged that he had a probation violation hearing coming up in Pasadena in four days on October 20, but that his lawyer Nardoni said he would be released because it is "a very, very weak case." 17 RT 1575. Holmes acknowledged burglarizing his Uncle McFee's

house in February 1995, along with Ernest Holly, Danny Cooks, and Brandon Nero. 17 RT 1577. Also in the burglary group were Darrell Johnson and Eric Thomas. 17 RT 1578. The group went to steal drugs and money from McFee because he was a drug dealer. 17 RT 1579. They did burglarize McFee's residence, taking TVs, Nintendo games, and CDs.

In early-September 1995, he went to the Temple City Sheriff Station to go into protective custody. He had gone to the Altadena Station to pick up a subpoena in a case in which he was the victim in a shooting. When asked whether he was a victim of some crime involving the case against Danny Cooks, Holmes claimed the Fifth Amendment. 17 RT 1587.

When asked whether he wrote out a statement that "Lorenzo's lawyer told him he did not have to testify," Holmes said that it was a mistake to attribute that advice to Lorenzo's lawyer, and instead he "got that from Nishi." 17 RT 1587.

Charles Bell was the defendant in the case in which DeSean was a victim. 17 RT 1592. DeSean described a telephone call in which he was listening to a conversation between Danny Cooks and his coach Clyde Turner. The next day he went to the Temple Station, made a statement, and asked for protective custody. 17 RT 1594. He asked that his probation be revoked, he went into

custody as a trustee, and remained there until November 11 when he was transferred to a motel. RT 17 1594.

Regarding his conversations while in custody with Newborn, Danny Cooks was also present at some point. 17 RT 1597. Holmes acknowledged he had a bad memory, and that he had told the police "I got a bad memory cuz' I smoke a lot of weed." 17 RT 1601.

Holmes identified a five-page plea agreement, Defendant's Ex. C. 17 RT 1613. He reviewed and signed this the previous day, October 15, 1995. Holmes had told attorney Nardoni some weeks prior that he was not going to testify, but then two or three days later decided to testify. DeSean demanded a provision that the District Attorney would not ask any questions about anybody except Newborn. 17 RT 1616. Holmes acknowledged refusing to have an interview with Newborn's attorney approximately 10 days earlier. 17 RT 1617. Holmes refused the interview because he did not want to explain himself twice, and because he "was scared and Myers was right there, that's why." 17 RT 1620. The morning after the refusal, DeSean Holmes called attorney Nishi, who setup a three-way that included attorney Jones. DeSean said that Nishi told him that he had the right not to say anything. 17 RT 1621.

Holmes acknowledged that at some point in early-October, he told his mother he was being held against his will, and that he wanted to go home (a position at odds with his earlier claim that he turned himself in for protective custody). 17 RT 1625. Holmes never had any conversation with any law enforcement personnel about a reward for testifying, and received no other promises.

Regarding the Ford Tempo car depicted in People's Exhibit 21, Darrell Johnson and another person gave him the keys to the car, and he picked it up at the corner of El Sereno and Fair Oaks Drive in the beginning of November. He drove the car for perhaps a month, and then abandoned it. He knew it was a rental car. 17 RT 1627.

On further questioning regarding the McFee burglary, DeSean Holmes said they had gone to the McFee residence to "burglarize and kill him." DeSean Holmes was going to kill him with a brand new Smith & Wesson, which he got from Danny Cooks, because he was a witness on the Halloween murders. 17 RT 1629. There had not been much planning, as Holmes had been picked up at another uncle's house as Cooks and two others just showed up. 17 RT 1632. Holmes then claimed that he went to the McFee residence for the second time to "find paperwork" to help his uncle. 17 RT 1634.

DeSean Holmes read about the Halloween murders the following day, but did know who the suspects were until shortly before Christmas when the police raided his house looking for Karl Holmes. 17 RT 1638.

During the conversations with Newborn in county jail, Newborn kept saying, "I was really, really, really never, ever there at the hospital." 17 RT 1640. Returning to what Lorenzo said about the incident at McFee's, Holmes said that he told the police "about the time when he [Newborn] went to Willy McFee's door the night of the shooting," and "said it wasn't his fault because it was a mistake because some other dudes were the ones that said those kids—I mean those were Crips, not kids." 17 RT 1645. DeSean acknowledged that Newborn repeatedly said that he was not at the hospital, and that Felicia would confirm that. 17 RT 1649. DeSean also claimed that Newborn had told him that he had taken his gun over to Terranius' house and took it apart. 17 RT 1654.

On redirect, he said everyone in his family discouraged him from testifying to avoid being labeled a snitch. He was concerned about his safety in the aftermath of his testimony because he had heard that other witnesses had gotten killed. 17 RT 1674.

When attorney Jones asked about DeSean being afraid because other witnesses had gotten killed, DeSean acknowledged that he was thinking of

Majhdi Parrish. 18 RT 1734. When asked whether Newborn hated DeSean Holmes in October 1993 at the time of the killings, Holmes answered, "no he didn't hate me...I don't know...I really don't know." 18 RT 1742. Holmes could not remember whether he told Detective Korpal on September 25, 1995 that Newborn hated him. Holmes did acknowledge saying it, but denied he was talking about 1993, and claimed that he must have said Newborn would hate him if he testified. The court instructed the jury that DeSean Holmes' testimony was limited to consideration against Newborn. 18 RT 1752.

William Jaeger testified that he is a Los Angeles County Sheriff Deputy and works at the Men's Central Jail. 28 RT 2909. He described the People's Ex. 70-A, which tracks the movement and location of the inmates through the jail system. 28 RT 2911. He identified the records of Newborn and DeSean Holmes.

Newborn and DeSean Holmes were jointly in Module 618 from March 28, 1995 through April 4; in Module 618 jointly from April 5 through 10; and jointly in Module 628 on May 16, 1995 only. 28 RT 2926.

Sergeant Johnny Brown testified that he is a Los Angeles County sheriff assigned to homicide investigation. 30 RT 3092. In September 1995, he was called to interview DeSean Holmes regarding the May 23, 1994 homicide that

Brown had been investigating. Brown testified to his course of contacts with DeSean and to certain prior statements.

Carolyn Owens, a fingerprint examiner for the Sheriff's department, lifted prints from a gray Ford Tempo, and one from the rearview mirror matched DeSean Holmes. 31 RT 3154. There was a print on the vehicle registration form that was matched to Lionel Edward Evans. 31 RT 3158.

5. Newborn's custodial statement to Deputy Keeling.

Christopher Keeling testified that he is a Los Angeles deputy sheriff and in 1993, he was assigned to the Super Max facility at Wayside County Jail. 19 RT 1921. He had contacts with defendants Newborn and McClain at the jail. From his interview with Newborn, he learned that Newborn belonged to the P-9 gang out of Pasadena. He described his conversations with Newborn as "very low keyed, consensual," and "actually we had a pretty decent rapport." 18 RT 1923.

Something happened in jail that required Keeling to move Newborn to the Adjustment Center. Newborn denied the allegations, and Keeling said there would be a hearing. 19 RT 1924. During a subsequent conversation, Newborn said, "I'm not saying I'm not guilty for what I'm here for, but while I'm here I don't want to be caged up like I'm some animal." 19 RT 1930. Before that

statement, Newborn had said, "I do want to get the motherfucker who lied on me," referring to the reason he was placed in the Adjustment Center. RT 19 1931.

After the statement about being held like a caged animal, Keeling left the location and had no contact with Newborn until a week later. At that time, Newborn was "very agitated toward me," and Newborn said, "you fuckin' lied on me. I didn't say that." 19 RT 1932. Keeling asked him what he was talking about. Keeling stopped him and repeated what he had heard from the previous conversation, and asked Newborn whether that was what he said. Newborn responded, "yeah, but I didn't mean it that way. Ah, that's fucked up." 19 RT 1933.

6. McClain's admissions, earlier crimes, and post-offense conduct.

a. McClain's post-offense admissions to Mario Stevens.

Mario Stevens testified that he is presently in prison for a drug offense. He was acquainted with Newborn, Holmes, and McClain. 25 RT 2542. Shortly after Halloween 1993, Stevens had a conversation with McClain at King Manor in Pasadena. McClain said, "Him and his homies had went down there on Wilson and had shot some—some Crips." [McClain responded in open court,

"You are a lying piece of shit, man. You are lying through your teeth, man." 25 RT 2545.] Stevens acknowledged that he was an associate of the Pasadena Devil Lanes, a Blood gang. There had been problems between the PDL and the P-9, first relating to the killing of a PDL named Walter. Stevens acknowledged that he had received benefits on his drug case for testifying at the Grand Jury proceedings, although the police had not intervened in his probation revocation. RT 2459. He identified Newborn and Holmes as belonging to the P-9 gang. 25 RT 2552. He expected relocation, job assistance, living expenses, and reward money for his testimony. 25 RT 2550.

b. McClain's post-offense admission to Troy Welcome.

Troy Welcome, in state custody on a drug case, testified that he knew the three defendants as P-9 gang members. He was affiliated with PDL Denver Lane. 28 RT 2947.

The day after Halloween 1993, he was driving to a friend's house in Tulare with his friend David Morris. Shortly after his arrival Tuesday morning, he went to the house that James Carpenter shared with David Morris and saw McClain there. Welcome was concerned for his safety when he saw McClain because "in Pasadena the two of us don't get along," because of their antagonistic affiliations. 28 RT 2950. He did not have any weapons, but

McClain had a handgun. 28 RT 2951. While they were sitting in Morris' town car smoking weed, McClain "referred to the gun as 'this is my nigger. I put in work with this. I put it down.'" 28 RT 2952. To Welcome, that meant that somebody had been killed with the gun and the gun was hot, or that he had shot somebody with it. In fact, McClain's words were adapted from an Ice Cube rap tape that was playing in the car.

He had one other encounter with McClain later that week when McClain gave him a cigarette and said, "man, I ain't tripping." 28 RT 2955. McClain had a burgundy colored rental car at that point. Other people who were staying at the Carpenter/Morris residence included Little Bam, Alonzo Hamilton, and Laward. 28 RT 2957. McClain mentioned that he was on the run, and Welcome said that he was also wanted on a failure to appear warrant. 28 RT 2958. At one point during that week in Tulare, McClain had his hair cut from shoulder length to very short. 28 RT 2962.

Welcome had an interview with the Pasadena Police Department on November 29, 1993, but did not tell them everything he knew. 28 RT 2963.

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c. McClain's prior shooting of Robert Price, former Crip, on October 28, 1993.

Robert Price testified that he was shot in the face and butt on October 28, 1993 in the early morning hours, and that McClain was the shooter. 31 RT 3161. Price was shot as he was leaving his grandmother's house in the Community Arms Apartments. McClain called to him and asked if he had a cigarette. Price gave him a cigarette and McClain pulled out a gun, shot him in the face, and as Price was running shot him twice in the back and butt. 31 RT 3162. McClain said, "Thank you Blood," after he accepted the cigarette. The bullet went in below his left eye and out below his earlobe.

Price had previously seen McClain around the Community Arms Apartments, but did not know his name at the time of the shooting. 31 RT 3167. Price told the police he did not know who shot him "because for the simple fact I was going to try to take care of it myself." 31 RT 3169.

d. McClain's breach of parole after October 31, 1993.

James Thomas testified that he is a State of California employee [unspecified to reduce potential prejudice], and works in Pasadena. On September 14, 1993, McClain was supposed to report to him, 20 RT 2062, and they eventually did meet on October 25, 2004.

On November 4, 1993, Thomas attempted to reach McClain by telephone and left a message with his sister. On November 5, they spoke by telephone and McClain said he was at a park in Pasadena. 20 RT 2066. Thomas told him to report to the office before noon, but he did not show up. Thomas went to the McClain residence on November 7, and he was not at home. He spoke to McClain on November 16 and again told him to be at the office by noon on November 17, but McClain did not show up. 20 RT 2068. The parties stipulated that Thomas never saw McClain after November 17, 1993.

e. McClain's flight to Memphis on November 7, 1993.

Tonja Underwood-Johnson testified that she is a flight attendant and on November 7, 1993, she flew from Ontario to Dallas to get to her Boston base. 23 RT 2268. She was seated next to defendant McClain, and they chatted during the flight. McClain introduced himself as "Herb," and acknowledged being a gang member and drug dealer. 23 RT 2281. She recognized McClain from a photograph after she saw a news program about the Halloween murder.

f. The seizure of guns and ammunition from McClain and Brown on September 12, 1992.

Luis Banuelos testified that he is a Pasadena Police officer and was a training officer in September 1992. 23 RT 2295. At 3:15 on September 12,

1992, he had contact with McClain and Solomon Bowen at a gas station, searched McClain, and found several .38 live rounds in his pants pocket. He then looked around the area of the gas station where the search had occurred and found a .357 revolver and a Tech 9 pistol. 23 RT 2298. The parties stipulated that McClain did not get either weapon returned to him following the search.

g. McClain's admissions to James Carpenter in early-November 1993.

James Carpenter testified that in early-November 1993, he lived in Tulare and had some visitors including McClain, Alonzo Hamilton, and Laward Looney. 23 RT 2303. He acknowledged giving a statement to the police on December 18, 1993, but denied telling the police that McClain had admitted involvement in the Halloween murders in Pasadena. 23 RT 2307. He denied telling the detectives that McClain had said, "boom, boom, pow, pow, pow, I can still hear the noise." He denied telling Detectives Uribe and Korpal that McClain said he and some others shot three Crips in Pasadena in retaliation for the shooting of Fernando Hodges.

He acknowledged telling the police that McClain sold a .38-caliber handgun to Michael Thompson, another cousin, 23 RT 2311, and that Michael

Thompson had gotten arrested in possession of the .38 handgun. 23 RT 2314. Carpenter said the police kept asking questions, and he told them what they wanted to hear. 23 RT 2328. He was in custody on a warrant, and the interview was held at the Tulare Police Department. 23 RT 2329.

Detective Uribe testified that he interviewed James Carpenter on December 18, 1993, after a Tulare officer had arrested him for a robbery. Carpenter did say that McClain had said "boom, boom, pow, pow, pow, I can still hear the noise." 23 RT 2335. Detective Uribe said that Carpenter told him that McClain had said that he and others had shot three Crips in Pasadena in retaliation for the shooting of Fernando Hodges. Carpenter also said that when McClain heard that the victims were children and not Crips, he became very nervous and cut his hair short. 23 RT 2336. Neither Detectives Uribe nor Korpal told Michael Thompson or James Carpenter that there was some reward money available for him. 23 RT 2338.

7. Karl Holmes' admission to Derrick Tate.

Derrick Tate was called to testify, and the court instructed the jury that his testimony "concerning the statement of Karl Holmes [was] limited to defendants Karl Holmes and Herbert McClain." 15 RT 1347.

Tate testified that he was 29 years old and was related to Terranius Pitts, whose nickname was "T." In December 1993, he was visiting "T" and had a conversation with Karl Holmes, who went by the nickname "Boom." 15 RT 1349. The conversation occurred on Claremont Street in Pasadena. Tate heard Holmes indicate that he was a gangster, characterized himself as "rider," mentioned getting a "trick-or-treat hat," and described a shooting—"That they was in some bushes, he was looking for—you know, they was in some bushes and I jumped out and they said trick-or-treat." 15 RT 1351. Holmes said that there were others with him when this happened, and mentioned two additional people. During the conversation, Holmes was wearing a green hat that said P-9 on it. Holmes was bragging, and said that the trick-or-treat killing was a result of Fernando Hodges getting killed by the Crips. 15 RT 1354.

Tate first gave this information to a police officer while he was in the Pasadena jail for joyriding. "Because at first, you know, I was trying to get out of a case that I had, but I went to prison behind it anyway so, you know, I didn't get out of it." 15 RT 1355. He also spoke to Detectives Korpal and Uribe about the conversation. 15 RT 1356. He denied any California felony convictions, but acknowledged three or four out-of-state convictions for aggravated battery, forgery, and unlawful restraint. When he was in custody in California, he asked

Detective Korpal to get out of the unlawful restraint case that he eventually went to prison on, but that did not happen. He was aware of a poster announcing reward money. 15 RT 1360. Tate had been brought to California at public expense to testify.

Detective Korpal testified that he spoke to Derrick Tate in the company of Officer Luna, and during the interview, Tate said that Holmes said "Herb was involved." 16 RT 1434. Detective Korpal testified that the phrase on the tape, "oops, that's not the one" related to his own difficulty in finding a photograph that Tate had previously identified, not in coaching Tate. 16 RT 1438.

B. Defense Evidence.

1. Newborn defense witnesses.

Shawntia Blaylock testified that she was dating Fernando Hodges in October 1993 when he was killed. She went to Huntington Hospital driven with her cousin Trina. 32 RT 3363. At no time did she see appellant Newborn there, 32 RT 3365, nor did she ever see LaChandra Carr there, with whom she had grown up in the same neighborhood. 32 RT 3366. The people she saw at the hospital were Solomon Bowen, Darrell Johnson, Ishmael, Felton Leagon,

Dawon, Frank (no last name), Karl Holmes, Orlando Hodges, and Ephraim Hodges. 32 RT 3368.

The women that she saw gathered at the hospital who were acquainted with Fernando Hodges were Anedra Keaton, Alisha Thomas, Ramona Hodges, Chris Hodges, Antoinette Black, Patricia Williams, Vanessa Holly, Trina Woods (her cousin), Dory McGee, Deneisha McGee, and Tasha Bonner. 32 RT 3371.

During the evening, she tried to contact appellant Newborn "to notify him that his best friend has been shot." She dialed his pager number and punched in the number of the pay phone she was calling from, but he did not respond to the page. She also called Anedra Keaton, who was one of his girlfriends because she thought Anedra might know his whereabouts. At one point, Karl Holmes pulled up at the hospital. 32 RT 3375. She gave a statement in November 1994 to the police about her observations at the hospital.

Newborn was the godfather of Shawntia's three-month old daughter. 32 RT 3363. She thought Newborn "seemed like the right person to be the godfather of my child, and he was also Fernando's best friend." Hodges and Newborn socialized almost every day. 32 RT 3364. She never had any

problems with Newborn, although she knew he belonged to the P-9 gang, as did Fernando.

Somewhere between 9:00 and 10:00 p.m., she left the hospital for about 30 minutes to get her baby and then returned. 32 RT 3372. Shawntia returned to the hospital with her daughter, driven by her friend Vanessa Holly, Earnest's sister, and Vanessa's boyfriend, Jay North. 32 RT 3404. When she got back to the hospital, Alisha Thomas, Anedra Keaton, and Chris Hodges had arrived. 32 RT 3404. While she was at the hospital, there was discussion that some Raymond Crips shot Fernando. 32 RT 3408. She spoke briefly to Karl Holmes, who had pulled up in a car, and then drove away. 32 RT 3411. She did not see McClain at the hospital. 32 RT 3412.

Felicia Goodall testified that she was dating appellant Newborn in 1993 and met with him on Halloween 1993 at around 5:00 p.m. on Washington Boulevard in Pasadena. 32 RT 3417. She asked Newborn to come to her house in Azusa a little later. She was living in Azusa with her aunt and uncle, Kim Reed and Wendell Jefferson. Appellant arrived at approximately 7:00 p.m. and spent the night with her. He left the next day at approximately 9:00 a.m. There was no working telephone at that location in Azusa. Appellant was there the entire night. 32 RT 3420.

On cross-examination, she said she broke up with appellant in November 1993. She acknowledged discussing her proposed testimony with Wendell and Kim, and she acknowledged that she never called the Pasadena Police Department to convey the alibi information at any time after appellant's arrest on December 23, 1993, 32 RT 3423, even though she thought her information was "very important."

She knew appellant had a pager in 1993, but did not hear it go off at any time during the night of October 31, although he generally carried it with him. 32 RT 3425.

James Otis testified that he had known Newborn for several years prior to Halloween 1993, considered him a close friend, and saw him on Halloween at approximately 7:00 p.m. 33 RT 3455. He was backing out of his driveway when Newborn came up and asked to give him a ride. Otis was going out to take his son trick-or-treating from their residence at Woodberry and Summit in Pasadena. Newborn asked Otis if he could drop him off in Azusa at his girlfriend's house, which he had done before. 33 RT 3457.

Otis next saw Newborn at about 10:00 the next morning when he picked him up, as Newborn had requested. 33 RT 3458. As they drove back, Otis told Newborn that Fernando Hodges had been killed. Otis believed that Newborn

and Hodges had been "real tight friend, real good friends." Newborn appeared surprised, told Otis to "quit lying," and Otis said he was not lying. Otis took appellant to the residence of Hodges' mother at Marengo and Hammond in Pasadena. 33 RT 3461. Appellant said nothing to demonstrate that already knew about Hodges' shooting.

Wendell Jefferson testified that his nickname is Huck, and that he is a childhood friend of Newborn. 33 RT 3528. Jefferson had also known Willy McFee since approximately 1973. In October 1993, Jefferson was living at 630 N. Cerritos in Azusa, California, along with a girlfriend, Kim Reed, their child, and his niece, Felicia Goodall. 33 RT 3529. He also was acquainted with Fernando Hodges in 1993. At some point on Halloween evening, he heard that Fernando Hodges had been shot. He had been visiting his mother on Ashtabula Street in Pasadena.

Sometime in the early afternoon of October 31, between 1:00 and 2:00 p.m., he had been at Willy McFee's house near Blake and Pasadena Streets, accompanied by a friend, James (Roscoe) Riley. 33 RT 3531. Newborn never came to McFee's while he was there. No shooting occurred in the vicinity of McFee's while he was there. After he left McFee's, he and Riley drove around for a few hours in Jefferson's 1979 Cadillac Coupe de Ville, gray with a white

top. 33 RT 3532. He got back to his mother's house around 7:30 p.m. He visited some friends in the vicinity and went back to Azusa around 8:30. Kim Reed told him that Newborn was there with Felicia. He did not actually see Newborn until the next morning as Newborn was getting ready to leave. 33 RT 3536.

On cross, he explained that when he and Riley arrived at McFee's house, McFee met them outside because "he don't let too many people into his house." 33 RT 3545. He did not remember where he was when he heard that Fernando had been shot, and he was unsure whether he found that out on Halloween night. 33 RT 3555. Jefferson then said, "I did not know that Fernando got shot," but "it was just talk around there was a shooting in Community Arms," but "there was no name given and I didn't ask." 33 RT 3556. Jefferson acknowledged a conviction for grand theft in 1987 and four drug-related offenses from 1986 through 1988. 33 RT 3580.

Latoya Carr testified that on Halloween 1993, she was at her house on Monrovia and spoke to LaChandra Carr several times by telephone during the course of the evening.

Marie Bonner testified that she was acquainted with LaChandra Carr, as well as Lorenzo Newborn. Marie was at Huntington Memorial Hospital on

Halloween night 1993, 33 RT 3624, but saw neither LaChandra Carr nor Newborn at the hospital. 33 RT 3625. She acknowledged that she made a statement to a defense investigator some six months after the incident, when she estimated her time of arrival at the hospital at about 10:00 p.m. 33 RT 3639.

Detective Korpal, recalled, testified regarding a report of shots being fired in the vicinity of the McFee house at Pasadena and Blake Streets. 35 RT 3765. Detective Korpal identified four reports of shootings, logged in at 1:52 a.m. on November 1; at 1:47 a.m. (two calls); and 1:50 a.m. 35 RT 3769. Those were the only reports of shootings in the vicinity of the McFee residence on October 31 or November 1.

2. Karl Holmes' defense.

Kathy Pezdek testified that she is a professor of psychology at Claremont Graduate School specializing in research on factors that relate to the accuracy of memory. 34 RT 3648. She testified as an expert regarding eyewitness identification more than 100 times since 1976. She described memory as having three stages—input, which has to do with the perception of an event; storage, which has to do with how well a witness can hold onto information over a period of time; and identification, the stage at which a witnesses is asked

to make an identification from a photograph or live lineup or whatever. 34 RT 3656.

The psychological factors that affect the accuracy of memory are exposure time; lighting and physical distance; distraction in cases of brief exposure, e.g., movement or a weapon; and cross-racial identification, i.e., the greater difficulty that people have identifying someone of a different race or ethnicity. 34 RT 3660. She also said there is a very low correlation between the ostensible confidence of a witness in his or her identification and the accuracy of the identification. 34 RT 3661. She referred to "time delay," i.e., that "memory drops off with the passage of time," 34 RT 3662, and "suggestibility," such as when a prospective witness sees a photograph in a paper of a suspect and substitutes the features of the newspaper photograph for their actual memory of the perpetrator.

Donna McCallum testified that she is Karl Holmes' aunt and described how he received the nickname "Boom" when "as a toddler he was very active and he was always bumping into things." 35 RT 3853. On cross, the prosecutor asked whether she knew if Holmes had left town on November 1, 1993 and went to Fayetteville, North Carolina, and she answered that she had no personal knowledge but she had heard that. 35 RT 3854. On redirect, she confirmed that

he came back shortly afterwards and turned himself in when his picture was in the newspaper. 35 RT 3855.

W. R. Ireland testified that he is a detective employed by the Pasadena Police Department. 35 RT 3741. He interviewed Gabriel Pina in the early morning hours of November 1, 1993, initially at his home and then at the police station. 35 RT 3742. Pina described the men that he saw get out of a car as including a Black male approximately 20 or under, wearing a tannish trench coat and a plaid shirt and ivory colored pants. When asked whether he could recognize him, Pina said he was not paying attention. 35 RT 3747. On redirect, Detective Ireland described Pina as "sleepy and not completely awake" during this interview because Detective Ireland had "pulled him out of bed." 33 RT 3578.

DeWane Moe testified that he is a detective in the Pasadena Police Department and spoke with Kenneth Coats on November 31, 1993. 35 RT 3794. Coates said he saw two suspects jump out of some bushes, and described the first suspect as "male Black, 18 to 24, 5'10" to 6', 175 pounds and muscular," and with "slicked back hair, tied in a ponytail, down to the shoulders." That person was wearing a red bandana and dark clothing. He

described the other person as a male Black, 18 to 24, 5'10," 175 to 185 pounds, and "looking flabby," also with a red bandana and dark clothing. 35 RT 3795.

Bob Zink testified that he is a private investigator who worked for attorney Nishi, and in that capacity interviewed Derrick Tate in Macon County Jail, Decatur, Illinois on May 11, 1995. 36 RT 3858. Tate told Zink that the statements he had made to law enforcement had been fabricated, "that he told the officers what they wanted to hear" because the officers told him that if he helped them with the Halloween case, that they would help him with his Illinois warrant and also that he might be eligible for part of the reward. 36 RT 3861.

Carlos Lopez testified that he is a Pasadena Police officer and on November 3, 1993, he stopped a silver Ford Tempo depicted in People's Ex. 21, and made contact with the occupants. The occupants were Edward Lionel Evans and Charnel Blaylock. 36 RT 3876. On cross, he said it's "very common that they [gang members] share cars amongst each other." 36 RT 3879.

Detective Uribe, recalled, testified regarding an interview with Gabriel Pina on November 4 in which he and Detective Korpal showed him vehicle brochures to help identify a vehicle. 36 RT 3901. He was not able to identify any vehicle as one he saw on Halloween evening in the four-car caravan. 36 RT 3902. Detective Uribe confirmed that Pina did not describe any individuals in

the second car, other than Black males, and did not give the detail about short curly hair and clean cut that he did at the Grand Jury testimony five months later. 36 RT 3906. Upon questioning by the District Attorney, he referred to Pina's description of the driver of the first car as a Black male, age 22 to 23, with a long jheri curl. 36 RT 3920.

Wanda Martin testified that Karl Holmes picked her up from work on Halloween 1993 and drove to the babysitter's house where they picked up their son and went home. 37 RT 4093. They arrived at 601 Foothill in Azusa. They had dinner and started to watch a movie when Karl Holmes received a page. There was no telephone inside the house, so he went to a 7-11 to make a call. 38 RT 4094. He came back and told her that Fernando Hodges had been shot, and that he was going to the hospital. She continued watching the movie but fell asleep. She later woke up when her two-month-old son woke her for a feeding. Karl Holmes returned home a little before 10:00 and said he had gone to the hospital and returned. 38 RT 4097. She recalled the time because Karl was supposed to take care of the morning feedings because she worked in the morning. 38 RT 4098.

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3. Herbert McClain's defense.

Detective Derrick Carter, recalled, testified regarding his interview of Robert Price. In that interview, Price never said that McClain responded to the cigarette with the phrase, "thank you Blood." Rather, Price told Detective Carter that McClain said, "thank you Chief," per Carter's notes and from the tape. 35 RT 3764.

McClain testified on his own behalf. 36 RT 3962. He denied committing the homicides and denied driving any vehicle that was involved in the homicides. He denied making incriminating statements to James Carpenter while he was in Tulare. 36 RT 3963. McClain explained that he went to Tulare "to sell my dope," and because he has "two or three girlfriends up there." 36 RT 3964. He acknowledged having a conversation with flight attendant Underwood on the airplane, and explained that he had been going to Kansas City to sell drugs. 36 RT 3966.

McClain denied that he said anything about putting in work to Mario Stevens, and that he would never be hanging out in the King's Manor because "them is my enemies." 36 RT 3967.

McClain said he was present when Robert Price was shot on October 28, 1993, but that he did not shoot him. Rather, he was shot by someone else to

whom he owed money. McClain acknowledged being convicted of charges an ex-felon with a gun following his grand theft auto conviction. 36 RT 3971.

McClain testified he had been at Kathy Brown's house passing out Halloween candy, but left after he "got a page telling me my homeboy was killed." 36 RT 3977.

McClain paged Newborn, Alonzo, Solomon, and others but no one returned his page. 36 RT 3989. McClain had a .44 handgun with him because he "felt I was going to get back for—that I was going to retaliate" and "kill a Crip." He was not trying to organize retaliation because he wanted to do it by himself, although "I never killed nobody as yet." 36 RT 3991.

He did encounter Ricky Lacy, who was a Crip, but did not kill him because there was a lady nearby with some children. 36 RT 3994. McClain admitted that he spent some hours smoking marijuana and talking with Rick Lacy and others so he could gain Lacy's confidence and then kill him, but did not have any luck. 36 RT 3988.

McClain gave Detective Korpal his alibi that he was at Kathy Brown's handing out trick-or-treat candy until midnight. 37 RT 4028. McClain denied that he told James Carpenter that he and Karl Holmes and another person were involved in the shootings. 37 RT 4037.

When Robert Price was shot, McClain was with his homeboy Ishmael, as well as another person to whom McClain was selling drugs. 37 RT 4038. When asked whether he was too happy about sitting up there charged with this crime, McClain gave an impassioned denial, concluding with the phrase, "You're mother fucking right I don't like this shit." 37 RT 4040.

Herbert McClain, Sr., the father of the defendant, testified that he did not have a relative in Tulare named James Carpenter, nor does he have a twin sister. 38 RT 4090.

C. Prosecution Rebuttal.

Detective Korpal testified regarding his conversation with James Carpenter. Korpal repeated Carpenter's statement to him that McClain admitted that "he, McClain, Karl Holmes, Boom," and another subject by the name of Cornell Daniels were involved in the shooting. 39 RT 4141.

Pasadena Police officer John Luna testified that he was the department's Latino gang officer from 1992 to 1994, worked with his partner Carlos Lopez. 40 RT 4215. He was familiar with James Otis' residence, had been inside, and saw a picture of P-9 gang members hanging on his wall. 40 RT 4216.

Lakesha English testified that on Halloween 1993, she lived in Covina and attended a Halloween party in a recreation room at the Casa Del Longo

Apartments. The person throwing the party was Jacqueline Neal. 40 RT 4226. Lakesha helped Jacqueline setup for the party starting around 3:00 p.m. Wanda Martin arrived at the party after dark, perhaps around 7:30 or 8:00. She arrived by car with her boyfriend (Boom) and her baby. When Wanda and the others drove up, Wanda asked Lakesha to get the baby as Wanda and Holmes were arguing. Holmes drove off. Wanda and the baby stayed at the party for a couple of hours. 40 RT 4230. Lakesha did not know Newborn personally, but knew someone who had a baby by him. Newborn was not at the party. 40 RT 4231.

Finally, the parties stipulated that on October 31, Wanda Martin clocked in at Sears at 10:54 a.m., and out for the day at 7:20 p.m. 40 RT 4245. The parties stipulated that on Halloween 1993, the television shows "Martin" and "Living Single" were not on at their usual times of 8:00 p.m. and 8:30 p.m. 40 RT 4246. The parties stipulated that Ex. 103 is a copy of a county jail visitor's pass with the name Wanda Martin on it for November 13, 1994. The parties also stipulated to a description of the perpetrators published in the Los Angeles Times and other newspapers on November 2, 1993. 40 RT 4248.

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PENALTY TRIAL[1]

A. The Prosecution's Case.

1. Holmes' in-court outburst.

The prosecutor began the penalty trial by showing the videotape of Karl Holmes' profane in-court reaction to the guilt verdicts, in the presence of the prior jury – "Fuck you, you mother fuckers. P-9 rules." 65 RT 6412; Exhibit 117.

2. The Halloween shootings on Emerson and Wilson.

The prosecution's evidence regarding the shootings themselves largely tracked the guilt trial, and will not be reiterated here in detail. The prosecution's primary witnesses included the surviving victims of the shootings, e.g., 67 RT 6517; Security Guard Carlyle regarding the gathering of youths at the Huntington Hospital after the shooting of Fernando Hodges, RT 6438; the residents of the Emerson and Wilson neighborhood who saw the cars and who heard the shots; and Gabriel Pina regarding his identification of Holmes and McClain, 37 RT 6634.

[1] This is a summary of the penalty re-trial that began on October 2, 1996. The first penalty trial resulted in a hung jury as to all three defendants. VII CT 1888.

The prosecutor did not present evidence of DeSean Holmes' testimony regarding Newborn's in-custody statements about the shooting near the McFee residence, and McFee himself did not testify. Charles Baker testified that the shooting occurred, but did not implicate Newborn. 71 RT 7034.

The prosecution did present more detailed testimony about the defendants' asserted gang membership. Officer Carlos Lopez of the Pasadena Police Department testified that he had had at least 50 contacts with Newborn relating to gangs, and gave the opinion that Newborn was a "hardcore" gang member, as opposed to an associate. Lopez named appellant's gang as "Parke Street Nine Lives," and that Newborn had a leadership position. 66 RT 6456.

Lopez had some 20 contacts with codefendant McClain, also a member of the P-9 gang, but more of an associate. He also had about 20 contacts with Holmes, whom he characterized as between leader and associate, about the same as McClain. 66 RT 6457. He identified Exhibit 100 as a picture of the P-9 gang at a gang funeral. Officer Lopez identified from the photograph Solomon Bowen, Newborn, Carlos Clayton, Robert Legons, and two or three others, including Fernando Hodges. 66 RT 6458.

Mr. Lopez described the P-9 gang as comprised of "all original Blood gang members," renamed for the street where Newborn lived, 289 Parke Street. 66 RT 6461.

He was asked to identify Exhibit 116, a photograph of graffiti written on the wall of the courthouse holding cell, he identified "Boom" as the nickname for Karl Holmes, 66 RT 6463, and "Sunday Shoes," as Newborn's nickname. A third name was "Monsta Herb 1," with which he was unfamiliar. Another piece of graffiti on Exhibit 116 was the phrase, "Anybody Killa," with the words "sheriff" and "police" crossed out, which had significance because "when things are crossed out it means death, it means murder."

On cross-examination, he estimated that there were 20 to 30 hardcore P-9 gang members and 10 to 15 associates in 1993, who could have written the graffiti. 66 RT 6469. Officer Lopez acknowledged that he knew Newborn had been employed by the City of Pasadena, and did have contact with him during that employment. 66 RT 6474.

3. Prior incidents of violence involving Newborn.

Newborn had never been convicted of a felony or of any offense involving drugs or weapons. However, there were a number of instances of domestic battery.

a. Battery of Tanchell Anderson.

Tanchell Anderson testified that in October 1991, she had been seeing Newborn for about three or four months. She was 16 or 17 years old at the time. Her mother wanted her to end the relationship, and she told appellant that it was over. Some two weeks later, she encountered him at a liquor store, and they began arguing. 67 RT 6563. He called her a bitch, she slapped him, and then they hit each other about 15 times.

She was impeached with her statement to the police, where she told them that appellant came up, grabbed her, said "What's up bitch? How come you don't call me anymore," at which time Newborn became angry and punched her 30 times. 67 RT 6567.

On cross-examination, she acknowledged that she wanted to continue seeing him, but her mother thought he was too old. 67 RT 6571. She reconfirmed that she was the first person to take a swing, and she hit appellant. She went home angry, told her mother what had happened, and her mother called the police. In her statement to the police, she "did [her] best to make it seem as bad as possible with respect to what Lorenzo said and did." 67 RT 6575. She did not need medical treatment as a result of the altercation.

Salvador Vidales testified that he was a Pasadena Police officer in 1991, and responded to a telephone call regarding the Tanchell Anderson incident. She came into the Pasadena Police Department.

Ms. Anderson said she had been confronted by Newborn at a liquor store, but as she tried to walk away he grabbed her arm and began punching her in the face. When he interviewed her, her cheeks were swollen and she had a bump on her forehead. 67 RT 6588.

b. Battery of Detrick Bright.

Detrick Bright testified that she has known Newborn since grade school, started seeing him in 1991, had a child with him, but has no current relationship with him. On August 30, 1992, she was in her car on Park Street, and someone kicked in the driver's window of her car. 68 RT 6696. She called the police and told them she had seen Newborn running toward her car immediately before the window broke. She initially told the police she wanted to prosecute for the injuries she sustained, but signed a release form a few days later.

On April 9, 1993, Newborn took her pager and in response, she got upset and "slapped him alongside his head." He took her pager out to where he was changing tires on his car. She followed and after some pushing and shoving, she fell back into the rosebushes, sustaining scratches from the thorns. The

police came and took a statement. On December 7, 1993, she shared an apartment with Newborn and late in the evening, he sprayed Windex and Lysol at her face. 68 RT 6702. He sprayed Raid at her as well, although she was pregnant at the time. She lost her breath and fell down, at which point Newborn called the paramedics.

On cross-examination, she acknowledged that the argument preceding the incident of her car window getting kicked out was that she was dating someone else at the same time. 68 RT 6707. Regarding the incident with the pager, it went off and displayed the number of the other person she was dating. 68 RT 6708. The time Newborn sprayed her was preceded by an argument in which she hit him three or four times and spit on him. 68 RT 6710. She was using a lot of profanity, and appellant made a statement about her having a dirty mouth. Newborn called the paramedics the night of the incident, and then called the police the following morning.

On redirect examination, she said that in the course of the December argument, appellant said he had a New Year's resolution that he was not going to put his hands on anyone anymore, so he was going to spray her instead of putting his hands on her. 68 RT 6714.

Steven Geon testified that he was a Los Angeles police officer on December 8, 1993 and was dispatched to Detrick Bright's house, who told him about the argument she had with appellant and appellant spraying her with Lysol, Windex, and Raid. 68 RT 6720. She said her tongue was too swollen for her to call the police that night, and that Newborn awakened her abruptly the next morning by pulling her off the sofa onto the floor. 68 RT 6721.

Donald Forster testified that on April 9, 1993, he encountered Newborn during an investigation of spousal abuse on North Summit Avenue. As he and other officers approached Newborn to discuss the circumstances, he became agitated, pushed himself away, was taken to the ground, and handcuffed. 68 RT 6802. Newborn resisted getting into the police car, so officer Forster maced him, and he immediately became compliant. 68 RT 6806. In cross-examination, officer Forster said appellant was upset and said something to the effect, "fuck you all" several times. 68 RT 6810.

c. Battery of Rochelle Douglas.

Rochelle Douglas testified that in November 1992, she was 21 years old and was 8-1/2 months pregnant with Newborn's child. That was her first child with him. On November 3, 1992 at about 11:15 a.m., Newborn knocked on her door. 68 RT 6664. They had an argument after Newborn said that he had heard

she had been messing around, and that the baby was not his. She was upset and hit him with the telephone; he slapped her in the face and threw the phone outside. He slapped her hard several times. She did not prosecute, but her face was swollen. 68 RT 6670.

On cross-examination, she acknowledged that she and Newborn had been dating for some three years, and he had never hit otherwise abused her. 68 RT 6675. She now has a three-year-old son, whose last name is Newborn-Douglas. 68 RT 6676.

d. Altercation with Louise Jernigan.

Louise Jernigan testified that on December 11, 1992, she had a confrontation with Newborn at a beauty supply store at Fair Oaks and Orange Grove in Pasadena. 68 RT 6769. Her son, Keith, had been killed in a gang shooting. Newborn approached her with what she thought was a gun. She pushed him away, and asked him why he put a gun into her side (although she had not actually seen a gun). Newborn said, "Come to the car." 68 RT 6771. She was not afraid of him and went outside to argue with him. She asked him "Why he was going around killing everybody son," and asked why he couldn't talk to people instead of shooting them. He told her to "come over to the car," and she refused. He then got into the car and drove away. 68 RT 6773.

On cross-examination, she acknowledged that when she pushed him away, he fell over the counter and used it to catch his balance. 68 RT 6779. She acknowledged that there was a verbal exchange in the store in which Newborn said, "fuck you" to her, and she said "fuck you" back because she was upset. 68 RT 6785. She denied her prior testimony that she was the first one who said something to appellant out in the parking lot. 68 RT 6788.

e. Battery of Anedra Keaton.

Anedra Keaton testified regarding a dispute with Newborn, her former boyfriend, on May 7, 1992. 69 RT 6934. They had gotten into an argument because she had ditched school, and he had wanted her to go school. She was at a friend's house when Newborn came in, and they started arguing. Newborn eventually pulled her down the stairs and outside the apartment. They stood outside arguing when a police car came up. She said that he slapped her across both cheeks with his open palm while they were outside. 69 RT 6939.

On August 20, 1992, she was at home with a friend named Shawntia Blaylock, when appellant came over accompanied by Fernando Hodges. 69 RT 6945. They went for a drive, and she began arguing with appellant. Hodges and Blaylock were arguing in the backseat, and Hodges hit Blaylock. Later,

Newborn hit her when they were at a park. She acknowledged telling police officers that appellant had hit her several times and had called her a bitch.

Officer Ruben Chavira testified that on May 7, 1992, he took a statement from Anedra Keaton, who had a swollen lip, and reported that that Newborn had hit her. 69 RT 6953. Appellant threatened the police officer when they arrested him. 69 RT 6955.

f. Refusal to follow orders of Officer Monica Cuellar.

Pasadena Police Officer Monica Cuellar testified that she was dispatched on May 12, 1993 to look for a Black male with a gun. When she arrived at the location, there were about 20 civilians and six officers. She was directed to search Newborn and asked him to place his hands on his head. Newborn responded, "don't touch me, bitch" and "fuck you." She asked him again to put his hands on his head, and he verbally brushed her off. Investigator Peterson then asked him to put his hands on his head, and he refused to comply. Newborn shouted more obscenities, and officer Cueller believed he was inciting the crowd and felt it was necessary for their safety to detain him. 69 RT 6826. He resisted being handcuffed, but eventually they got him into the police car, while he continued to yell obscenities. 69 RT 6827. Appellant was searched and he had no weapons of any kind. 69 RT 6828.

g. 1986 altercation in Youth Authority.

Gary Driggs testified that in 1986, he was a youth counselor at the California Youth Authority in Stockton. 69 RT 6857. On August 4, 1986, Newborn broke a rule, in that he was "talking during the time when wards aren't permitted to talk." Mr. Driggs escorted him to a temporary lockup room while Newborn continued to talk to the other ward. Newborn broke away from him, jumped over a four-foot railing, and a fight ensued between Newborn and the other ward. 69 RT 6858. Driggs knew that Newborn was a Blood gang member, and the other ward had called out "slob," which is a derogatory term for a Blood gang member. Neither ward stopped fighting, so Driggs maced them to get them to stop. 69 RT 6860.

h. Another altercation in Youth Authority.

Joseph Patelle testified that in 1986, he was a carpentry teacher at a CYA facility in Stockton. He saw an altercation in his shop between Newborn and another ward named Khaton. The two were engaged in gang-related talk, and Newborn struck Khaton. Mr. Patelle summoned security officers, and both wards were arrested. 69 RT 6900.

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4. Prior incidents of violence involving McClain.

a. Attack on inmate in county jail.

Gregory Boghosian testified that he was a Los Angeles County deputy sheriff and on June 19, 1995 was assigned to the central jail to escort high-powered inmates for their exercise time. 68 RT 6648. As he and his partner were escorting a group that included McClain, Deputy Boghosian and his partner were right behind him and took him to the ground. When they lifted McClain up, "underneath him was a knife." 68 RT 6655.

b. Possession of firearm and ammunition.

Pasadena Police Officer Luis Banuelos testified that he was working with a partner in a patrol car on September 12, 1992. 68 RT 6685. At about 3:15 a.m., he was driving eastbound on Orange Grove near Raymond when he saw two individuals running out of the housing project across Orange Grove Boulevard, one of whom was McClain, and the other was Solomon Bowen. Officer Banuelos followed them in his car and saw them go behind the gas station, where he found them trying to conceal themselves. He detained them, patted McClain down, and found several 38-caliber bullets. He found two guns in the area, one of which had ammunition identical to that found in McClain's pocket. 68 RT 6689.

c. Robbery of Bernard Rowe.

Bernard Rowe testified that in 1990, he was at his house on West Harriet Street talking with his friend, Bryant, in the front area. He went in side to get a beer and when he came back, Bryant said somebody had robbed him. He denied telling the police he was outside with Bryant and the two people pulled handguns from their front pockets. 68 RT 6725.

Deputy Sheriff Ken Talinko testified that he interviewed Rowe about the robbery. Rowe told him that two men had approached them while they were talking in their front yard and produced handguns. Cook ran toward the rear of the house while the robbers backed Rowe up against the garage. One robber looked in Cook's car, saw the keys, and stole the vehicle. 68 RT 6730. Rowe identified McClain as one of the robbers when the car was found within the next 30 minutes. 68 RT 6732.

d. Possession of firearm.

Ron Blankenbaker testified that he was a Los Angeles sheriff in 1989, and was in a patrol car with a partner at 1:00 a.m. on November 8 at Charles White Park in Altadena. 69 RT 6815. He saw two males near the bathroom area of the park, and they ran into the bathroom when they approached. He then heard a gunshot from inside the bathroom, and he ordered the individuals

to come out. Four men came out and one (McClain) said, "I shot myself," pointing to his fingers that were bleeding. 69 RT 6817. He searched the bathroom and found a small caliber handgun. His partner found some live rounds on McClain. 69 RT 6819.

e. Robbery of Raquel Flores.

Raquel Flores testified that she was standing near her car near her home in Pasadena, having just gotten home from work at about 9:30 p.m. Someone approached her, asked a question, pushed her with one hand, and grabbed chains from her neck with the other hand. 69 RT 6834. She had seen the person as she drove up with two other people, walking a bicycle. After the person took the chains, he ran off and she called the police. They took her to another location, where she identified the attacker as McClain. 69 RT 6839.

f. In-court threat to witness Pattelle.

After Joseph Patelle testified about the Youth Authority altercation between Newborn and another ward, he passed by McClain on the way from the witness stand. He stopped to wish DA Callahan well. As he was passing by McClain and his attorney, "McClain leans back and says to me, 'I'll kill you,' in a word." 69 RT 6923. Patelle became "incensed" and complained to the District Attorney. The trial court informed the jury of the stipulation that

attorney Richard Leonard would testify that he heard McClain say, "You're a dickhead." 69 RT 6925.

g. McClain's former testimony about gang retaliation.

The trial court instructed the jury that McClain's former testimony should not be considered against any of the other defendants, at which point the prosecutor read McClain's testimony about who was a P9, named Newborn, among other. 70 RT 7018. McClain's testimony described a telephone call he received with the news that Fernando Hodges had been shot by some Crips; his intent to retaliate and his armed search with a .44 handgun "to kill a Crip." 70 RT 7024.

h. Assault with a firearm on Robert Price.

Derrick Carter testified that he was a Pasadena police detective in 1993, and interviewed Robert Lee Price on October 29, whom he knew as a Raymond Avenue Crip. 71 RT 7030. Price showed him a bullet wound where he had been hit on the side of his nose, and which had come out by his ear. He was also shot in the right thigh near the Community Arms housing project. The prosecutor then read the jury's verdict of guilty of the attempted murder of Price as to codefendant McClain.

i. Threats to courtroom bailiffs.

Deputy Sheriff Robert Browning, a courtroom bailiff, testified that the previous day, he was getting the defendants ready to come out and was putting on their stun belts. The court instructed the jury that it was a security device and "does not mean that they are guilty or not guilty." He put the security device on Holmes, who went into the courtroom. McClain then came out and asked why his belt was warm, and Browning explained that they had just tested it. McClain went back into the cell to get an over shirt, at which point McClain said, "If you do one of us, you'll have to do us all." Browning said, "what?" and Newborn repeated the statement to him, adding that "If you push one button, then you better push all three, because you know what I'm going to do." 73 RT 7336. McClain then said, "Don't get within two feet of me or I'll kill you, and we'll all have weapons this time." The trial court interjected, "Was the statement 'we'll have' or 'I'll have'?" The witness answered, "I'll have." 73 RT 7337. When asked how loud McClain was speaking when he made this threat, Browning answered, "It was loud enough he wanted all three of us to hear," so he "purposely said, 'what?' in order for him to repeat so that my partners could key up so in case something happens." Browning said that

McClain's phrase, "I'll kill you" was "a little bit louder, with a little bit harsher tone." 73 RT 7341.

McClain called Deputy Admire who testified that he was in the holding cell but did not hear the phrase, "I'll kill you." 73 RT 7342.

Deputy Tranberg also testified that he did not hear the words, "I'll kill you," but did hear McClain say something about "if you get within two feet of me," and "I'll have a weapon this time." 73 RT 7346. The trial court instructed that McClain's threat was admissible only against McClain and only if proven beyond a reasonable doubt.

5. Prior incidents of violence involving Holmes.

Tory Riley testified that he was a Pasadena police officer on August 3, 1990, and was on duty at a carnival at Jackie Robinson Park. 68 RT 6796. He was notified that Karl Holmes had been observed with a gun, and officer Riley checked. He saw a handle of a gun protruding from Holmes right pant's pocket and placed him under arrest. 68 RT 6797.

6. Victim impact testimony.

Katrina Evans, the mother of Edgar, gave a very positive description of Edgar as being very helpful with his younger siblings and very industrious in the neighborhood. She identified several pictures of him wearing his school

uniform, including one taken after he had won a citywide essay contest on the Martin Luther King "I Have A Dream" theme. 66 RT 6498.

Colett Evans testified that she is Edgar Evans younger cousin. She talked about Edgar's good qualities and her memories of him. 71 RT 7057. The prosecutor read to the jury Edgar's essay about Dr. Martin Luther King. 71 RT 7060.

Kenneth Coats described fond memories of his brother Stephan, his art mural at the Washington Middle School, and his own feeling of loss. 68 RT 6763.

Deborah Bush described her son Steven Coats as a child, and the prosecution played a videotape of her surviving son, Kenny. 69 RT 6981.

Steven Coats testified that his son, Steven, was killed on October 31, 1993. 70 RT 6988. He was separated from Deborah, but saw them on weekends. All the other children were devastated, as was he. 70 RT 6990.

Florence Crawford testified that she was Reggie's mother. She was devastated when she heard that Reggie had been shot, and she went to the hospital to see him. She had worked very hard to "keep him from getting involved in gang banging" because "it was so common" in Pasadena. 70 RT 6998.

B. Defense Evidence in Mitigation.

1. Newborn's presentation.

a. The Louise Jernigan incident.

Officer Tracey Ibarra regarding the incident with Louise Jernigan at the beauty supply store on December 11, 1992. 72 RT 7193. He spoke to Mrs. Jernigan, her daughter, and to the beauty store cashier. Mrs. Jernigan told him that she was in the store when Newborn entered and hugged the sales clerk, Ms. Edwards. Mrs. Jernigan left the store when Newborn hugged the cashier. Mrs. Jernigan said nothing about Newborn approaching her with an apparent gun in his pocket while she was inside the store.

Rather, as she was walking across the parking lot with her daughter, Newborn was also crossing the parking lot when she said, "How you doing," and Newborn responded with profanity. 72 RT 7196. "Fuck you. You accuse me of killing your son, and we're going to get you too." 72 RT 7198. She saw his hands inside his jacket pocket, with pointed shape. After that interchange in the parking lot, Newborn got in a car and drove away. 72 RT 7197.

Helen Edwards testified that she was a cashier in a beauty supply store in late-1992. 72 RT 7241. She described Newborn as "like a nephew," but not an actual blood relative. 72 RT 7242. Appellant frequently came in to say hello

and to buy hair products. One day, appellant came in at the same time Mrs. Jernigan was there, and he hugged her. Mrs. Jernigan said to appellant, "You killed my son." Appellant said to Helen, "She thinks I killed her son." Mrs. Jernigan began yelling, Helen told appellant to leave, which he did, and Mrs. Jernigan followed him out to the parking lot where they yelled at each other. She never saw any threatening gesture on appellant's part. 72 RT 7244. Appellant did keep saying, "I didn't kill your son." 72 RT 7245.

b. Newborn's difficult upbringing.

Gracie Newborn, appellant's mother, testified that Newborn was born in 1970 when she was in high school, 16 or 17 years old, already pregnant with another child, Alonzo Hamilton. 72 RT 7200. She stayed with Lorenzo's father, Buford, for five years before they divorced. During that five-year period, she was sexually and physically abused by Buford Newborn. The police were called on more than one occasion in response to the physical abuse, and Buford was arrested on more than one occasion. After their separation, she got a restraining order, but he came back more than once, abused her more, and was arrested again. 72 RT 7202. After she left Buford, she took Lorenzo and they had little contact with him.

One of Buford Newborn's other sons, Buford, Jr., developed a strong relationship with Lorenzo that lasted for several years. However, Buford, Jr. was killed. 72 RT 7204.

Newborn also developed a strong relationship with his half- brother, Alonzo Hamilton, but that came to an end as a practical matter when Alonzo was sent to prison, where he remained at the time of trial. 72 RT 7204. Newborn became close friends with Fernando Hodges, and was the godfather to Fernando's child. 71 RT 7215.

Mrs. Newborn was unaware that any of the boys were involved in gangs, as she was living in Palmdale at the time. She moved from Pasadena to Palmdale to better her living conditions, and asked Newborn to go with her. He went initially, but returned to Pasadena over her objection. She tried to teach him right and wrong, tried to take him to church, and did the best she could.

There was a time that he was sent to juvenile camp when he was 13, and then to the Youth Authority when he was 15. She visited him at the juvenile camp and at the Youth Authority, and still loves him.

He was always teased in his youth because he had a noticeable limp. 72 RT 7207. He also had learning disabilities relating to reading and writing, as well as a stuttering speech impediment. 72 RT 7208. At some point, appellant

was labeled as "retarded" and placed in a special school. In elementary school, he was offered medication to treat his various difficulties. He developed a tolerance to what was being administered. School authorities kept increasing the dose, and effectively sedated him—"It was like he just wasn't there." 72 RT 7210.

Accompanying that treatment, he had a bedwetting problem into his early teenage years, which resulted in more ridicule by inmates at the Youth Authority. In his Youth Authority school, he was ranked 490 out of 500 students.

Regarding the bedwetting, she punished him by making him stay in room, hanging his sheets out the window, or just making him sleep in it until she was ready to change the sheets.

She did seek medical treatment for head injuries he received during his youth. On the first incident, he was hit in the head with a rock or bat. She explained that on one occasion his sister threw a rock at him and hit him in the head. On another occasion, he was at a baseball game and accidentally hit by a bat. He went to the USC Medical Center for treatment and was given aspirin. On another occasion, he fell off his bicycle, got a tooth knocked out, and was also given aspirin for treatment at the hospital. 71 RT 7212.

She identified a certificate, Defendant's CC, in fourth grade in 1981 for excellence as a ball monitor. She also identified a photo of a basketball trophy, Defendant's BB, from 1988. 71 RT 7214.

When Newborn was 17 or 18, he developed a problem with alcohol and marijuana. She talked to him about it, but it did not do any good. Newborn had one job, when he worked for the City of Pasadena picking up trash after the Rose Bowl. 72 RT 7216. In his youth, Newborn "just constantly ate the Tide [laundry detergent] if I didn't keep it up off the floor." 72 RT 7216. During his upbringing, she talked to psychologists, psychiatrists, and counselors and did the best she could with appellant and his problems.

On cross-examination, the prosecutor's line of questioning was whether Newborn called her a bitch when she walked past him out of the courtroom earlier in the case. She denies hearing any such thing. 72 RT 7217.

When asked at what age she first noticed that Newborn would be a difficult child, she answered at age three or four. She was impeached with the testimony from the prior trial when she answered the same question "probably around the age of 10, 13." 73 RT 7223. Between the two trials, she "just had time to think back over his growing-up years." She described him as "just a handful, always had to have his way." She described him as "stubborn, just had

to have his way. I mean fall down, cry, kick, scream." She did not always let him have his way because she would "lay down the law." She acknowledged that Newborn had seen a psychologist before he was 13 because of his behavioral difficulties in school. 72 RT 7226. He had fights with other students, was "hyper," and would not do what the teachers wanted him to do.

She acknowledged there were other interventions, including a special school in Pasadena that he was kicked out of, and private tutoring at home before he ended up in the Youth Authority. 72 RT 7229. She was informed that he was in the low-average range of intelligence. 72 RT 7232.

She acknowledged that appellant had a bad temper, and that he did not like having his father around. 72 RT 7237. She explained that Buford, Sr. "used to beat me and he would rape me in front of the kids," while they were in bed with her. 72 RT 7238.

c. Law enforcement testimony regarding the absence of reports of a shooting near Blake and Pasadena on October 31, 1993.

Detective Michael Korpal, recalled, testified that he tracked down the reports of shootings in Pasadena on October 31, 1993 at defense counsel's request. 73 RT 7263. His computer search revealed no reports of shootings in the vicinity of McFee's residence or Blake Street on that date. 73 RT 7264.

However, there were reports of gunshots fired close to 1:00 a.m. on the morning of November 1, 1983. 73 RT 7264. There were three separate calls within a few minutes of 1:00 a.m. regarding the shots. 73 RT 7268. One report related to 600 Blake Street, which is the address of Dion Nelson, a Raymond Street Crip. 73 RT 7269.

d. Photographs of Newborn as a youth.

Defense counsel introduced by stipulation nine photographs of Newborn.

2. McClain's presentation.

Out of the presence of the jury, McClain asked for more witnesses from the county jail for the defense, regarding his "demeanor in jail [and] the type of person I am in jail," including Clarence Jones, Barry Crumpton, and Anthony Torres. 72 RT 7189. McClain also wanted to call Bowen and Bailey to "help me in my lingering doubt case," as well as their deal to a lesser charge. 72 RT 7191. The trial court responded, "It goes again to lingering doubt, which this Court has repeatedly said I have not made a decision" because "I still can't find any case where it is mandated," so "under 352 it is my discretion where it comes in." McClain added that Bowen and Bailey knew him for a long time and "would be good witnesses to testify in my behalf on the type of person I am." 71 RT 7192.

Clarence Jones testified that he recalled an incident involving a shank on the tier of 3100 Module, but did not see a weapon in anyone's hands. 73 RT 7272. Mr. Jones testified that in a racial incident, someone might throw a shank to aid one of the people fighting. 73 RT 7273. Mr. Jones was convicted for carjacking and robbery in April 1995 and sentenced to 28 years. Mr. Jones has known McClain for some 10 to 20 years, "in and out of YA, on the streets." 73 RT 7277. When given a more open-ended opportunity to testify by the court, Mr. Jones said that McClain was "a good guy and he's not what these people claim that he is," and contended that "There is a racial war going on in these courtrooms; and these white boys, white Caucasian guys that's got, you know, high publicity cases, they don't file the death penalty against them at all." 73 RT 7280.

On recross, Mr. Jones testified that he was "treated unfair every time [he] went through the court system." The prosecutor asked whether Jones was shackled at his own prior trial. 71 RT 7283. McClain then responded, "It's obvious the way they bring you in here with all those chains, they are trying to paint a picture you are some dangerous dude." Jones concurred, and referred to the visible stun belt he was wearing as indicative of an effort by the sheriff to reflect adversely on McClain. 71 RT 7284. Mr. Jones pointed to what he called

a "zapper," apparently a stun belt, and expressed his concern that the restraints would inadvertently reflect on McClain.

Earlean Shamburger, a girlfriend of McClain's, was asked how it would impact her life if he were put to death. She answered, "It would hurt me and my kids and your daughter, and life won't be the same." 73 RT 7286. On cross-examination, she was asked about a cousin who was just killed, an uncle is in state prison, and a brother in state prison. She denied knowing that her brothers were in the Blood gang in Pasadena. 73 RT 7287. She said that McClain was the father of one of her daughters, and that she has had contact with him on and off since 1980, although she never lived with him and he never provided child support. 73 RT 7290. She answered, "yes" when asked by McClain, "What I can do for my daughter, do I do it?"

Doris Russell, McClain's mother, testified that if he got the death penalty, it would "be hard" and "would affect not only my life, but it will affect the whole family's life," 73 RT 7293, referring to the group sitting in the back. She had proclaimed his innocence, and told the jury that it was unfair for him to be in this position for something he did not do.

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3. Holmes' presentation.

Counsel for Holmes attacked the identification testimony Gabriele Pina, first by cross-examination about the circumstances of the identification, 71 RT 7063, then about when he learned of the reward being offered, and how much he received. 71 RT 7097.

Holmes recalled Detective Uribe regarding his contacts with Mr. Pina. 71 RT 7137. On cross, the prosecutor attempted to rebut Holmes' theory of misidentification by emphasizing that Pina did not pick Newborn from the six-pack, even though Newborn's picture was in the newspaper. 71 RT 7146.

Holmes also recalled officer Chavira regarding his contacts with Mr. Pina. 71 RT 7158. Pina described one of the vehicles involved as a 1983 to 1984 dark blue Toyota, and never mentioned a 1994 vehicle. 71 RT 7158.

Holmes called Detective W. R. Ireland of the Pasadena Police Department regarding his contacts with Mr. Pina. 71 RT 7163. Detective Ireland acknowledged that Pina told him at one point that he was not paying particular attention to the individuals inside the vehicle. 71 RT 7164.

Holmes called his father Willie Wimberly, who testified that he also had an older son who plays professional football, and two daughters. 71 RT 7176. Karl Holmes was fine in his early childhood until his mother died in 1990,

when Holmes was 14 or 15. The death penalty for his son would have a serious impact on all of them. 71 RT 7177.

Donna McCallum, a State of California Department of Health Service employee, is Holmes' aunt. She noted his nickname of "Boom" because "When he was little, he was always bumping into things and bumping his head, and that's when his mother gave him that nickname." 71 RT 7184. Ms. McCallum had talked to Holmes' mother twice on the day she died so abruptly. She also gave an opinion that his mother's death had a serious impact on Holmes and the entire family, and giving the death penalty to Holmes would have a serious impact as well. 71 RT 7185.

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ARGUMENT

GUILT PHASE ARGUMENTS

I. APPELLANT WAS DEPRIVED OF DUE PROCESS, EQUAL PROTECTION, AND A REPRESENTATIVE JURY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERROR IN REFUSING TO REMEDY THE PROSECUTOR'S IMPROPER EXERCISE OF PEREMPTORY CHALLENGES BASED ON RACE AND SEX.

A. Summary of Facts.

1. Overview.

Following voir dire for hardship and for cause, the parties began exercising peremptory challenges on August 23, 1995, when the jury was initially comprised of two male Filipinos, two Black males, two Caucasian males, one Hispanic male, three Black females, two Caucasian females, and one Hispanic female. After several rounds of peremptories, defense counsel objected to the prosecution's sixth strike against Black female jurors on Batson/Wheeler grounds. 13 RT 907. The trial court refused to find a prima facie case, and denied the motion. 13 RT 908.

The bottom line is the prosecution executed 16 peremptory challenges, all against prospective jurors who were women, or minorities, or both. The prosecution did not strike one white male. The defense, in contrast, made 15

joint peremptories, equally divided among 7 white prospective jurors, and 8 non-white prospective jurors.

Counsel for appellant has summarized the course of these peremptory challenges below, both as a narrative and in chart form, with the intention that the combination will assist in explaining the dynamics of this jury selection process.

2. The parties' peremptory challenges by gender and ethnicity.

The prosecution's first challenge was against a Black female, Juror #37. 12 RT 693. The Black female juror was replaced by a Caucasian female juror. The defense then exercised a joint peremptory against a male Filipino juror. 12 RT 698. The prosecutor then exercised a strike against a Caucasian female juror, 12 RT 705, who was replaced by another Caucasian female juror.

The defense then exercised a peremptory challenge against a male Hispanic, who was replaced by a female Hispanic.12 RT 715. The prosecutor then exercised the peremptory against a Caucasian female juror, who was replaced by a Black male juror. 12 RT 728. The defense then exercised a challenge against a Black male juror, 12 RT 744, who was replaced by a Caucasian female juror.

The prosecutor then exercised a challenge against a female Hispanic juror, #53, 12RT 749, who was replaced by a Caucasian female juror. The defense next peremptory was against a Caucasian male juror, 12 RT 753, who was replaced by another Caucasian male juror. At this point, the jury consisted of one male Filipino, one Black male, two Caucasian males, three Black females, three Caucasian females, and one Hispanic female.

The prosecutor then struck juror 35, a male Filipino, 12 RT 758, and the defense struck juror 52, a white female, 12 RT 772. The prosecutor struck juror 48, a black female, 12 RT 789, bringing the prosecutor's total strikes against females to five out of six.

The defense then struck juror 59, a white male, 12 RT 801, and the prosecutor struck juror 56, a white female, RT 815. The defense then struck a white female, juror 45, 12 RT 823, and the prosecutor struck a male Hispanic, juror 66, 12 RT 832. The defense struck a black male, juror 54, 12 RT 845, and the prosecutor struck a black female, Juror #9, 13 RT 870. The defense struck a white female, juror 55, 13 RT 879, and the prosecutor used his tenth strike on a minority female, juror 80, 13 RT 884. At that point, the prosecution had struck 8 female jurors and two minority males.

The defense struck a male Asian, juror 100, 13 RT 890, and the prosecutor struck a black female, juror 88, 13 RT 896. The defense struck a white female, juror 103, 13 RT 903, and the prosecutor struck another black female, juror 94, 13 RT 907, triggering the Batson-Wheeler objection by defense counsel. At that point the prosecution had exercised 12 peremptories against 10 females and two minority males.

3. The Batson-Wheeler objection and denial.

When the prosecutor made its twelfth peremptory challenge against another Black female, Juror #94, the defense made a Batson-Wheeler motion. Attorney Nishi, speaking for the defense, argued as follows:

> Mr. Nishi: Your Honor, there is going to be a Wheeler motion. From our count we show that he has – Mr. Myers has kicked six Black women, juror no. 37, juror no. 53, juror no. 48 –
>
> The Court: You don't have the numbers here?
>
> The Clerk: They are all down here. I have to do it by seats.
>
> Mr. Nishi: —juror No. 9, juror No. 88 and juror No. 94.
>
> The Court: Do you want to respond?
>
> Mr. Myers: I want to know if the Court is going to say that there has been a prima facie showing, considering the Court has read and considered all the questionnaires and heard their answers.
>
> The Court: I don't.

I said ["]do you want to answer["]. I don't find a prima facie case yet. In fact, three of the jurors we had some sidebars on. We had some very difficult issues with them.
We had the questionnaire. I didn't find anything that would be in the nature of bias or prejudice. I they they have a right to preempt those people they have done so far, and I keep track and I film everyone on this case, so I know.

Mr. Myers: Thank you.

The Court: Thank you. 13 RT 907–908.

4. The continuation of jury selection.

The defense then jointly challenged a white female, Juror #102, 13 RT 911, and the prosecution challenged a male Hispanic, Juror #101, 13 RT 916. The defense accepted the panel, 13 RT 921, the comprised of two white males, one white female, one male Hispanic, two female Hispanics, and six black females. The prosecutor then struck Juror #109, one of the black females, 13 RT 922.

She was replaced by a white female juror, and the defense again accepted the jury. 13 RT 929. The prosecutor then struck a female Hispanic, Juror # 69, 13 RT 929. The defense struck a male Asian, #116, 13 RT 930; the prosecution struck a black female, #107, RT 934, and the defense struck a white male, #123, 13 RT 939.

That seat was filled by Juror #126, a female, who was excused for cause, over defense objection, for her expressed reluctance toward the death penalty. The Court called counsel into chambers and lectured them about their peremptory challenges, noting that the defense had accepted the jury three times, and the appearance of fairness in the courtroom was being compromised by the continued peremptories. The Court concluded the exhortation as follows:

> I want to put you on notice: be very careful, both of you. Be very careful. I had the opportunity one time sitting here a there were three Justices that came down to visit me and they came in chambers and commented on that. This is not apparent, but you have to be very careful. The appearance of justice is as important as justice.
>
> I think your peremptories were proper, but you are giving the appearance. You are down to the short straws here. I think most of those people had some problems, people in jail and things.
>
> But for justice for everyone I want you to think about what we are doing here. I am not admonishing you; I am just saying I am very sensitive about that on both sides. 13 RT 948 – 949.

Following that statement, the People accepted the jury. 13 RT 953. The defense struck Juror #129, a male Hispanic, 13 RT 953, and all counsel accepted the jury. 13 RT 959. It was comprised of two white males, three white females, one male Hispanic, one female Hispanic, one black male, and four black females.

B. The Trial Court's Errors.

The trial court erred in failing to find a prima facie case of purposeful discrimination by the prosecutor's peremptory challenges, and in failing to require an explanation for the strikes.

1. The constitutional standard.

Johnson v. California (2005) ___ U.S. ___, 125 S.Ct. 2410, held that the standard for determining the existence of a prima facie case of discriminatory use of peremptory challenges had been unconstitutionally formulated and applied by California courts. People v. Johnson (2003) 30 Cal.4th 1302 had stated that Batson "permits a court to require the objector to present, not merely 'some evidence' permitting the inference [of discriminatory purpose], but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." Id. at 1316. The objector's burden was described as "substantial."

The United States Supreme Court reversed the judgment of the California Supreme Court, stating that "[t]he facts of this case well illustrate that California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by Batson." 125 S.Ct. at 2419. Reviewing the state court record and the California Supreme Court's acknowledgement that "it certainly

looks suspicious that all three African-American prospective jurors were removed from the jury," 30 Cal.4th at 1307, the United States Supreme Court held that "[t]hose inferences that discrimination may have occurred were sufficient to establish a prima facie case under Batson." Ibid. The Court explained that the objector's initial presentation need only support an "inference that discrimination has occurred":

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Id. at 2417 (emphasis supplied).

Applying the teaching of Johnson to this case, the trial court's constitutional errors are clearly confirmed.

2. The statistical demonstration of discrimination in this case.

Batson recognized that "a prima facie case of discrimination can be made out by offering a wide variety of evidence, [fn] so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose'." Batson v. Kentucky (1986) 476 U.S. 79, 94. One particular type of evidence has been widely recognized as establishing by itself a prima facie case, i.e., a statistically

disparate use of peremptories against prospective jurors of a protected class. The United States Supreme Court found in Johnson that the defendant had met the prima facie burden by pointing out to the trial court that the prosecutor had exercised three peremptory challenges against Black prospective jurors, out of a total of 12 peremptories, and had eliminated all Blacks from the seated jury. "In this case the inference of discrimination was sufficient to invoke a comment by the trial judge 'that "we are very close,"' and on review, the California Supreme acknowledged that 'it certainly looks suspicious that all three African-American prospective jurors were removed from the jury'." Johnson, supra at 2419, quoting from People v. Johnson, supra, 30 Cal. 4th at 1326.

The federal courts have addressed in detail both before and after Johnson what degree of statistical disparity is necessary to establish as prima facie case. Williams v. Runnels (9th Cir. 2006) 432 F.3d 1102, granted relief under 28 U.S.C. 2254 following the denial of relief in the California courts. There, "Williams established that he is African-American and that the prosecutor used three of his first four peremptory challenges to remove African-Americans from the jury," and "only four of the first 49 potential jurors were African-American." The Ninth Circuit held that "[t]hese bare facts present a statistical disparity," and that under Ninth Circuit precedent cited with approval in

Johnson, "a defendant can make a prima facie showing based on a statistical disparity alone." Id. at 1107. Williams v. Runnels, supra, cited Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1077, in which "we found an inference of bias where four of seven Hispanics and two African-Americans were excused by the prosecutor; Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 812 [overruled on other grounds in Tolbert v. Page (9th Cir. 1999) 182 F.3d 677, 681 [en banc]], where "we determined there was a prima facie showing of discrimination where the prosecutor exercised peremptory challenges to exclude five out of a possible nine African-Americans"; and Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083, 1090, where "we concluded there was an inference of bias where the prosecutor had used five out of six peremptory challenges to strike African-Americans." Id. at 12-13. Paulino was expressly cited with approval in Johnson v. California, supra, at 2418.

The minority strike rate in Fernandez was 67%; 55% in Turner; 83% in Paulino; and 75% in Williams v. Runnels. Here, the prosecutor's protected category strike rate was 100% at the time of the Batson motion. All twelve of the peremptories at that time had been directed toward women, minorities, or

minority women as follows: six black females[2]; three white females; one "other" female; one male Filipino; and one male Hispanic. Defense counsel emphasized the particular category of black females, which the prosecutor had hit the hardest, but the big picture is that all of the prosecutor's challenges were directed toward members of protected classes.

Viewing the peremptories against black females by in comparison with the total number of black female prospective jurors in the box, the prosecutor had struck six black females out of nine who had been called to sit, a strike ratio of 67%, clearly within the range of disparity that has always been recognized as sufficient to establish a prima facie case.

The prosecutor's final strike tally was entirely corroborative of an inference of discrimination. From the denial of the Batson motion until the jury was sworn, the prosecutor struck only females, minorities, or minority females as before -- two more black females, one more white female, and one Hispanic male. The prosecutor stopped making peremptory challenges after the trial court

[2] Attorney Nishi spoke for the defense and enumerated the six black females struck by juror number – 37, 53, 48, 9, 88 and 94. 13 RT 907 – 908. The clerk's enumeration of the sex and race of the jurors designates Juror #53 as a female Hispanic, rather than as a female black. This discrepancy was not addressed by the court or by the prosecutor.

gave counsel a lecture about the "appearance of justice" being compromised by the parties' challenges. RT 949.

In sum, the trial court failed to give adequate weight to the clear statistical evidence of possible discrimination, and failed to find that a prima facie case had been established.

3. The inadequacy of the trial court's response to the motion.

The trial court refused to find a prima facie case, and offered the explanatory comments that "[I]n fact, three of the jurors we had some sidebars on," and "[w]e had some very difficult issues with them." 13 RT 907. This response was inadequate and improper under Johnson, because it contains an implicit judicial speculation that the prosecutor might have had some race neutral reason from striking the black female jurors. Johnson emphasized the trial court's duty to obtain the prosecutor's reasons for the strikes if an inference of discrimination was present, rather than assume, presume, or otherwise supply permissible reasons. Johnson condemned the practice of substituting judicial speculation for the solicitation of actual reasons, "[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question," id. at 2418, and quoted Paulino v. Castro, supra, 371

F.3d at 1090 for the proposition that "it does not matter that the prosecutor might have had good reasons...[w]hat matters is the real reason they were stricken." Ibid.

Moreover, the trial court's implicit justification of the prosecution's challenges is facially inadequate, because the prosecutor had struck only women, minorities, or both, including six black females. Even if three of the black females had been the subject of sidebar discussions, suggesting that there may have been potential challenges for cause, there were at least nine other struck jurors to whom this speculation did not apply, including three additional Black female jurors.

Finally, the record does not support the trial court's implicit suggestion that three of the jurors had expressed something that made them natural targets for prosecutorial peremptories. The court and counsel had agreed prior to voir dire and after reviewing the jury questionnaires, to ask certain questions at the sidebar where the questions related to some potentially sensitive or confidential matter. The arrangement was that the trial court put his initial next to any question that the parties proposed for sidebar follow-up, to avoid possible embarrassment to the prospective juror. The questions asked at the sidebars correspond to the questions that have Judge Smith's initials next to the item on

the questionnaire. There was no necessary implication from the flagging of a question for sidebar exploration that the jury's fitness to serve was in any way compromised.

The following review of the jury questionnaires and jury voir dire of the six Black female jurors struck by the prosecution reveals a roster of gainfully employed and eminently respectable Black females, all of whom favored the death penalty, and none of whom displayed any type of lightning rod characteristics or attitudes to trigger a prosecutorial peremptory.

Juror #37 was a 58 years old black female, married for 35 years, and employed as an educational advisor at Mt. San Antonio Community College for 23 years. 15 Clerk's Supplemental Transcript I, pp. 4263 – 4266, hereinafter ("CTS-I"). She was well educated, and her husband had as A.S. degree in Correctional Science, and was a veteran of the military. 15 CTS-I 4269. She was active in her church, and named the Bible as the most influential book she had read. 15CTS-I 4272. She had prior jury service in civil and criminal cases, and reached verdicts. 15 CTS-1 4275. She had a son who had been to prison, and who had been the victim of an assault. 15 CTS-I 4277.

Regarding the death penalty, she stated in her questionnaire that "[t]here are circumstances or cases that I felt warrant the death penalty," 15 CTS-I 4294,

but that the death penalty was imposed "randomly" in cases "when you're poor and uneducated," 15 CTS-I 4295.

At voir dire, the following colloquy occurred at the bench:

> The court: I put down "out."
> I don't know why. She looks like a beautiful nice lady. I don't know why, unless I remind myself what I did it for.
>
> Ms. Callahan: No. 91.
>
> The Court: Question 91?
>
> Ms. Callahan: Question 91, page 21.
>
> The Court: I think I had a lot of trouble just reading it.
>
> Mr. Nishi: I don't have any problem.
>
> The Court: I had a lot of things. I had a hard time reading it. No problems? I will let you ask the questions.
>
> Mr. Myers: I am going to try to get her off for cause on death and, if not, I will be preempting her.
>
> The Court: I don't find any cause. I don't find any cause. There is something else I couldn't read here.
>
> Mr. Myers: Let me ask her a few quick questions and if it works; it works, if not, we are done. 12 RT 677 – 678.

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The prosecutor asked if she would have any problem imposing either life without parole or the death penalty, and she answered "No" immediately and unequivocally. 12 RT 679. That was the extent of voir dire.[3]

Juror 53 was a 53 year old woman who had worked at the I.R.S. for more than eight years, and whose ex-husband had also been employed by the I.R.S. 18 CTS-I 4919 – 4922. She identified the most influential book she had read as Life on the Color Line, and explained that "because I'm Black I have to work twice as hard to became all that I can become within my life time." 18 CTS-I 4928. She described herself as a practicing Catholic, and stated that her religious beliefs would not affect her ability to sit on a death penalty case. 18 CTS-I 4931. She had once received a traffic citation and "learned a lesson" to "be more observant at all times." 18 CTS-I 4935.

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[3] The questionnaire answer No. 91 on page 21, referred to by prosecutor Callahan as a possible reason for striking Juror 37, was entirely innocuous. The question read: "If a defendant testified, would you judge the defendant's testimony the same as any other witness?" Juror 37 checked "Yes" and added the following explanation:

> "He/she is innocent until proven guilty. I have seen a defendant who was adamant about his innocence and on the day of the trial guilt was admitted by another. The accused had been identified. The accused and the guilty was as different as night and day. I have also known of the person going free and was guilty when a dishonest juror sat on other cases trying the same individual." 15 CTS-I 4282.

Regarding the death penalty, she stated that "the death penalty for certain crimes and under certain circumstances is the only vehicle to maintain safety." CT 4951. She would not automatically vote for either LWOP or death. 18 CTS-I 4958.

On voir dire, she stated that she could be fair to both sides. 12 RT 718. The prosecutor asked her whether she had "developed a system of moral beliefs and you are firmly entrenched in your convictions and beliefs," to which she reasoned that her beliefs were subject to change. 12 RT 721 – 722. The prosecutor asked about her answer to question No. 65, her observation about the criminal justice system that "a juror can ignore the letter of the law and follow his/her conscience," 18 CTS-I 4932. This related to a television program regarding a Wisconsin man who was on parole, and illiterate, and applied for a job as a security guard. When hired, he bought a gun as required for his employment, and was subsequently charged with parolee in possession of a firearm. The jury acquitted, and Juror #53 explained that "in this particular situation it was the most equitable thing that could have been done." When asked if she could see herself "in a situation also ignoring the letter of the law and voting your conscience," she answered, "yes'. 12 RT 724. On further voir dire by defense counsel, she assured the court that she would follow the judge's

instructions regarding the law. 12 RT 726. The court reconfirmed that the juror was free to vote her conscience in the penalty phase. 12 RT 727,

Juror 48 was a 67 year old retired physical therapist, who had lived in Los Angeles for some 28 years and owned her home. 17 CTS-I 4715. Also residing in her home was a retired municipal court judge. 17 CTS-I 4716. She had a B.A. in chemistry, and a certificate in physical therapy from U.S.C. 17 CTS-I 4717. She served in the military and was discharged as a second lieutenant. 17 CTS-I 4719. She owned a handgun, which she had obtained in response to a burglary and rape of her neighbor. 17 CTS-I 4720. She had previously sat as a juror in a robbery murder case, and a verdict was reached. 17 CTS-I 4725.

Regarding the death penalty, she believed that it was imposed "too seldom," 17 CTS-I 4746, and when asked whether she felt about the responsibility of sitting as a juror in a capital case, she answered, "I would try to fulfill my responsibility as a good citizen." 17 CTS-I 4750.

On voir dire (12 RT 698 – 705), she was asked who her retired judge friend was and she identified "Mary Obera," to which the court replied, "One of the greats." 12 RT 699. The court asked whether this friendship would "bother anybody here," and there was no response from counsel. After some routine

voir dire by the court and defense counsel, the prosecution declined to ask her questions. 12 RT 705.

Juror #9 was a 33 year old Compton resident of 15 years, employed by the U.S. Postal Service, and mother of a twelve year old (11 CS-IT 3118 – 3158). She had recently been the victim of a carjacking, and thought she had been treated fairly by the police. 11 CTS-I 3132. She was in favor of the death penalty in California, 11 CTS-I 3151, but was not particularly familiar with its functioning. 11 CTS-I 3150 – 3151. Regarding Question 166 about her feeling toward the responsibility of being a juror in a capital case, she responded, "as I always say, I would weight out everything to the best of my ability." 11 CTS-I 3155.

On voir dire (11 RT 596 – 611), the court asked her about the carjacking incident in which she had been a victim; about her statement that crime was "out of control"; and about her ability to be fair, which she reaffirmed. The prosecutor asked if her religious beliefs would prevent her from sitting in judgment of another, and she said they would not. 11 RT 608. The remainder of voir dire was entirely unremarkable.

Juror #88 was a 42 year mother of five, employed as an eligibility worker at the Los Angeles Department of Social Services (23 CTS-I 6354 – 6394). Her

most influential book was the Bible, 23 CTS-I 6363, although she was not a church-goer, 23 CTS-I 6365. Regarding the death penalty, she clearly wrote that "some circumstances warrant death," 23 CTS-I 6388, and in answer to Question 166 about her feeling toward the responsibility involved, she wrote, "If the crime warrants that I have no problem." 23 CTS-I 6391.

On voir dire, 12 RT 833 – 844, she expanded on her remarks that she had a sister incarcerated in Texas, as well as a prior husband. On questioning by the prosecutor regarding her answer to Question 150, 23 CTS-I 6388, where she had checked "yes" to whether she felt that she could not personally vote to impose death, she answered, "It is 'no' because I feel if it is certain circumstances that, yes, the death penalty should be imposed," 12 RT 843, which was consistent with all of her other answers. She was also asked at the sidebar some questions about potentially sensitive areas. She had not answered question #29, "Did you ever take a human life," and the trial court correctly intuited that she had had an abortion, which she explained had occurred in the early 1970's, 12 RT 836. She had not answered Question #58, whether her religious beliefs would affect her ability to sit, and answered immediately and unequivocally that they would not. She noted that she had two cousins who had been in and out of jail. 12 RT 841.

The prosecutor questioned her further about her initial "yes" answer to Question #150 about her ability to personally vote for the death penalty, and she stated that she could do it. 12 RT 843. She then asked for clarification about any possible exceptions to "life without possibility of parole," and was assured that there were none.

Juror # 94 was a 33 year old single mother of two, and had been employed as a postal clerk for the U.S. Post Office for 11 years (24 CTS-I 6600 – 6640). Regarding the death penalty, she was strongly in favor of it, 24 CTS-I 6632, specifically where someone "has intent to kill and is caught doing it," 24 CTS-I 6634. She asked to discuss Question #77 in private with the court, relating to acquaintances in law enforcement.

On voir dire, she was called to a sidebar to discuss this and other answers. She had answered Question #70 with a description of an incident of domestic violence with a former boyfriend. The court clarified for her regarding Question #162 that life without parole meant no parole, 12 RT 863. Regarding her acquaintance with law enforcement, she explained that her sister who lives next door to her was on the O.J. Simpson jury, and had Sheriffs posted at her house on weekends. The prosecutor asked whether she could impose the death

penalty on someone who was not caught in the act, and she assured the court that she could. 12 RT 865 – 866.

This record reveals a roster of six eminently respectable, gainfully employed, and mostly religious black women, all of whom were in favor of the death penalty. There were no negative or even equivocal statements about the death penalty that would have provided a colorable basis of a challenge for cause. The prosecutor never argued that sufficient grounds existed for a challenge for cause.

Moreover, none of the colloquies at the sidebar revealed anything that would have reasonably triggered a prosecutor to exercise a peremptory challenge. In each case, the jurors' sidebar answers either filled an omission from the written questionnaire; or explained an apparent inconsistency; or expanded on the written answer. This record belies any suggestion by the trial court that the sidebar conferences indicated some kind of cloud over the juror that might have justified a prosecutorial peremptory. The trial court stated in hindsight that "[I]n fact, three of the jurors we had some sidebars on," and "[w]e had some very difficult issues with them." 13 RT 908. In fact, most of the sidebars related to clarification of basic concepts, e.g., that LWOP meant LWOP, see Juror #94, 12 RT 863, and Juror #88, 12 RT 844.

Thus, the trial court's implication that three of the six black female jurors revealed at the sideboard various matters that would have supported a non-racial peremptory challenge by the prosecution is both a legally unfounded basis for refusing to find a prima facie case, and a factually unsupported one. Every one of the struck black female jurors was solidly middle class, pro-death penalty, and gainfully employed citizens. That high degree of respectability demonstrated as to all of the struck black female jurors is itself a compelling circumstance that supports an inference of discriminatory purpose. The trial court failed to require that the prosecution attempt to offer race-neutral reasons for striking these six Black female jurors and the additional 10 female and/or minority juror strikes. Counsel for appellant has included a chart as Appendix A that sets forth the composition of the jury as initially seated, and as altered with each peremptory challenge, until the final twelve jurors were sworn.

C. The Requirement of Reversal.

Under Batson, the improper strike of even a single juror compels reversal. People v. Snow (1986) 44 Cal.3d 216, 226. While there are cases that remand for a limited hearing regarding the existence of previously undisclosed race-neutral reasons, those cases were all remanded within a year or two of the trial, when the court and counsel "were more likely to recall the specifics of the

voir dire," see People v. Rodriguez (1996) 50 Cal.App.4th 1013, 1024. Snow refused to remand when some six years had passed since the trial. Here, more than 10 years have passed since the trial at the time of the filing of appellant's opening brief, and it will necessarily be some additional years until a decision is reached by this Court. The prospect of an actual recollection on the part of counsel is slim to none, and the capacity of the court to evaluate the validity of any such reasons, even if forthcoming, is irreparably compromised. For these reasons, reversal is required.

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A REPRESENTATIVE JURY BY THE ERRONEOUS EXCUSAL OF JUROR #126 FOR CAUSE.

A. Summary of Facts.

Juror #126 was called to the jury box during voir dire, `2 RT 940, and the trial began inquiring about certain matters in his jury questionnaire. The questionnaire is found at 28 CTS-I 7747—7787. She stated in the questionnaire that she would not automatically vote for either death or life without the possibility of parole regardless of the evidence, questions 171 and 172, 28 CTS-I 7785—7786, but did write in response to question 166, asking how she felt about the responsibility of sitting as a juror in a capital case, "I don't think I would like that responsibility." 28 CTS-I 7784.

The trial court first confirmed her answers to question 59 that she had no prior jury experience, 13 RT 940, and then asked about the last book she had read called Mitigating Circumstances, which she characterized as being about rape and murder. 28 CTS-I 7756.[4] When asked whether she learned something from the book, the juror answered "no, not much."

The court had flagged question 71 regarding family or friends who had been arrested or charged with the crime because the juror had mentioned her brother was arrested some three years earlier. Her brother had been convicted of a theft-type offense and put on probation. She had also called the Los Angeles Police Department regarding a burglary at her home, and one officer was not pleasant, while another one. 13 RT 941-942.

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[4] The author, Nancy Rosenberg, described the plot of the novel as follows:

> My first novel concerns a female DA, a past victim of incest, who is brutally raped alongside her teenage daughter. When I was writing this book, much of my own past spilled onto the page, as I was sexually abused by my own grandfather. I was intrigued by the concept of a professional in the criminal justice system who falls victim to an act of violence. I was also attempting to show what causes a basically "good" person to step outside the law and commit a heinous act. As in most of my novels, the underlying crimes have been taken from actual cases I handled as an investigator.

She was next asked about her answer to question 105, whether a defendant's failure to testify would affect her determination of the case, to which she had written "Yes. I would think a person not guilty would want to testify." CT 28 77S-I 71. The trial court informed her of the privilege against self-incrimination. 13 RT 942.

After some other unremarkable questions and answers, the court turned to her responses regarding death penalty questions:

> The Court: You are really not sure how you feel about the death penalty?
>
> Prospective juror No. 126: Ambivalent.
>
> The Court: You are just explaining your feelings here?
>
> Prospective Juror No. 126: I don't know what I put there, it has been so long.
>
> The Court: Really what you are saying is in some cases some people could be rehabilitated and helped and maybe it is not a good idea; on the other hand, they can't be and you would impose the death penalty.
>
> This is the last time I am going to say this—that is the issue—if the people prove the case against these defendants beyond a reasonable doubt, all defendants, to a moral certainty and they prove all the special circumstances, they are found to be true by you, the jury, in the guilt phase, then you would go to a second phase of the trial where you would hear perhaps testimony on both sides.

Your job—and the only time that the jury ever does talk about penalty would be in this type of case—you would have the option of either placing the defendants in prison without the possibility of parole, which means they never get out, or the death sentence. So you would have to be able to do that. Do you understand?

Are you capable of doing that? I know it is awesome. That is why we started out with some four or 500 people and we are down to 12 of you and about 25 left for the alternates.

Do you understand? It is an awesome responsibility. We all know that. Do you want to think about it over the lunch hour, or do you want to give me an answer?

Prospective Juror No. 126: I can give an answer.

The Court: Okay.

Prospective Juror No. 126: I am not certain I can do that.

The Court: I appreciate what you are saying. It is not an easy thing to do.

Can you think of any circumstance where you could give the death penalty?

Prospective Juror No. 126: That I could not give it?

The Court: That you could.

Prospective Juror No. 126: That I could give it?

The Court: Yes.

Listen, I am not going to push you on this, and the lawyers aren't either. I won't allow it. This comes from the old Hovey case. It is very difficult. I don't want to put that burden on anyone.

You, along with the other jurors, have to make that decision; and like the one question asks, if the other 11 jurors do that and you went along with that, then you actually are the one putting that person to death, along with the other jurors.

Do you understand that?

Prospective Juror No. 126: Yes, I understand.

The Court: I am not attacking you. I know your feelings. Understand? I know how difficult it is. But the lawyers need to know and I need to know.

Do you want to think about it?

Prospective Juror No. 126: I have thought about it since I have answered the questionnaire. It is not something I am certain I can do.

The Court: Would you feel more comfortable not sitting on a case that involved the death penalty?

Prospective Juror No. 126: I am sure we all would. Yes, I would.

The Court: All right. I am going to relieve you of that responsibility.

Mr. Myers: Stipulate.

The Court: Would you like to ask a couple of questions?

Ms. Harris: I would, your Honor, if I may.

The Court: I am going to deny that. I am going to find cause.

I will meet counsel at sidebar.

Wait just a minute.

You guys meet me in chambers with the reporter.

(The following proceedings were held in chambers:)

The Court: We are in chambers.

The court has a female with pretty good credentials. It looks like she is an honest person and she is having a difficulty with imposing the death penalty.

I think the court has asked enough questions. Miss Harris wants to ask questions. I don't think it is appropriate. I have been through this so many times and you have, too.

To put people in that position is improper, wrong, and I know you would handle it with dignity. I am not saying that. I just think you can make your record here a little bit. You can ask questions, but I can feel her heart and I don't think she wants to do that. It doesn't mean she couldn't or wouldn't, but she is saying in effect that she really couldn't do that.

Ms. Harris: I would submit it.

The Court: Okay. Thank you.

The court then excused Juror #126 in open court:

The Court: We are back in session. The court is going to excuse you. The lawyers agree. We just don't want to put anyone in that position. You would make a fine juror. We appreciate your honesty.

Prospective Juror #126: Thank you, sir.

The Court: It is a tough decision. We will excuse you. Thank you very kindly. 12 RT 949.

B. The Trial Court's Errors.

The passages in the questionnaire that promoted the court's questions about the death penalty were her answers for question 1—"What are you general feelings about the death penalty?"; to which she answered: "I'm for the death penalty I think. I never really thought about it. Ambivalence." 28 CTS-I 7779. When asked in question 142 why she felt that way, she referred to an expanded explanation on the back page where she wrote the following:

> I'm not really sure how I feel about the death penalty. I guess it would be ambivalence on one hand. On one hand I believe in time and with help people can change their way of life, how they see and do things. On the other, maybe there are some people who will never change, who have no conscious [sic], remorse, or any feelings of guilt. 28 CTS-I 7787.

Juror #126 was otherwise well-suited to perform her jury duties in a careful and thoughtful manner. She was a 44-year-old lifelong Los Angeles resident, mother of a six-year-old daughter and a homeowner. 28 CTS-I 7747-7748. She was a registered nurse, then currently employed at the Los Angeles County King/Drew Medical Center. 28 CTS-I 7749. She had attended college and had a nursing diploma. As far as clubs or organizations, she had been a member of the Black Student Union while in college, 28 CTS-I 7755, but did

not currently belong to any politically active group. 28 CTS-I 7756. As noted above, her brother had been convicted of an offense and put on probation, which caused her to state, "I thought probation was fair...I felt good about the legal system." 28 CTS-I 7763. If anything, she could be characterized as somewhat prosecution-prone on guilt issues, stating in response to question 91, "If a defendant testified, would you just the defendant's testimony the same as any other witness?"; to which she responded, "No, I don't think so; I think I would be more critical." 28 CTS-I 7767. In sum, Juror #26 was cut from the same mold of gainfully employed, upstanding, respectable, Black females that the prosecution had so disproportionately struck with peremptory challenges. See Argument I. She had no ax to grind, and at most appeared to be grappling with difficult issues about criminal justice and groping with her feelings about them.

The trial court committed two errors in the course of excusing Juror #126: (1) the erroneous refusal to permit voir dire by defense counsel as to the juror's capacity to impose the death penalty; and (2) the erroneous excusal for cause in the face of the juror's unexplained, unelaborated declaration of "ambivalence" as opposed to any admission of incapacity.

1. The erroneous refusal to permit defense voir dire.

This Court reaffirmed the critical importance of full and fair voir dire regarding the difficult issues of death qualification in People v. Cash (2002) 28 Cal.4th 703. Cash began with the proposition that "[p]rospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors," citing Wainwright v. Witt (1985) 469 U.S. 412, 424, and noted that, "[t]he qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty." 28 Cal.4th at 720. This Court emphasized that, "[t]he 'real question' is whether the jurors' views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." Id. at 721 (emphasis in original). To ensure a proper resolution of this question, "[a] challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried." This Court concluded that it was error to preclude questions "specific enough to determine if those jurors harbored bias, as to some fact or circumstance shown by the trial evidence" that would substantially impair their penalty deliberation. Ibid. The specific cause for reversal in Cash was that "[t]he trial court's ruling prohibited

defendant's trial attorney from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder." Id. at 721. The specific error here was the trial court's refusal to permit voir dire whether Juror 126 could shoulder the responsibility of sitting as a capital juror and rendering a judgment.

In this case, in virtually the same breath, the court asked defense counsel, "Would you like to ask a couple of questions?"; and when attorney Harris answered affirmatively, "I would, your Honor, if I may," reversed course:

> The Court: I am going to deny that. I am going to find cause. 13 RT 947.

The principle of Cash was reaffirmed in People v. Vieira (2005) 35 Cal.4th 264, 286 ["A trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of murder would be error."]. Vieira declined to find error because the trial court had given defense counsel an opportunity to submit supplemental questions for the court to pose to the jurors. This Court noted that on one hand, "The trial court conducted voir dire by itself and for the most part did not allow counsel to directly question prospective jurors, but on the other hand, "The trial court made clear that it would permit on voir dire 'supplemental questions that I

would ask if you asked me to ask'." Id. at 286. Defense counsel in Vieira "Did not request such a question." Id. at 287. This Court concluded that "[b]ecause defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." Ibid.

The record in this case demonstrates that the trial court both failed to conduct adequate voir dire on its own and also entirely precluded defense counsel from conducting any supplemental voir dire. As demonstrated in the colloquy set out in Part A above, juror 126 expressed uncertainty as to whether she could return a death verdict, not on inability or aversion to doing so.

The court told her that "The lawyers need to know and I need to know," and the juror responded, "I have thought about it since I answered the questionnaire," and "It is not something I am certain I can do." The court then asked whether she would feel "more comfortable not sitting on a case that involved the death penalty," to which she answered, "I'm sure we all would," and "Yes, I would." 13 RT 946-947.

Notwithstanding the court's laudable concern for the juror's feelings on a difficult subject, the juror's understandable feelings of ambivalence and discomfort are simply not disqualifying attitudes.

If a juror unequivocally stated that he or she could not sit in judgment of another, that would be an affirmative demonstration of incapacity. In contrast, a juror's acknowledgement of some uncertainty as to whether she could impose the death penalty is not. A death qualification does not require a juror to declare a certainty and willingness to impose the death penalty in the case before it.

The trial court thus short-circuited the voir dire of Juror #126 and improperly excused her for cause without permitting defense voir dire at this crucial point. Someone, either the trial court or defense counsel with the court's permission, needed to pursue the issue to determine whether the expressed ambivalence of Juror #126 constituted an actual and substantial impairment under Wainwright v. Witt, supra. Witt itself emphasized that "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." Id. at 423, emphasis supplied.

At a minimum, the juror should have been asked about her answers to questions 148 and 149, which asked, respectively, whether it would be impossible to vote either for death under any circumstances or against death

under any circumstances. Juror #126 appropriately answered "No" to both questions, positioning herself as a death-qualified juror. With respect to question 150, "Some people say they support the death penalty; yet could not personally vote to impose it. Do you feel the same way?" Juror #126 answered, "I don't know...not sure." That answer is in no way a proxy for a disqualifying answer such as "Yes, I do feel the same way and could not personally vote to impose the death penalty."

Question 159 asked, "Would you, for any reason, find it difficult to sit on a case where you might be called on to impose the death penalty?"; and she checked "Yes," appending the remark "Who would not find it difficult to make a decision regarding someone's life?" 28 CTS-I 7783. That remark is entirely understandable and appropriate, and is in no way a proxy for an observation such that "The decision is too difficult for me, I could not do it."

Under these circumstances, the trial court's refusal to pursue the juror's ambivalent answers and refusals to permit defense counsel to pursue them rendered the excusal for cause erroneous.

Morgan v. Illinois (1992) 504 U.S. 719 reaffirmed that "Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan held that the capital defendant there "was

entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." Id. at 736. The Supreme Court concluded that, "[b]ecause the 'inadequacy of voir dire' leads us to doubt that petitioner was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." The same "inadequacy of voir dire" is manifest here.

2. The erroneous excusal for cause.

Even if the combination of the juror's questionnaire answers and the brief court-directed voir dire is considered a sufficient basis to make a for-cause determination, the excusal was erroneous because the record does not demonstrate a substantial impairment. The constitutional standard under Witt, supra, is "Whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." 469 U.S. at 424. Even where a prospective juror is adamantly against the death penalty generally, exclusion for cause is permissible only where the juror would refuse to follow the law and consider the alternative punishments. See, e.g., Szuchon v. Lehman (3rd Cir. 2001) 273 F.3d 299 [reversing a death sentence because the juror's anti-capital punishment sentiment did not

demonstrate a substantial impairment in following the law in that particular case].

In this case, the trial court precipitously excused Juror #26 because she could not guarantee that she could impose the death penalty; that is in no way the equivalent of a guarantee or even a limited warranty that she could not. She expressed discomfort, and understandably stated that it would be difficult for her and for anyone else, an entirely reasonable and permissible position. The trial court thus erred in excluding her.

C. The Requirement of Reversal.

Cash noted that, "[e]rror in restricting death-qualification voir dire does not invariably require reversal of a judgment of death," and that such error might be harmless where the attorneys were able to ask the essential questions during general voir dire following death-qualification voir dire. That did not occur in Cash, nor did it occur here, because the trial court conducted all the voir dire and refused to permit voir dire by defense counsel or to pursue voir dire himself. Cash requires expansion of the voir dire to include questions that incorporate the relevant aggravating factors in the case. 28 Cal.4th at 722.

Where a trial court erroneously excuses jurors for cause who should have been permitted to sit, the standard of reversal is reversal per se. In re Anderson

(1968) 69 Cal.2d 613, 619-620. Anderson rejected the prosecution's argument that the erroneous excusals for cause against scrupled jurors were harmless because the prosecutor would have used peremptory challenges to strike the jurors in any case, such that the composition of the jury was not adversely affected.

This Court has recently reaffirmed the reversal per se standard in light of federal constitutional mandate. People v. Heard (2003) 31 Cal.4th 946 reversed a death sentence because of the erroneous for cause excusal of a life-leaning juror, applying the test of Wainwright v. Witt, supra, i.e., whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." After finding that the trial court erred in concluding that the juror's expressions of concern about the death penalty did not substantially impair his ability to follow the law, Heard confirmed that "although such an error does not require reversal of the judgment of guilt or the special circumstance findings, the error does compel the automatic reversal of defendant's death sentence, and in that respect the error is not subject to a harmless-error rule, regardless whether the prosecutor may have had remaining peremptory challenges and could have excused." 31 Cal.4th at 966 (emphasis in original).

The same result must apply here under the longstanding authority of Anderson and the more recent authority of Cash. Here, the trial court precluded the voir dire that would have established that the dismissed jurors would have considered the death penalty if apprised of the relevant case-specific factors. The court offered an opportunity for defense counsel to voir dire Juror 126, but then withdrew that offer immediately after defense counsel had accepted it. Just as in Cash, reversal is required.

III. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S EXCESSIVE RESTRICTIONS ON CROSS-EXAMINATION OF DESEAN HOLMES.

A. Summary of Facts.

1. Rulings prior to DeSean Holmes' testimony.

The prosecution sought to call DeSean Holmes, a witness rife with controversy. On the morning of October 13, 1995, the District Attorney made an ex parte in-chambers motion for relief from the trial court's ruling that the prosecution provide the defense at least a day's notice of prospective witnesses. Deputy District Attorney Myers explained that the prosecution wanted to call DeSean Holmes on the following Monday, but that police officers would testify

that Holmes had received telephone calls from a number of people, including his mother, "that had been pressuring DeSean Holmes which would make it tough for him to testify." 16 RT 1503-1504. The prosecutor further asked that the court "exclude from the audience those individuals who would act to dissuade or make it difficult—dissuade the witness or make it difficult for the witness to testify." Ibid.

The trial court asked for the testimony of Pasadena Police Officer Robert Uribe, who testified that DeSean Holmes had several conversations with his mother, who was "trying to convince him not to testify in court," as well as "telephone conversations between Lorenzo Newborn, his mother, and himself, a three-way conversation where Lorenzo Newborn has been trying to convince DeSean's mother to convince DeSean not to testify or things could be happening to the family or DeSean." Detective Uribe also testified that DeSean Holmes' track coach, "Clyde Turner, who he trusts very much and who [he] would do anything for, has also turned on him within the last couple of days and tried to convince him also not to testify." 16 RT 1506. Deputy Uribe stated that DeSean Holmes' father told him that "he would disown him if he ever did [testify], and that he should think about the family before he does such a thing." Ibid.

Detective Uribe described DeSean Holmes as willing to testify at the time of his first police interview on September 12, 1995, but that after the defense was provided information from Holmes "that could be used against specifically Newborn and potentially defendant Holmes," DeSean Holmes started receiving telephone calls "trying to convince him not to go to court and testify." 16 RT 1507.

After a police officer told Holmes that he could be impeached with audiotapes from his prior statements, Holmes said he was not worried about that because "he knew that as long as he took the stand and didn't say anything or made the statement that he wasn't going to discuss anything that the audiotapes could not be played," and that he had "got the idea when he talked to attorney Nishi [defendant Karl Holmes' attorney]." 16 RT 1508.

Deputy Sheriff Johnny Brown testified that he had contacted DeSean Holmes on September 9, 1995 at the Alta Dena Sheriff's Station, because Holmes had approached the deputies and told them that his life was being threatened. DeSean Holmes said he had been asked to kill two witnesses that had been responsible for sending two of his friends to jail, and because he did not kill them, he was concerned about his life. Deputy Brown took him to a motel for his safety. 16 RT 1509. Danny Cooks, also known as "Two-Punch,

conveyed the threats to DeSean. Danny Cooks was in custody, as was Ernest Holly, known as "E-Dog." DeSean Holmes had given Deputy Brown information about a double homicide in which Danny Cooks was involved that had occurred on May 10, 1994 at Lake and New York Streets in Alta Dena. When Holmes said that he also had information about the Halloween murders, and Deputy Brown immediately contacted Detective Uribe. 16 RT 1511.

At the subsequent interview on September 12, 1995, DeSean Holmes implicated appellant Newborn as a participant in the Halloween murders and was very cooperative about testifying. Deputy Brown described DeSean Holmes' attitude toward testifying as varying between reluctant and willing, and attributes the reluctance "primarily [to] his mother and Lorenzo Newborn." Ibid. DeSean Holmes told Deputy Brown that he had been on a three-way hookup with his mother and Lorenzo Newborn "where his mother and Lorenzo Newborn were trying to dissuade him from testifying in this case." 16 RT 1512. The trial court denied the motion to forego notice to defense counsel about prospective prosecution witnesses, but agreed to consider the alternative of excluding DeSean Holmes' parents from the courtroom. 16 RT 1513.

On the morning of Monday, October 16, 1995, the prosecution announced that their next witness was DeSean Holmes. 17 RT 1514. Attorney

Jones objected on appellant Newborn's behalf on several grounds: (1) that the ex parte hearing of the previous Friday was improper; (2) discovery violations regarding the tape recordings and transcripts of DeSean Holmes' statements; and (3) that DeSean Holmes "has absolutely perjured himself when he says that I suggested anything to him." 17 RT 1514-1516. Based on all of this, the defense needed to interview more witnesses and conduct additional preparations to be ready to confront and cross-examine him.

Attorney Harris made a severance and mistrial motion on behalf of coappellant McClain on the grounds that the parties examining DeSean Holmes would likely bring out material that "will spill over to my client." 17 RT 1517.

Attorney Jones amplified his objection, explaining that "this young man is claiming Lorenzo's lawyer was on the phone and 'told me I had the right not to say anything and the right to do what Fuhrman did in the OJ trial'," and that attorney Jones had "proof" that "[it] is a lie, because it was a three-way conversation and Mr. Nishi was the third party...so now his lies have made Mr. Nishi a crucial witness for us for purposes of impeachment." 17 RT 1520-1521.

The prosecutor concluded by arguing that DeSean Holmes had some "very, very damning evidence...concerning Mr. Newborn." Attorney Jones responded that he was not trying to prevent DeSean Holmes from testifying, but

only to have the prosecution comply with Penal Code section 1054. 17 RT 1526. The trial court denied the defense mistrial motions, permitted the prosecutor to proceed with DeSean Holmes, but admonished counsel that "I don't want the representation of any ethic problem here at all." 17 RT 1530.

When attorney Harris asked for a limiting instruction on behalf of coappellant McClain, attorney Jones argued that "putting me in the position of bringing out information about McClain and Holmes was the original intent of the District Attorney's office," "is prosecutorial misconduct," and moved for a mistrial, which the court denied. 17 RT 1531-1532.

2. Rulings during DeSean Holmes' testimony.

DeSean Holmes' testimony began with him identifying appellant Newborn, codefendants Bailey and Bowen, as well as McClain. 17 RT 1536-1537. He had a party on October 15, 1993, and appellant Newborn and coappellants McClain and Karl Holmes attended, as did Fernando Hodges. 17 RT 1538. He described P-9 as a gang and a club. DeSean Holmes was associated with a gang called S-9, which got along with P-9. Danny Cooks (Two-Punch) was associated with S-9.

DeSean Holmes was in custody for a burglary of Willy McFee's residence in 1995 and was housed in the proximity of appellant Newborn.

DeSean Holmes said Newborn told him that Newborn had gone up to the door of McFee's residence and had "got into it with some other people." 17 RT 1543. DeSean Holmes said appellant Newborn had said he was at McFee's house at Blake and Pasadena Avenues looking for his brother Wendell, and that appellant Newborn "ended up shooting at the people he came with." 17 RT 1544. Holmes acknowledged being uncomfortable about testifying, that his life had been threatened, and that his mother had received threatening telephone calls. 17 RT 1545. DeSean Holmes told Deputy Brown that he was afraid Danny Cooks and Ernest Holly were trying to kill him. 17 RT 1546.

Holmes testified under prodding by the District Attorney that appellant Newborn had told him that he [Newborn] had used a 9-mm Glock on Blake Street. 17 RT 1553. DeSean Holmes interjected, "I remember Torrance Brumfield saying that Lorenzo took a 9-mm from him but—," at which point attorney Jones objected on hearsay grounds, and the trial court sustained the objection and struck the answer. 17 RT 1553.

DeSean Holmes referred to appellant talking about a list of names of people who were "going against him" on the case, which included Charles Blake, Willy McFee, and Darryl [no last name], over defense objection. 17 RT 1567. Holmes testified that appellant Newborn said the Halloween shooting

was the fault of two other people who thought they were shooting Crips but were shooting kids instead. 17 RT 1569. Holmes said appellant Newborn said, "He was depressed because he was in custody because of his homeboys." Ibid. Holmes testified to further statements by appellant Newborn about a girl he "hoped to use as an alibi," 17 RT 1572; that Newborn said it was a false alibi; and that Newborn "was going to smash everybody that was on his list" once he got out of custody. Holmes believed that he was on the list. 17 RT 1573.

Attorney Jones asked Holmes whether he was already in custody when he was arrested in early-1995 for the McFee burglary. The prosecutor objected as irrelevant, and the trial court sustained the objection while permitting the answer "in custody" to stand, but cautioned counsel that "I don't want to go into any detail unless I have something else." The court clarified that Holmes was in custody on another case and directed counsel to proceed. 17 RT 1584.

The court also sustained the prosecutor's objection to attorney Jones' question as to how Holmes was the victim of a shooting in 1995. 17 RT 1587. Jones then asked, "So you were a victim of some crime involving the case against Danny Cooks?," and Holmes responded, "I would like to take the 5th on that, please." 17 RT 1587. Attorney Jones, "Did you tell the police...that you spoke to me on the phone and that I told you you should do like Fuhrman and

take the 5th?," to which Holmes responded, "That was a mistake. I got that from Nishi." 17 RT 1587. Jones asked about the written reference to "Nishi" on October 15, 1995 handwritten statement, and DeSean Holmes claimed he had gotten the name confused when he wrote this account, "because I am not a very good speller or writer," and that he meant to say "Carl's lawyer." 17 RT 1590.

DeSean Holmes was describing a conversation he had with police officers at the Temple Station, and said that "We were talking about my Charlie Bell case," in which he claimed to have been a victim. 17 RT 1607. When attorney Jones asked "somebody shot at you?," the prosecutor's relevance objection was sustained. Ibid. Attorney Jones asked whether it was true that "nobody shot at you" in the "shooting case where you say you were the victim," and Holmes answered "yes." The court directed counsel, "Let's not probe into it any further." 17 RT 1612.

Regarding his plea agreement, DeSean Holmes said the District Attorney agreed to his demand that the prosecutor "would not ask [him] any questions about anybody except Newborn." 17 RT 1616. DeSean Holmes acknowledged that he refused any pretrial interview with attorney Jones. 17 RT 1617.

Jones probed further about the October 6, 1995 three-way telephone call, and Holmes insisted that Nishi told him that he had the right not to say anything and not to testify. 17 RT 1621.

Holmes admitted that he and three others—Ernest Holly, Eric Thomas, and Darryl Johnson—had at one point gone over to burglarize McFee's house and kill him because McFee was a witness on the Halloween case. For that outing, Holmes was carrying a "brand new blue steel" 38 Smith & Wesson that he had gotten from Danny Cooks. 17 RT 1629.

The court sustained the prosecutor's objection to DeSean Holmes saying he heard from Ernest Holly and Shawnee Floyd that one of the murder weapons had wound up at Shawnee's house. 17 RT 1654. The trial court also sustained the prosecutor's objection on relevance grounds to attorney Jones' questioning Holmes about whether he had "A motive, interest, and bias in order to get Mr. Holly into trouble," apparently relating to Holmes dating Holly's ex-girlfriend. 17 RT 1655.

On redirect, the prosecutor focused on who said what during attorney Nishi's initial interview with Holmes at the police station about taking the Fifth, and then the three-way telephone conversation that included attorney Jones the next morning. 17 RT 1671, et seq.

Out of the presence of the jury, attorney Jones made an offer of proof regarding the relevance of his cross-examination of DeSean Holmes as a victim in an August 25, 1995 shooting case, 18 RT 1692:

> What he was was the driver of a car from which shots were fired at another gentleman. After the shots were fired out of the car driven by this witness, they fled the scene and there was a high-speed pursuit, at which time the driver, Mr. DeSean Holmes, bailed out of the car and fled. That was approximately noontime.
>
> At 8:00 p.m. later that night, after discussing the matter with numerous parties, the report indicates Mr. DeSean Holmes came back to the police station and indicated that—matters that tended to totally exonerate him.

The prosecutor gave his version of what he understood the situation to be, argued that Jones should not be permitted to probe the matter any further, but suggested a stipulation that Holmes was not a victim in that particular situation. RT 1694. The court agreed that Holmes has falsely portrayed himself to the police, permitted the parties to pursue a stipulation that Holmes was not a victim, but ruled, "I don't think you can probe it legally." 18 RT 1694.

The trial court also precluded defense counsel from asking Holmes any questions about his involvement in a carjacking. 18 RT 1709. On redirect, the prosecutor elicited that appellant Newborn had told DeSean Holmes that he had ridden around the block with some people just before the victims were shot, and

that some of the people point them out to him. 18 RT 1715. Holmes never asked appellant Newborn if he had actually shot the victims. 18 RT 1716.

The trial court precluded defense counsel from following up on recross DeSean Holmes' statement that he had a case against the police, meaning the Pasadena Police. 18 RT 1721. The trial court sustained the prosecutor's objection with the comment "He has answered it 'yes'. Just the fact he has a suit is sufficient." Defense counsel's question as to the name of Holmes' attorney was also sustained. 18 RT 1722.

Also on recross, attorney Jones asked about Holmes' answer to the prosecutor's question about Holmes hearing of other witness killings, and referred to Majdi Parrish. Holmes invoked his Fifth Amendment privilege after that question. 18 RT 1733. The trial court overruled the privilege and asked the witness whether he had heard about the Parrish killing, and told counsel "no more questions on that." 18 RT 1734. The court refused to permit attorney Jones to ask whether Parrish was the victim in a case previously charged against Holmes and Cooks. 18 RT 1734. In addition to the trial court sustaining the objection, Holmes invoked the Fifth Amendment privilege. Attorney Jones asked whether Parrish was a complaining victim in a case filed against Holmes and Danny Cooks, and Holmes invoked the Fifth Amendment privilege as to

that question as well. The court sustained the prosecutor's objection to attorney Jones' question. 18 RT 1735. The trial court instructed the jury that Holmes' testimony was limited to appellant Newborn. 18 RT 1752.

B. The Trial Court's Errors.

The trial court repeatedly violated appellant's right of confrontation by precluding cross-examination into areas directly relevant which demonstrated the nature and magnitude of DeSean Holmes' bias in the case. Holmes provided the prosecution with ostensibly damaging testimony on one hand, but was subject to substantial impeachment he did not come forward until he had a serious need to obtain benefits from law enforcement. At the time he came forward and at the time of his testimony, DeSean Holmes was enmeshed in a number of criminal cases, criminal investigations, and other lawsuits, all of which the defense sought to develop to demonstrate his bias. The Fifth and Sixth Amendments of the federal constitution guarantees a defendant the right to cross-examine a prosecution witness to demonstrate the existence of bias and any other factors that call the reliability of the testimony into question. See Olden v. Kentucky (1988) 488 U.S. 227, 231; Pennsylvania v. Ritchie (1987) 480 U.S. 39, 51-52 ["The right to cross-examine includes the opportunity to

show [not only] that a witness is biased [but also], that the testimony is exaggerated or [otherwise] unbelievable."].

These principles were recently applied in Fowler v. Sacramento County Sheriff's Department (9th Cir. 2005) 421 F.3d 1027 to warrant habeas corpus relief to a California petitioner who complained that the trial court had precluded him from asking the complaining witness about prior false allegations. Fowler recognized that prior false allegations against others, particularly where there was potential gain from the false accusation, constituted an important means of cross-examination. At various times, DeSean Holmes claimed to be a victim of the attacks of others, acknowledged being involved in other violent criminal activity, and had a civil lawsuit pending against the Pasadena Police. All of these objectively verifiable events were amenable to an inference that he had substantial, overlapping, and compelling motives to help the prosecution in this case at appellant's expense. "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Davis v. Alaska (1974) 415 U.S. at 308, 318.

In light of these principles, the trial court erred in restricting defense counsel to establishing the bare fact of six separate and discrete incidents, and

precluded development of the incidents to demonstrate the potential magnitude of DeSean Holmes' bias and mendacity. The six incidents were:

1. The nature and severity of the offense for which DeSean Holmes was already in custody in early-1995 when he was arrested for the McFee burglary;

2. The May 10, 1994 double homicide that DeSean Holmes attributed to Cooks and Holly in order to gain favor from law enforcement;

3. The August 25, 1995 incident in which DeSean Holmes committed a noontime drive-by shooting, but that evening approached the police and gave a self-serving exculpatory version of the incident;

4. A carjacking committed by DeSean Holmes;

5. DeSean Holmes' involvement in violence regarding Majhdi Parrish that resulted in a criminal charge against DeSean Holmes, after which Parrish was murdered; and

6. DeSean Holmes' civil lawsuit against the Pasadena Police Department.

In each of these instances, the trial court's response was to sustain the prosecutor's objection, let an answer stand that acknowledged the existence of the event, but to preclude any further exploration of the topic intended to

demonstrate the magnitude of bias on DeSean Holmes' part. This was a clear violation of the Sixth Amendment, as long explicated in, inter alia, Alford v. United States (1931) 282 U.S. 687, 694, which affirmed that cross-examination "is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply."

The error in the trial court's rulings is confirmed by the analysis in United States v. Old Chief (1997) 519 U.S. 172, 189, which addressed a defendant's claim that he should be permitted to stipulate to any evidentiary fact that he wanted to, and that the stipulation would preclude the prosecution from presenting narrative evidence regarding the issue subject to stipulation. The Supreme Court concluded as a general matter that the enforced stipulation was an unworkable infringement on a party's right to present evidence in a narrative form, with the following explanation that applies equally to evidence offered by the prosecution or the defense:

> In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a

> break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best. Id at 189.

Old Chief also concluded that this general proposition did not apply to the specific issue in dispute there, i.e., the defendant's status as a convicted felon – "As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense." Id. at 190.

Defense counsel's effort to cross-examine DeSean Holmes about the disparity between his day-time drive-by conduct and subsequent self-serving description of the event fell within the general rule of Old Chief, and appellant was entitled to have his attorney do his best to show DeSean Holmes squirming on the stand, trying to explain how he could false portray himself as the victim of a drive-by shooting without alerting the jury to the likelihood that he was testifying falsely against appellant for similar self-interested reasons. The stipulation was a completely inadequate substitute for "robust evidence" elicited by cross-examination. Old Chief at 189.

DeSean Holmes obviously had a great deal of criminal exposure from his violent gang activity, and was trying to shield himself by periodic efforts at cooperation with law enforcement. Newborn should have been permitted to demonstrate as clearly as possible how deep the trouble was that Holmes had gotten himself into; how much law enforcement credit he stood to obtain from his various efforts at cooperation; and how much he stood to gain in his civil suit if the Pasadena Police wanted to reward him for his testimony against Newborn in this high profile capital prosecution. Appellant would likely have persuaded the jury that DeSean Holmes had an overwhelming motive to cash in on accusations against people like appellant Newborn in exchange for protection and benefits with respect to his own self-interest.

C. The Requirement of Reversal.

The standard of reversal of the Sixth Amendment right of confrontation is the Chapman standard that the state must prove the error harmless beyond a reasonable doubt. Chapman v. California (1967) 386 U.S. 18. Delaware v. Van Arsdall (1986) 475 U.S. 673, 686 explained that "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, and a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Van Arsdall further explained that

"[w]hether such an error is harmless in a particular case depends on a host of factors" that "include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Id. at 686-687. Applying these factors to the circumstances of this case, reversal is clearly required.

DeSean Holmes' testimony was crucial to the prosecution's case, because it was the only testimony that purported to convey a direct and clear acknowledgement of participation and involvement by appellant Newborn. Next, Holmes' testimony was in no way cumulative, as he was the only one who purported to hear these alleged admissions. Third, there is no evidence whatsoever corroborating his testimony on any of these material points. Fourth, the trial court consistently precluded cross-examination as to each of the areas that appellant's trial counsel sought to pursue for impeachment purposes. Finally, the overall strength of the prosecution's case was very dubious, in that there were no eyewitnesses identifying appellant at the scene of the shootings; no incriminatory statements to police or other reliable witnesses; no physical evidence implicating appellant; and other circumstantial evidence calling

DeSean Holmes' credibility into question. The prosecution could not persuade the jury that appellant Newborn possessed, much less used, a gun in the offense.

There are additional indicia of prejudice in this case, resulting from the prosecutor's argument to the jury. The prosecutor used the death of Majhdi Parris as an explanation for why LaChandra Carr was purportedly reluctant to testify that she was at the hospital when called as a witness. 42 RT 4362. Defense counsel should have been able to explore DeSean's relationship to the death of Majhdi to show that he had a strong motive to help the prosecution in this case to avoid his own prosecution on the Parrish murder. Next, the prosecutor argued based on near total conjecture that DeSean Holmes had no reason to make up inculpatory statements as to appellant Newborn because "He doesn't need protection from Lorenzo," rather, "He needs protects from Danny and Ernest and their associates." 44 RT 4646. Where the prosecution took certain superficial aspects of these Machiavellian maneuvers on the part of the gang members to argue that DeSean Holmes was a credible witness, the prejudice from precluding defense counsel from delving into these matters to show that he was a lying witness is apparent. Had defense counsel been able to develop the evidence, he could have argued based on the evidentiary record that even if DeSean Holmes needed protection from Cooks and Holly, the only way

to get such protection was to hand the prosecution a defendant such as appellant Newborn on a silver platter in relation to a much more high profile case that would mobilize the prosecution on his behalf. See 44 RT 4646. The prosecutor again alluded to the death of Majhdi Parris in support of the credibility of Robert Lee, and argued by innuendo that Parris saw Robert Lee get shot by McClain, and "Where is Majhdi Parris now? Dead." 44 RT 4684. Given that the prosecutor attempted to patch together an inference of credibility on behalf of prosecution witnesses based on the incidents involving DeSean Holmes' prior violence, the defense was prejudiced by being foreclosed from developing contrary evidence that would have demonstrated DeSean Holmes' motive to lie against appellant Newborn.

IV. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND H IS RIGHT OF CONFRONTATION IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF INCRIMINATING HEARSAY FROM LACHANDRA CARR.

A. Summary of Facts.

LaChandra Carr testified that she knew Newborn and Holmes in 1993. 18 RT 1803. She spent Halloween afternoon 1993 at her grandmother's house in Pasadena in the company of Latoya Carr and Anedra Keaton. Her friends left

before dark, and she paged her boyfriend, Solomon Bowen, who picked her up around 7:00 p.m. 18 RT 1807. Bowen told her that Fernando Hodges had been killed, that he was going to the hospital, and that he would drop her off at his house. 18 RT 1812. She did not see him again that night, although they spoke on the phone several times. 18 RT 1815.

She acknowledged telling the police on December 22, 1993 that Bowen had admitted being present at the time of the shooting, but that he was not a driver or a shooter, and did not know the others were going to start shooting. 18 RT 1822.

The trial court then threw her into jail overnight because she was acting "cute." See Argument V, infra, 18 RT 1826. The following day, over multiple defense objections, 19 RT 1833-4, she repeated that Bowen had told her, "he was there but he was no driver and he was no shooter." 19 RT 1834.

She was then asked about her grand jury testimony. 19 RT 1836. The prosecution elicited that she "told the grand jury and Mr. Myers that [she was] at the hospital that night. 19 RT 1837. That was permissible cross-examination as a prior inconsistent statement. She was asked whether she told the grand jury that appellant—identified in Photograph C on People's Exhibit 20—was at the hospital, and she said yes. RT 1838. She also said that Bowen, Bailey, and

Holmes were at the hospital. When asked about her testimony the previous day that she was not at the hospital, she said "The truth is I really wasn't there." 19 RT 1930. When asked why she said that the others were at the hospital in light of her testimony that she was not there, she explained "I knew they were there from Solomon when he called me from the hospital." An immediate defense hearsay objection was rejected on the ground that "[t]he witness has now testified twice under oath and said two different things, such that the People have a right to go into it and see why she is saying that." 19 RT 1839-1840.

The prosecutor concluded her examination by asking "Isn't it fair to say that the reason that you are not scared now and you were scared then is because you are not implicating Mr. Newborn and Mr. Holmes and you implicated them at the grand jury?," to which she answered "correct." 19 RT 1856. On cross-examination, she reiterated the untruthfulness of her grand jury testimony that she was at the hospital and saw appellant Newborn there. 19 RT 1874.

Following the conclusion of her testimony and certain other witnesses on that date, attorney Jones made a motion for mistrial, 20 RT 2027-2030:

> Mr. Jones: Number one, with respect to Ms. Carr, LaChandra Carr yesterday, this record now has a statement in it over my objection that she said Solomon said Lorenzo was at the hospital.

> That goes to the heart of my defense. That is double hearsay. Our position from the very beginning and from the opening statement, is Lorenzo Newborn was not at that hospital; and now we have that hearsay from Bowen which I cannot cross-examine because he has been severed away as a codefendant.
>
> And I object. It is just like we suspend the rules of evidence when they start. And this is not disrespectful, just trust me; I don't mean that to be personal to you—. 20 RT 2027.

The trial court justified its ruling on the basis that "When a person testifies under oath at two different proceedings and says different things, you have got to let it in for some reason," and commended counsel on cross-examining Carr about whether it was a consistent or inconsistent statement. Attorney Jones reiterated that "Something she says Bowen says is not admissible to impeach her," to which the trial court responded "I think I told the jurors they are going to have to make the determination whether what she said is true, whether she was at the hospital or not at the hospital," although "It may be hearsay on hearsay." 20 RT 2028.

The prosecutor argued that "The statement that she heard it from Solomon and what Solomon said is not being offered for the truth of the matter asserted, therefore, it is not hearsay," a facially untenable position in light of Evidence Code section 1235 that makes prior inconsistent statements

admissible for the truth. 20 RT 2029. The mistrial motion was denied. 20 RT 2038.

B. The Trial Court's Errors.

The trial court erred in two fundamental ways with respect to LaChandra Carr's hearsay statements. First, she testified at trial that she was not at the hospital. The prosecutor was permitted over objection to introduce not only her grand jury testimony that she was at the hospital, but also that she saw appellant Newborn at the hospital. The portion of her grand jury statement that she saw appellant Newborn at the hospital is not inconsistent with her trial testimony, and should never have been admitted, see Evidence Code section 1235, much less admitted for its truth.

Next, LaChandra Carr was permitted to testify, again over defense objection, that while she had not been at the hospital following the shooting, her boyfriend Solomon Bowen told her that appellant Newborn and others were at the hospital. That was flagrant and inadmissible hearsay.

1. The error in permitting evidence of Carr's grand jury testimony that appellant Newborn was at the hospital.

The prosecutor appropriately impeached her trial testimony with the question, "And at the grand jury you told the grand jurors and Mr. Myers that

you were at the hospital that night, correct?" LaChandra Carr responded, "Correct." 19 RT 1837. That statement was inconsistent with her trial testimony. In contrast, the trial court should not have permitted her to further answer the question of "Did you say Mr. Newborn, in Photograph C on People's 20, was at the hospital?," 19 RT 1838, because that was not inconsistent with her trial testimony. Because she denied being at the hospital in her trial testimony, she had no occasion to state whether Newborn or anyone else was at the hospital. The defense hearsay objection should have been sustained.

2. The error in permitting Carr's hearsay testimony as to Bowen's statements to her that appellant Newborn had been at the hospital.

The prosecutor asked Carr to affirm one of her two inconsistent statements, i.e., whether she was or was not at the hospital—"Which is the truth, since you took an oath at the grand jury and you took an oath here?" She answered, "The truth is I really wasn't there." When asked to explain her grand jury testimony, she said "I don't know why I said they were there," but "It is just that I knew they were there from Solomon when he called me from the hospital," to which the defense interposed a hearsay objection. 19 RT 1839.

Rather than sustain the hearsay objection, the court overruled it with the comment, "The witness has now testified twice under oath and said two different things," such that "The People have a right to go into it and see why she is saying that." 19 RT 1839-1840. Perhaps the prosecutor had some latitude to ask her why she changed her testimony, but there was no basis whatsoever for her hearsay testimony relating Bowen's extrajudicial statement that incriminated appellant Newborn.

The constitutional error presented here is similar to that analyzed in People v. Miranda (2000) 23 Cal.4th 340, 342. There, the defendant complained of a police officer's testimony at a preliminary hearing that related the confession of a nontestifying codefendant, Jose Canela, implicating defendant and Morales in the crimes. This Court noted the testimony would have been "inadmissible at the defendant's trial as a violation of the state hearsay rule or state and federal confrontation principles," citing Lilly v. Virginia (1999) 527 U.S. 116, 132-133; Bruton v. United States (1968) 391 U.S. 123, 136; and People v. Fletcher (1996) 13 Cal.4th 451, 460-465.

This Court concluded that the hearsay recitation of the codefendant's incriminating extrajudicial statement was admissible at the preliminary hearing

"for the limited purpose of establishing probable cause to hold defendant for trial." Ibid.

Here, the trial court did not state any hearsay exception that it was relying on, and none exists. See, e.g., People v. Roberts (1992) 2 Cal.4th 271, 304 [error "in finding the [codefendant's] statements to come within the co-conspirator exception," such that "defendant's state and federal rights were violated"].

C. The Requirement of Reversal.

The portion of the hearsay evidence in which Carr was permitted to report Solomon Bowen's incriminating statement that appellant was present at the hospital gathering is prejudicial unless demonstrated to be harmless beyond a reasonable doubt. Bruton v. United States, supra. The prosecutor argued repeatedly that Carr testified truthfully at the grand jury, i.e., that she was there and did see appellant Newborn. 42 RT 4412. The prosecutor also argued that Carr "backs off her initial statement," and at testified at trial that she learned what she had testified to at the grand jury by means of telephone calls with other people, "specifically her boyfriend, Mr. Bowen." 42 RT 4413. The prosecutor was clearly urging the jury to accept as true that, based on the combination of her grand jury and trial testimony, appellant Newborn was at the

hospital. Even if Carr was permissibly impeached with her testimony that she was at the hospital, the incriminatory part as to appellant Newborn was entirely inadmissible because it was not contradictory to any of her trial testimony. Nor was the trial testimony about Bowen's incriminating telephone call admissible for any purpose. However, that testimony was prejudicial because it corroborated the prosecution's theory of the case against Newborn, i.e., that he was present at the hospital and a participant in the conspiracy. The impression given to the jury was that either LaChandra Carr saw appellant at the hospital, or she was told by Bowen that he was at the hospital, incriminating either way.

Appellant Newborn's attorney told the jury that the defense had fulfilled its promises about the trial evidence made in opening statement, including the promise that "there will be nobody who places Mr. Newborn at that hospital," 44 RT 4577, adding that "we now know includes LaChandra Carr."

The prosecutor on rebuttal emphasized that "Miss Carr tells you, or at least she told the grand jury that among those at the hospital were Bowen and Bailey and Newborn and Holmes." 44 RT 4630. The prosecutor noted her conflicting trial testimony and reiterated that "she does say that Holmes, Bowen, Newborn, and Bailey were [at the hospital]." Ibid.

Long after the evidence had been admitted, the trial court did instruct the jury that "The alleged statement of Solomon Bowen to LaChandra Carr cannot be used against any defendant," 44 RT 4672, but that occurred long after the jury had absorbed it into their view of the evidence and subjective assessment of the case. The prejudice is particularly evident in light of Carr's consistent position that appellant Newborn was at the hospital, varying only in her version as to whether she saw him there or she heard he was there.

V. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF PRESENCE BY THE TRIAL COURT'S ROGUE ACTION IN DETAINING WITNESS CARR OVERNIGHT IN THE ABSENCE OF ANY REASONABLE GROUNDS AND IN APPELLANT'S ABSENCE.

A. Summary of Facts.

LaChandra Carr was called by the prosecution on the afternoon of October 17, 1995. RT 1801, et seq. She acknowledged that she had been Solomon Bowen's girlfriend in 1993, and described her numerous police interviews in the aftermath of the shootings. 18 RT 1819. She acknowledged that she felt pressured to give a statement to the police and made up "what they wanted to hear so they would leave me alone." She testified that on the night of the shooting, she was at Bowen's house. Solomon Bowen had picked her up, told her that Hodges had gotten killed, and that he was going down to the

hospital. He asked her to stay at his house. 18 RT 1812. They spoke several times that evening on the telephone, but she never saw him again that night. She was certain that she first heart about the shootings on the news the following morning, and she recognized some of the victims because she was acquainted with their family. 18 RT 1817. She reluctantly acknowledged that she told the police that Bowen did not shoot the youths, that he was there but not the driver, and he did not know the shooting was going to take place because "that's what he told me." 18 RT 1822.

The prosecutor then turned to her testimony at the grand jury and asked what she said to the grand jury about the people she had previously identified, e.g., Bowen, appellant Newborn, and others. 18 RT 1825.

At that point, witness Carr did something that provoked the ire of the trial court and the following occurred:

> The Court: You do think you are kind of cute. Let me tell you something. We have three young men into eternity, three young men are facing the death penalty. Do you understand that?
>
> The Witness: Yes.
>
> The Court: These jurors are here, these lawyers are doing their job and you think this is cute, so I will tell you what—.
>
> The Witness: How is it cute when I am telling the truth?

The Court: Listen to me. I will put you in jail. What we are going to do, we will stop these proceedings tonight. You think about how cute these proceedings are. Tomorrow morning 8:45. Tomorrow morning be here on time.

Mr. Meyers: Your Honor, may we approach?

The Court: No.

Mr. Meyers: May I?

The Court: 8:45, Mr. Meyers. I don't want to hear anything more about it.

Mr. Meyers: Yes, sir.

The Court: Now, you think about what cute is. 18 RT 1825-1826.

At that point, the defendants were apparently taken from the courtroom at the conclusion of the day's proceedings, as the reporter's transcript states "The following proceedings were held in open court outside the presence of defendant's and the jury."

The Court: All right. Defendants are not present. This is a hearing on this witness.

I am going to put you in custody because I don't think you are going to return. Because you testified before the grand jury and you haven't been cross-examined, that means you would be unavailable.

This is a very serious case. You don't think it is. I do, and so what I'm going to do is keep you in custody and make sure you return tomorrow.

If you think you are helping either side here, you're not. What you are doing is acting like this is for you. These lawyers put a lot of time in on both sides. The defendants' lives are at stake and we have two people , three people who are already dead.

The jurors are trying to do their job and you are sitting there acting like you don't care and you don't want to answer any question, and I am not going to tolerate it. Do you understand?

The Witness: Yes.

The Court: Do you understand what I just said?

The Witness: Yes.

The Court: I am not into that stuff. You are going to be here tomorrow and I'm going to ensure that by putting you in custody and make sure that you come back tomorrow.

You can answer however you want tomorrow, but I'll tell you something, you are not helping either side here. This is a court of justice. That is what we are going to have. Thank you. 18 RT 1827.

The court adjourned after a $5,000 bail was set.

The following morning, October 18, she resumed her testimony and gave incriminating testimony over defense objection that her boyfriend Bowen had told her that appellant Newborn and others had been present at the hospital after the Fernando Hodges shooting. The hearsay objections by defense counsel were repeatedly overruled. 19 RT 1833-1835; 1839; 1844; and 1845-1846. She

repeated during her cross-examination that "I just heard they [appellant Newborn, Holmes, and others] were down there." 19 RT 1857.

B. The Trial Court's Errors.

The trial court's errors regarding this highly unusual incident are of two types: (1) the unauthorized and prejudicial act of jailing LaChandra Carr overnight without due process and in violation of statutory procedures; and (2) doing the above in appellants' absence. Each of these compounding errors is analyzed below.

1. The trial court's error in summarily taking LaChandra Carr into custody.

As noted above, LaChandra Carr was called by the prosecution and gave testimony that conflicted with her grand jury testimony. The prosecutor eventually asked the jury to believe her grand jury testimony that she was at the hospital and did see appellants there, as demonstrated by closing argument. 44 RT 4630-4633. The prosecutor was just about to elicit incriminating aspects of her grand jury testimony—"Do you remember what you said about those people [appellant Newborn, et al.] when you testified before the grand jury?" Defense counsel interposed an objection. Immediately after the trial court overruled the objection, the court became sorely offended by some gesture or manner

displayed by LaChandra Carr and lit into her: "You do think you're kind of cute"; "These jurors are here, these lawyers are doing their job and you think this is cute..."; "You think about how cute these proceedings are." 18 RT 1825-1826. The court recessed early, the defendants were escorted out, and the trial court immediately stated, "This is a hearing on this witness," and "I am going to put you in custody because I don't think you are going to return." 18 RT 1826. The court noted she had not been cross-examined about her grand jury testimony, that "This is a very serious case," and "So what I'm going to do is keep you in custody and make sure you return tomorrow." 18 RT 1827.

Clearly, the court was offended by her manner or attitude, but there is nothing whatsoever in the record that suggested in any way that she would not appear for her testimony the following day. She was apparently taken to a motel in police custody. 19 RT 1875-1876.

California has a well-established procedure for determining when it is appropriate to incarcerate a material witness to ensure the witness's presence at trial. Penal Code section 1332 ["material witnesses; order for written undertaking; commitment for refusal to comply; review; forfeiture"] provides that "[n]otwithstanding the provisions of sections 878 to 883, inclusive, when the court is satisfied, by proof on oath, that there is good cause to believe that

any material witness for the prosecution or defense, whether the witness is an adult or a minor, will not appear and testify unless security is required, at any proceeding in connection with any criminal prosecution or in connection with a wardship petition pursuant to section 602 of the Welfare and Institutions Code, the court may order the witness to enter into a written undertaking to the effect that he or she will appear and testify at the time and place ordered by the court or that she will forfeit an amount to court deems proper." Section (b) provides that, "[i]f the witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the court may commit the witness if an adult, to the custody of the sheriff...until the witness complies or is legally discharged."

The court in this case entirely abrogated the requirement of "proof on oath" that "there is good cause to believe that any material witness...will not appear and testify unless security is required." Moreover, even if such proof had been made, the court's first obligation is to establish an undertaking and surety in an amount appropriate to ensure the witness's attendance. Only if the witness refuses to enter such an undertaking is incarceration permitted. The trial court here violated Penal Code section 1332 by the precipitous

incarceration of LaChandra Carr without any proof of a possibility of non-attendance.

This statute carries out the constitutional mandate of Article 1, Section 10 of the California Constitution—"Witnesses may not be unreasonably detained." The Court of Appeal has described the surety and/or detention provisions of the material witness statute as "draconian," even where applied in conformity with the statute. See In re Jesus B. (1977) 75 Cal.App.3d 444, 452. Next, cases have recognized the coercive relationship between the incarceration of a material witness and the voluntariness of a subsequent statement. See, e.g., Smith v. Duckworth (7th Cir. 1988) 856 F.2d 909, 913 [referring to the incarceration of a material witness as a "important factor" in determining the voluntariness of a subsequent statement, the court remanded for further hearing "on the nature of Smith's incarceration and its duration" because "[t]his significant factor must be considered in evaluating the totality of the circumstances that led to Smith's confession"].

This Court has recognized in the context of prosecutorial misconduct that state officials may not preemptively punish prospective witnesses because that could skew the witness's testimony toward the prosecution to mitigate the punishment. In re Martin (1987) 44 Cal.3d 1, 31 [noting that prosecutorial

misconduct with respect to material witnesses "include[s] arresting a defense witness before he or other defense witnesses have given their testimony," citing Bray v. Peyton (4th Cir. 1970) 429 F.2d 500. Martin noted that in the prosecutorial misconduct context, a defendant is entitled to relief even if there is no showing that the prosecutor "intended to intimidate witnesses." 44 Cal.3d at 35. Martin involved the intimidation of defense witnesses, with the result that they would not testify. The court's actions in this case involved the intimidation of a witness called by the prosecution with the likely result that her subsequent testimony was prosecution-oriented. It must have been abundantly clear to LaChandra Carr that her freedom was contingent on her satisfying the court and presumably the prosecutor who called her with respect to the content of her testimony. While she had originally gotten into trouble with the court for being "cute" while on the witness stand, she would certainly have gotten the message that she would be a lot better off if she both cut out the "cute" and incriminated the defendants. She did so in her testimony the following day. The trial court's precipitous and unauthorized jailing of LaChandra Carr had the inevitable consequence of intimidating her and skewing her testimony toward the prosecution.

2. The trial court's error in conducting the unauthorized proceedings in appellant's absence.

For reasons that are nowhere explained, the trial court cleared the defendants out of the courtroom before holding the summary hearing and detention of Carr. This was clearly a critical phase of the proceedings, at which appellant had a state and federal constitutional right to be present. Appellant could not have been expected to know the legal procedures of Penal Code section 1332, but he certainly knew LaChandra Carr and could have assisted counsel in objecting to the summary incarceration because of its inevitable intimidating effect.

Campbell v. Rice (9th Cir. 2004) 408 F.3d 1166, 1171 stated the constitutional principle that "[a] defendant has a right to be present at any critical stage of his criminal proceedings if his presence would contribute to the fairness of the procedure," citing Kentucky v. Stincer (1987) 482 U.S. 730, 745 and United States v. Gagnon (1985) 470 U.S. 522, 527. Stincer confirmed that "Even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge'." 482 U.S. at 743,

quoting from Snyder v. Massachusetts (1934) 291 U.S. 97, 104-106. Appellant Stincer was found not to have suffered a due process violation when excluded from a competency hearing regarding child accusers because "[h]e has presented no evidence that his relationship with the children, or his knowledge of the facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency." Id. at 748.

In this case, appellant Newborn was acquainted with LaChandra Carr, knew her personality, and was in the best position to point out to counsel that the summary procedure announced by the court was all-too-likely to intimidate her and turn her from a neutral witness into a prosecution-prone witness. When the trial court invited defense counsel, again in appellant's absence, to make a further presentation in chambers if they wanted, none did. Perhaps they had no idea whether the improper jailing of LaChandra Carr would make her more prosecution-prone or more prosecution-averse. Appellant was in the best position to advise them whether it would make her more prosecution-prone and if he had done so, they could have further objected and insisted on the surety provisions of Penal Code section 1332, rather than exceeding to the unauthorized incarceration procedure. Under these circumstances, appellant

was a key source of information and advice regarding the appropriate response to the trial court's erroneous action.

C. The Requirement of Reversal.

The standard of review is whether the prejudice resulting from a defendant's absence may be found harmless beyond a reasonable doubt. Rushen v. Spain (1983) 464 U.S. 114, 121. No such harmless error finding is permissible in this case because (1) trial counsel did nothing to object to the rogue proceeding or to ameliorate its prejudicial impact; and (2) LaChandra Carr did testify in a manner very favorable to the prosecution when she was brought to court the following day. It is not as if defense counsel fully protected appellant's interests such that appellant's presence would have been surplusage as a practical matter. Prejudice is thus apparent from both the failure of counsel to undertake any ameliorative action and the subsequent prosecution-prone testimony of LaChandra Carr, demonstrating the likelihood that she was intimidated by the peremptory detention.

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VI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE COURT'S REFUSAL TO GRANT HIS MOTION TO SEVER FROM THE OTHER CODEFENDANTS.

A. Summary of Facts.

1. Pretrial rulings.

On July 1, 2994, counsel for appellant Newborn filed a Motion to Sever, based in part on attorney Carl Jones' declaration that "The prosecution in this case intends to call...witnesses...who will claim that codefendants had made extrajudicial statements that inculpate the defendant Newborn." IV CT 821. A hearing was held on July 8, 1994, and the severance motions were denied without prejudice. See IV CT 866. In support of appellant's Motion to Sever, attorney Jones cited discovery information from four confidential informants, three of whom claimed to have information that appellant Newborn was involved in the shootings. IV CT 824-825. Counsel appropriately cited the case of Burton v. United States, supra, as well as People v. Aranda (1965) 63 Cal.2d 518. At the hearing of the matter on July 8, 1994, the court simply stated that it had reviewed the parties' moving papers and said "At this time I see no reason to sever...but if something comes up—again, because of the grand jury I don't

have everything, nor do you...at this time I will not sever the case based on the moving papers and what we have." 3 RT 62.

Attorney Jones asked for guidance regarding the apparent intent of the prosecution to have witnesses relate the statements of codefendants that incriminate appellant Newborn, and the prosecutor responded "We will have sanitized and redacted statements available; however, given the circumstances surrounding the making of the statements by each defendant to third parties, it will be the People's position that there is sufficient indicia of reliability to comport with the requirements of the confrontation clause." 3 RT 65. The prosecutor filed a "motion to maintain joinder of defendants [] pursuant to PC 1050.1 and PC 1098 on July 22, 1994." IV CT 877. The grounds for joinder included the defendants' mutual membership in the P-9 gang and the desire to avoid repetitive victim impact presentations at penalty trials. IV CT 879. On July 29, 1994, the court again stated that "There is no severance of the case." 5 RT 155-156. The court also continued the case to October 5 over the objection of all defendants based on the need for further discovery and the court's schedule in trying the Bryant case. 5 RT 158.

At a subsequent hearing on June 20, 1995, the prosecutor proposed to sever defendants Bowen and Bailey, and proceed first with the trial of defendants Newborn, McClain, and Holmes. 8 RT 227-228.

Counsel for McClain filed a motion shortly afterward requesting a separate trial from all the other defendants on the basis that "The District Attorney will seek to introduce a series of extrajudicial statements by Lorenzo Newborn made to one Marlan Junor (aka 'Confidential Informant B') which directly implicates Herbert McClain in all of the above mentioned charges." I CT 3. The motion was heart on July 17 and was joined by defendant Holmes. McClain's attorney objected to the prosecution's proposed redaction, 8 RT 247, that entailed substituting a pronoun for McClain's name. The prosecutor argued that generic references "such as 'homeboys' and pronouns like the word 'they' were permissible under Bruton and Richardson." The court ruled as follows:

> I don't find any grounds for it. Every case we have had has had multiple defendants. That issue has come up; we have research it. I don't see anything different about this case.
>
> We have severed off to two clients [sic]. The building is bankrupt; the county is bankrupt. Separate trials for every defendant would be unacceptable to everyone. RT 249.

2. Midtrial rulings.

a. Derrick Tate's implied incrimination of Newborn.

Prior to the prosecution calling witness Derrick Tate, attorney Jones asked for a hearing regarding the admissibility of his testimony. 15 RT 1336. Jones referred to reports that Tate spoke with codefendant Holmes and attributed to Holmes the statement, "The murders were committed by Mr. Holmes, Lorenzo Newborn, my client, E-Dog, who I believe to be Ernest Holly, and definitely not Herb McClain." 15 RT 1337. Jones argued that "The only thing that is admissible is to have Tate say that Holmes say that he did it," but expressed concern on Aranda/Bruton grounds regarding Tate incriminating Newborn as well. The prosecutor stated that he had instructed Tate "never to utter the words Lorenzo or Herb," 15 RT 1338, and to say that Holmes told him "Yeah, I was involved. We were in some bushes and we fired." 15 RT 1339. Counsel for McClain sought and obtained permission to ask Tate whether Holmes had said "Mr. McClain wasn't there," 15 RT 1341, at which time counsel for Newborn responded "Then the problem is: I sit here looking like a dummy instead of asking Mr. Tate, 'well, didn't he say Lorenzo was not there?', and I can't ask that. And that's the problem when the People want [] to use the statements in their case in chief and object to a severance." 15 RT 1341.

The court noted, "It puts you in a pretty tough position," but "I don't know any other way out of this thing." Ibid. The prosecutor proffered a limiting instruction that the jury not hold Mr. Tate's testimony against Newborn, and the court agreed. 15 RT 1342. Counsel for Newborn did obtain permission to cross-examine Tate about whether Holmes had said Ernest Holly (E-Dog) was involved, because "The absence of any Ernest Holly...leads to the conclusion that Karl Holmes never said any of this stuff and Tate is lying." 15 RT 1343.

Tate was called as a witness, and the court instructed that his testimony was limited to Holmes and McClain. 15 RT 1347. He described a conversation in December 1993 with defendant Holmes, nicknamed "Boom," and Holmes described his involvement in the shooting in response to the prosecutor's question, "Without using any names, can you tell us what he said?" 15 RT 1352. The prosecutor extracted from Tate that Holmes had said there were two others with him. 15 RT 1352. Tate said Holmes attributed the shooting to retaliation for the killing of Fernando Hodges by Crips. 15 RT 1354.

When the prosecutor sought to play a statement made by Tate to the police on redirect, counsel for Newborn objected that "The District Attorney's intentions of going into other photographic identification, I think, improperly leads to an insinuation that violates Aranda/Bruton as to my client, and I cannot

go into the area for that reason," which "leaves the insinuation floating in the air unrefuted." Counsel for McClain objected as well and renewed the severance motion, which was denied. 16 RT 1405. The prosecutor asked Tate whether he had identified other people from photographic lineups in addition to Holmes, and he answered "yes." 16 RT 1415.

On recross-examination, counsel for McClain showed Tate a photograph of McClain, ascertained that he identified McClain, and elicited that "Boom told [him] that Herbert McClain was not involved." 16 RT 1425. McClain's counsel also elicited that Tate identified Ernest Holly (E-Dog) as another person Holmes said was involved in the shooting. 16 RT 1426. On redirect, the prosecutor elicited that Tate told the police that Holmes said it was "him and Herb" who were involved. 16 RT 1429. Apparently, Tate had made inconsistent statements to the police as to whether Holmes had named McClain as a perpetrator, but Tate stood by his trial testimony that Holmes had not named McClain. 16 RT 1431.

3. Restrictions on cross-examination of DeSean Holmes.

Prior to the testimony of DeSean Holmes, counsel for McClain renewed the severance motion on the ground that "Mr. Jones, in defense of his client, has

to bring out other things" that "will spill over to my client," and that she had "no way of confronting or examining." 17 RT 1517.

Defense counsel brought up to issue that DeSean Holmes' plea agreement included a provision that he not testify against his cousin, Karl Holmes, but the enforcement of that provision would restrict the cross-examination of counsel for Newborn. 17 RT 1522. After a testy interchange, 17 RT 1525, in which the prosecutor argued that counsel for Newborn was engaged in "an attempt to keep this witness from testifying." 17 RT 1526, counsel for Newborn insisted that "With respect to what this witness says about Mr. Holmes and Mr. McClain, I have a right to bring that out," and "an obligation to bring that out, because if I our position is, and I stress that it is our position, that he is lying about Newborn, then I need to show, number one, he wasn't willing initially to lie about his cousin, but, number two, that he did say things about his cousin and his mama and his coach and none of those are true." 17 RT 1528. The trial court denied the requests for a mistrial and/or severance. 17 RT 1530; 1531. Counsel for Holmes gave notice that he would object to any questioning that went beyond the scope of direct and implicated his client, Karl Holmes. 17 RT 1532.

4. Exclusion of Carpenter testimony that McClain attributed the shooting to himself, Holmes, and another person, not Newborn.

Prior to the testimony of prosecution witness James Carpenter, counsel for Newborn sought for permission to ask Carpenter whether McClain had told them that the shootings had been committed by McClain, Holmes, and another person, not Newborn. Counsel for Holmes objected, counsel for Newborn agreed to defer the request, and the court confirmed that counsel for Newborn "has a right to ask it for his client." 12 RT 2348, et seq., but did not.

5. Incriminating extrajudicial statement from Charles Baker regarding Newborn's involvement in the McFee shooting.

During the defense evidence, counsel for McClain elicited from Detective Korpal that in an interview with Charles Baker on November 10, 1993, Baker said that Newborn and Bowen were at McFee's place, and Bowen said "Shoot the motherfuckers," which was accompanied by a limiting instruction that the statements were "limited to one defendant" and "not offered to prove that was true." 35 RT 3792.

6. McClain's testimony.

The most prejudicial evidence came in during the course of McClain's testimony on his own behalf, which was admitted as to all defendants over

defense objection, see 37 RT 4082, subject to a possible limiting instruction that never materialized. McClain told a story of dubious credibility about him being personally upset by the news of the shooting of Fernando Hodges; arming himself to inflict retribution; intending to "smoke" any Crips he could find; but unable to find anyone in the P-9 gang to help him or any Crips to shoot.

During the course of cross-examination, the prosecutor led McClain to highlight the fact that Newborn and Holmes were not testifying on their own behalf, and their failure to testify supported an inference of guilt:

> McClain: You let all the rest of the Jimmy the Weasels come up here talking about play the tape and this and that because they know they're lying. You let them get away with that shit because they can't stand to be scrutinized because they're scared to get caught in a lie. Well, I'm not lying. I ain't got nothing to hide. I didn't kill no kids. I have not done that shit, period, period. I wouldn't do that to no little Black boys, man.
>
> The Court: Play that part of the tape.
>
> Mr. Myers: Thank you, your Honor. Oh, by the way, Mr. McClain, if you did kill the kids, you would get up there and admit it, wouldn't you?
>
> A: I wouldn't get up here. I wouldn't get up here.
>
> Q: If you did kill the kids, if you were on the stand right now—
>
> Ms. Harris: Objection: asked and answered.

The Witness: I am saying my homeboys got to do what their lawyers tell them for their best interest. I'm saying that I—my personal feeling is that I feel you all are going to try and railroad me anyway, so fuck with that your lawyers talking about. I am going to get up here and let everybody know what time it is.

Q: If you got up there and you did kill the kids—

A: I wouldn't. I wouldn't.

Q: You wouldn't what?

A: I wouldn't get up here.

Q: You wouldn't even admit it though, if you did?

A: If I'd done it—man, first of all, I wouldn't put myself in that position to do nothing to no kids.

Q: Well, when you went out on Halloween night, looking for Crips to kill, driving around with your gun—

A: You said it yourself, but you said it yourself—

Q: You had a motive to kill somebody and you're saying you didn't kill them? 37 RT 4053-4054 (emphasis supplied).

Following McClain's testimony, the prosecutor discussed how to clarify Holmes' testimony regarding his statement to Carpenter that he, Holmes, and others committed the shootings, 37 RT 4083, and it was agreed that Detective Korpal would give "the exact quote."

Counsel for Newborn and Holmes objected that the prosecutor's cross-examination of McClain had improperly highlighted their election not to testify and put that election in a negative light—"It was with respect to McClain's indication that only the innocent testify." 37 RT 4083. Counsel for Newborn also complained that "I don't think we should be burdened with McClain's testimony about smoking people and what he does and his lifestyle and his opinions about what people do and he didn't train the others that way." Defense counsel asked for instruction that McClain's testimony should be held only against McClain and not used against others. 37 RT 4084. The trial court had berated the prosecutor about his cross-examination of McClain, and the prosecutor asked for a curative jury instruction. The court told the prosecutor, "You have a defendant on the stand who is a wildcard and he keeps shooting his mouth off, and without looking around the courtroom you get in a verbal harangue with the witness, and I won't take responsibility for it." 37 RT 4084-4085. The court then recessed early for Thanksgiving and instructed the jury that the prosecutor had not committed conduct, but that the court admonished him because the line of questioning "causes a lot of heartache." 37 RT 4086.

During the discussion of jury instructions, the prosecutor argued that since McClain testified, all his extrajudicial statements should be admissible

against all defendants. Counsel for Newborn again objected that McClain's testimony should be limited to McClain, 41 RT 4300. The trial court agreed, saying "I know he said lots of crazy stuff and it shouldn't be attached to your client," 41 RT 4301, and agreed to give CALJIC 2.07. 41 RT 4302. Shortly afterward, the parties discussed the absence of evidence that anyone at the hospital discussed retaliation, and the trial court stated "I think Mr. McClain just sealed your fate on that because he said he went out looking for Crips based on his homeboy being shot after he talked to people that had been at the hospital." 41 RT 4311.

The prosecutor sought to argue that McClain's statement and testimony about the other P-9 gang members being involved in the shooting referred to and included Newborn and Holmes. The trial court attempted to mitigate the damages of McClain's "wildcard" testimony by precluding the prosecutor from arguing specifically that McClain's testimony referred to Newborn, but permitted the prosecutor to say "other P-9s" such that "the jury can draw from that." 41 RT 4299. Counsel for Newborn reiterated that it was "unfair...to have McClain testify as he did and then have Mr. Myers or Ms. Callahan taint everybody with McClain's statement," and the trial court agreed it was unfair and "was trying to get around it." The court stated "That is one of the problems

with the defendants belonging to a group and taking the stand." 41 RT 4301 Defense counsel reiterated his request that McClain's testimony be limited to McClain's guilt or innocence, but the trial court then acceded to the prosecutor's request for permission to argue that McClain's testimony that he tried to get in touch with Newborn could be considered against Newborn. 41 RT 4302. The court ultimately instructed with CALJIC 2.07, which states that evidence that was previously admitted with a limiting instruction could not be considered against other defendants. However, no such instruction had been given with McClain's testimony at the time it was presented, and the jury had therefore no basis for applying it to McClain's testimony.

B. The Trial Court's Errors.

The trial court erred in two ways: (1) failing to sever appellant Newborn from the other defendants based on evidentiary matters, either prejudicial spillover from the testimony of various prosecution witnesses, which should have been limited to either McClain or Holmes, or wrongful exclusion of evidence favorable to Newborn that would have prejudiced either McClain or Holmes; (2) failing to grant a mistrial and severance before, during, and after codefendant McClain got on the stand and gave extremely prejudicial testimony

that was otherwise unavailable against appellant Newborn. Each of these errors is analyzed below.

1. The trial court's refusal to sever based on prejudicial spillover from prosecution witnesses.

Beginning with prosecution witness Derrick Tate, the trial was rife with prejudicial spillover. Tate was asked what Holmes told him about the Halloween shootings—"Without using any names, can you tell us what he said?" 15 RT 1352. Tate then said that Holmes said that he and two others were with him when they committed the retaliatory shooting after the Hodges' murder. The testimony eventually got around to photographic lineups, and Tate identified a photograph of McClain and testified that "Boom told [him] that Herbert McClain was not involved." 16 RT 1425. McClain's effort to defend himself entirely negated the purported redaction of Tate's testimony. No longer were the two accomplices of Boom [Holmes] anonymous, but by process of elimination had to include appellant Newborn. Once McClain's attorney extracted an admission that Boom [Holmes] said that McClain was not involved and appellant Newborn's attorney did not elicit a comparable exculpation, the jury most certainly put one and one together to come up with appellant Newborn as one of the two other accomplices. That was exactly the danger that

counsel for appellant Newborn had argued in favor of the severance motion. 15 RT 1341. The danger identified by counsel by Newborn materialized at trial exactly as predicted.

Thus, even if the prosecutor were not at fault for eliciting damaging hearsay evidence in violation of appellant's Aranda/Bruton rights, the trial court nonetheless had the obligation to grant a severance or take other measures where the codefendants in exercise of their constitutional right to present a defense, introduced the damaging evidence against appellant Newborn.

People v. Reeder (1987) 82 Cal.App.3d 543 reversed a conviction because of the trial court's resolution of a similar dilemma, and confirmed that the trial court has to accommodate both a defendant who seeks to introduce exculpatory evidence, as well as the defendant who is entitled to be free from unlawful and inadmissible and prejudicial hearsay evidence. The trial court here abdicated that responsibility.

2. The trial court's error in refusing to grant a mistrial and severance in light of McClain's testimony.

McClain could not have been called as a witness against appellant Newborn by any party. Rather, appellant McClain's testimony arose solely based on his exercise of his personal and constitutional right to testify on his

own behalf. Rock v. Arkansas (1987) 483 U.S. 44. McClain had earlier demonstrated unruly and intemperate conduct throughout the trial, e.g., in response to Mario Stevens' testimony, McClain burst out, "You are a lying ass piece of shit," and "are lying through your teeth," for which he was admonished to little avail. 25 RT 2545. His decision to testify should have been viewed as a basis for severance and mistrial as to Newborn on the spot. However, that did not occur, and McClain went on to tell an extremely prejudicial tale that the prosecutor argued at great length that demonstrated the guilt of appellant Newborn as well. 44 RT 4694.[5] Newborn moved for a mistrial and severance, but the trial court erroneously denied those motions. Again, this is an instance in which McClain was entitled to exercise his privilege against self-incrimination, but appellant Newborn was entitled to be free from otherwise inadmissible and highly prejudicial evidence, a result that could have only been attained in this case by severance. However, the trial court failed to even apply the palliative of an instruction that McClain's testimony could only be considered as to McClain.

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[5] The prosecutor argued:

> "Then he talks about, well, his homeboys didn't do it, and he says 'my homeboy right there,' and he pointed to Lorenzo and said, 'I know damn well I done taught him better than that.' What does that mean? These guys were all in it." (emphasis supplied)

State and federal case law regarding severance of defendants requires reversal of the conviction of jointly-tried defendants, where the trial court either abused discretion in denying severance prior to trial, People v. Ervin (2000) 22 Cal.4th 48, 68, or after trial, upon the demonstration of a gross unfairness—"The reviewing court may nevertheless reverse a conviction where, because of consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." People v. Turner (1984) 37 Cal.3d 302, 313. Federal law requires severance where "There is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States (1993) 506 U.S. 534, 539. Zafiro explained that a risk of unfairness requiring severance "might occur when evidence that the jury should not consider against the defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant," adding that "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." 506 U.S. at 539. Case law requires severance when there is an excessive risk of prejudice from conflicting defenses. United States v. Tootick (9th Cir. 1991) 952 F.2d 78; People v. Massie (1967) 66 Cal.2d 899, 917.

C. The Requirement of Reversal.

The prosecutor quoted McClain's testimony about his homicidal responses on Halloween 1993, and emphasized McClain's efforts to contact Newborn and the other defendants in his argument to the jury as evidence of Newborn's guilt. 46 RT 4686-4690.

People v. Cleveland (2004) 32 Cal.4th 704, 726-727 addressed the standard to be applied by this Court in addressing a claim of prejudice from denial of severance where, in the language of Turner, supra, the appellant claims that "a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." Cleveland commented, "[b]ecause the trial court promised to protect the nondeclarants' rights when it denied severance, it is especially necessary to review the actual trial to see if the courts succeeded in doing so." Id. at 726.

In this case, appellant Newborn presented a coherent alibi, which was not contradicted by any prosecution eyewitness testimony or other physical evidence or admissions. However, the prospects for that testimony to raise a reasonable doubt as to appellant Newborn's guilt diminished to a vanishing point in light of McClain's testimony. The trial court essentially acknowledged the problem after McClain had testified—"I know he said lots of crazy stuff and

it shouldn't be attached to your client," 41 RT 4301, but at that point there was no way to insulate the jury deciding appellant Newborn's guilt from McClain's ringing rhetoric about the overriding gang emphasis on retaliation.

In addition to the overwhelming prejudice that accrued from McClain's testimony, appellant Newborn's defense was undermined by the various evidentiary rulings that either inured to the benefit of another defendant, e.g., McClain's elicitation from Detective Korpal that Charles Baker told him that Newborn and Bowen were at McFee's house on Halloween night, and that Bowen spouted "shoot the motherfuckers," 35 RT 3792, and testimony that would have assisted Newborn but which is excluded in deference to the other defendants, e.g., the exclusion of cross-examination of DeSean Holmes regarding the terms of his plea agreement. 17 RT 1517. Under these circumstances, appellant's right to a fair trial was violated by the combined prejudicial effects of a joint trial, and his convictions must be reversed.

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VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY PROSECUTORIAL MISCONDUCT IN THE FORM OF FLAGRANT APPEALS TO THE JURY'S PASSION AND PREJUDICE DURING CLOSING ARGUMENT.

A. Summary of Facts.

Deputy District Attorney Jonlyn Callahan gave the opening argument to the jury on behalf of the People. 42 RT 4388-4469, which generally consisted of a review of the law of homicide and a discussion of the credibility of the various witnesses. There were no defense objections during the course of that argument.

Attorney Harris argued on behalf of coappellant McClain, and began by acknowledging the sympathy the jurors would necessarily feel for the families of the victims, but implored the jury to follow the instruction and "not be directed by sympathy or prejudice." 43 RT 4470. Attorney Nishi began his argument on behalf of coappellant Holmes at 43 RT 4543 and generally talked about the credibility of various witnesses as well. Attorney Jones argued for appellant Newborn. 44 RT 4569-4623.

Deputy District Attorney Meyers gave the prosecution rebuttal beginning at 44 RT 4624. He began with a plea for the jurors to identify with the decedents:

> Because no matter who is going to be doing the spin up here, whether it's Mr. Nishi or Ms. Harris, Ms. Callahan, Mr. Jones, or even me, what we say is not evidence. We aren't the ones who are going to be deciding if there will be justice Stephan Coates and Reggie Crawford and Edgar Evans, whose names I did not hear the defense utter once. We are not going to be the ones to decide if they are going to rest in peace. That decision is in your hands. 44 RT 4624-4625.

After discussing the credibility of the prosecution versus defense witnesses, the prosecutor concluded as follows:

> I am going to wrap it up. I just want to let you see a few things, and I will be done before 4:30. I want you to remember something. [pause] It is always the last place you look.
>
> I did not bring you these pictures. I didn't do this to you. This is not my handiwork. These are dead children; big children, but dead children. They were gunned down because these guys went out to smoke some Crips that night. They shot at each other earlier and then they went looking again, and they picked the wrong target a second time. This is what they have given you. This is what they have given Pasadena.
>
> Now Ms. Harris said something yesterday that I thought was interesting. She said, "You are the only thing between the police and McClain." Well, if I were the only thing between the police and McClain, I would stand out of the way. Mr. McClain has told you he hasn't killed any—well, he claims he hasn't killed anybody

yet, but he used the work "yet." And DeSean has told you that Lorenzo has a list of people to smash when he gets out.

You are not the only thing between McClain and the police. You are the only thing between them and their next victims.

Ms. Harris: Your Honor, I object—.

Mr. Jones: I object to that. That is a patent appeal to passion and prejudice. It is improper; it is misconduct.

The Court: Sustained, Mr. Jones. All counsel have used some emotion. He is closing it up. This trial is about the defendants' rights to a fair trial, but also the reason they have a right to a fair trial is because we have three dead people. He has a right to comment on it. You are almost out of time.

Mr. Meyers: Yes, I understand it.

The Court: About five minutes.

Mr. Meyers: This is what they brought you. I didn't say I was going to smash anybody when I got out. That was Lorenzo who said that. I didn't say I haven't killed anybody yet. That was Herb who said that.

These guys aren't going to be home for Christmas ever again, and they sent them to eternity. Herb did, Lorenzo did, and Carl did. They lit the fuse, they let it burn; and now that it has exploded all over them, they want to run away from it.

I didn't make Herb and Lorenzo and Carl what they are, felons, convicted firearms offenses, dope dealers, women beaters, gang members, child killers. I didn't do that; Detective Uribe didn't do that; Sergeant Korpal didn't do that; Ms. Callahan didn't do that; Reggie Crawford didn't do that; Stephan Coates didn't do that;

Edgar Evans didn't do that. They did it by their own hands. By their own hands they have become what they are.

You are the only people now who stand between them and this. And by your verdict you will be sending a message, one way or the other, but it is unavoidable.

Ms. Harris: Your Honor, I again object.

Mr. Jones: I will object to that.

The Court: The jury's duty is not to send a message but to determine the evidence in this case and make a determination in deliberation.

Mr. Meyers, you're through. You have 30 seconds.

Mr. Meyers: Thank you.

The Court: You're welcome. Anything else?

Mr. Meyers: Thirty seconds. You'll be reaching a verdict and a just verdict based upon the evidence. I simply ask this: if you're the ones who are standing between the defendants and this (pointing to photographs of victims), don't stand aside; stand tall, stand firm, stand your ground, stand your principles, don't stand down, stand for a just verdict. Stand up for Edgar, Stephan, and Reggie. Come back with a guilty verdict so they can rest in peace. 44 RT 4701-4703 [emphasis supplied].

Following the concluding jury instructions and the beginning of deliberations, counsel made motions for mistrial with respect to the closing argument.

> Mr. Jones: Your Honor, we would make a motion for mistrial on the ground of the appeal to passion and prejudice with respect to the objection that was made out there.
>
> The Court: I understand, Mr. Jones. It was timely and, again, the court feels that I covered. And that's not unusual, emotions. Usually you are a little emotional but with your hoarse voice you couldn't do it. 44 RT 4715.

Attorney Harris joined in the motion for mistrial and argued that at the time the prosecutor appealed to passion and emotion, "there were the photographs of decedents in this matter placed up for the jurors to see and the coroner's diagrams." Counsel pointed out that "When we talked about this matter as to what should go into evidence, the prosecution told the court that it was for the showing of entry wounds and so forth." Counsel argued, "I think they wanted those things in evidence to do with what they did—what was done with them this afternoon, and that is to appeal to peoples' prejudice and passions and emotions in terms of young people being dead" urging that as a ground for mistrial as well. 44 RT 4716. The trial court denied the motions for mistrial. 44 RT 4717.

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B. The Prosecutorial Misconduct and the Trial Court's Error.

1. Prosecutorial misconduct in argument.

Viereck v. United States (1943) 318 U.S. 236, 247 established the proposition that "If the purpose and effect of the prosecutor's emotionally charged appeal was 'wholly irrelevant to any facts or issues in the case,' then it 'could only have been to arouse passion and prejudice'," constituting misconduct. Darden v. Wainwright (1986) 477 U.S. 168, 181, held that the due process clause requires reversal of a conviction when "the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction not a denial of due process'." The Federal Appellate Courts have applied these principles in what it has described as "the cardinal rule that a prosecutor cannot make statements 'calculated to incite the passions and prejudices of the jurors'." Gall v. Parker (6th Cir. 2000) 231 F.3d 265, 315.

While there are certain types of misconduct that have been recognized in the case law, and which occurred in this case, the most obvious is the explicit request for the jury to "send a message" to the defendants and to society at large about crime in general. See, e.g., Powell v. United States (D.C. Cir. 1982) 455 A.2d 405, 410 [prosecutor improperly appealed to jurors' fear of violence and

prejudice when he asked them to "send a message" that the community does not tolerate violence].

Next, the prosecutor used the photographs of the deceased victims for a purpose wholly different and far more prejudicial than that for which the prosecutor argued for the admission of the photographs. As defense counsel pointed out, the prosecutor sought admission of the victim photographs and coroner photographs to show bullet trajectories and other objective facts. That is not the purpose for which the prosecutor used them in closing argument—it was to rouse the jury to view the tragic deaths as the "handiwork" of the defendants. The contested guilt issues related to identification of the perpetrators, not whether it was a bad thing that deceased had been shot, which was universally acknowledged by the parties.

Further, the prosecutor is not permitted to urge jurors to convict to make the streets safe for themselves and others. However, the prosecutor argued that "You are the only thing between them [the defendants] and their next victims." 44 RT 4701. This type of argument has clearly been condemned:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future law breaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such

> appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear. United States v. Koon (9th Cir. 1994) 34 F.3d 1416, 1443 [rev'd on other grounds at 518 U.S. 581 (1996)].

The prosecutor's argument that a guilty verdict was necessary "so they [the victims] can also rest in peace, 44 RT 4703, is off the charts as far as legal irrelevance and prejudicial impact. Significantly, the prosecutor's plan to inflame the jury's passions was clearly intentional, because he opened the rebuttal argument with the following comment:

> "We [the lawyers] aren't the ones who are going to be deciding if there will be justice for Stephan Coates and Reggie Crawford and Edgar Evans, whose names I did not hear the defense utter once. We are not going to be the ones to decide if they are going to rest in peace. That decision is in your hands. 44 RT 4625.

That was the prosecutor's opening gambit and his final plea to the jury. Who among the jurors would not fervently want the defenseless victims to "rest in peace"; the jurors were all too susceptible to follow the prosecutor's exhortation to help them rest in peace by returning guilty verdicts. The concept of "resting in peace" is a religious abstraction that undoubtedly provides much comfort and solace to the bereaved after the death of a loved one. It has no place whatsoever in jury deliberations. According to the prosecutor's argument, it would be

entirely proper for a juror to say to the others, "I'm fairly sure the defendants are guilty but not really convinced beyond a reasonable doubt; however, I have an inchoate feeling that it will help the decedents 'rest in peace' if I return a guilty verdict, so I vote for guilty, what say you?"

The trial court showed some impatience with the prosecutor's closing argument using the photographs, the exhortation to prevent harm to "their next victims," and his exhortation to "send a message." 44 RT 4703. The court told the prosecutor that he had 30 seconds to wrap it up, and the prosecutor concluded with the legally irrelevant but emotionally compelling plea to "stand tall, stand firm, stand your ground"; "stand up for Edgar, Stephan, and Reggie"; and "come back with a guilty verdict so they can rest in peace." 44 RT 4703.

2. The trial court's errors.

As noted above, the trial court sustained defense counsel's objection to the prosecutor's first flagrantly improper conclusory plea—"You are the only thing between them and the next victims." However, the trial court gave the jury an instruction which was entirely ambiguous as to whether the jury could use the prosecutor's theory in reaching a verdict:

> All counsel have used some emotion. He is closing it up. This trial is about the defendants' right to a fair trial, but also the reason they have a right to a fair trial is because we have three dead

> people. He has a right to comment on it. 44 RT 4702 [emphasis supplied].

That is far from a specific directive not to consider the possibility of future crime in reaching the verdict as to guilt for the charged crimes.

The prosecutor then turned to his next inflammatory passage, which both reiterated the impropriety for which an objection was just sustained, and in addition urged the jury to "send a message":

> You are the only people now who stand between them and this [the defendants and the decedents]. And by your verdict you will be sending a message, one way or the other, but it is unavoidable. 44 RT 4703.

The trial court responded to defense counsel's objections with the remark that "The jury's duty is not to send a message but to determine the evidence in this case and make a determination in deliberation."

The prosecutor then concluded by reiterating the "rest in peace" theme that the prosecutor introduced at the beginning of rebuttal argument, with a resounding plea for the jury to "stand up for Edgar, Stephan, and Reggie," and "come back with a guilty verdict so they can also rest in peace," all flagrantly improper.

Under these circumstances, it was abundantly clear that the prosecutor had a staged conclusion that involved emphasis on the gruesome photographs

and inflammatory rhetoric that called upon the jury to act not as a deliberative body but as the standard bearers for the deceased victims. The trial court was entirely on notice that the prosecutor's repeated improper arguments at the conclusion of rebuttal were virtually guaranteed to have an inflammatory and prejudicial effect on jury deliberations. It was, therefore, erroneous for the trial court to deny the motions for new trial.

The court's response to the mistrial motion was "The victims are part of the trial and I think the prosecution can argue that"; "they can show the pictures"; and "there is no question it goes to an emotional thing, but it also shows what the case is about." 44 RT 4717. The trial court missed the point that the prosecutor back-loaded the jury with a patently emotional plea, and the jury was sent off to deliberations with extreme exhortations to decide the case on the basis of their pro-victim sympathy than on basis of the jury instructions and evidence.

C. The Requirement of Reversal.

Reversal is required for prosecutorial misconduct standing by itself when it "is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process" under the federal Constitution. People v. Panah (2005) 35 Cal.4th 395, 462.

"Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." Ibid.

If the misconduct deprived the defendant of due process under the federal Constitution, reversal is required unless the People prove beyond a reasonable doubt that the error did not contribute to the jury's verdict. People v. Bell (1989) 49 Cal.3d 502, 533, citing Chapman v. California, supra. If the prosecutor's conduct violated our state Constitution, reversal is required if there is a clear showing of a miscarriage of justice. People v. Hill (1998) 17 Cal.4th 800, 844, citing Cal. Const., Article VI, section 13.

In this case, the determination of reversible error must be made based on the record as a whole, including the obvious impact of the improper statements during argument, coupled with the cumulative prejudice from the other errors briefed on the appeal.

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VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS JURY INSTRUCTIONS AND INSUFFICIENCY OF EVIDENCE AS TO THE SPECIAL CIRCUMSTANCE FINDINGS.

Appellant Newborn and the codefendants were charged with a lying-in-wait special circumstance allegation as to the three counts of murder, and a multiple murder special circumstance allegation. III CT 631-642. The jury returned true findings on the special circumstance allegations, but found the firearm use allegations not true as to appellant Newborn. In addition, the only overt act alleged in conjunction with the conspiracy charge in Count 10 was that "At Pasadena Avenue and Blake Street, on October 31, 1993 at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen, and unnamed co-conspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip." VI CT 1598.

The jury was instructed with the 1993 version of CALJIC 8.80.1, which stated in pertinent part:

> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider-and-abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded,

induced, solicited, requested, or assisted any actor in the commission of murder in the first-degree." VI CT 1564

The multiple murder special circumstance allegation required the prosecution to prove that "The defendant has in this case been convicted of at least one crime of murder of the first-degree and one or more crimes of murder of the first or second-degree." VI CT 1566. The jury also specifically found not true the Penal Code section 12022(a)(1) allegation that appellant Newborn was "armed with a firearm" in the commission of the conspiracy. VI CT 1599.

The jury's view of appellant's culpable conduct, as indicated by the verdicts, must have been that the jury credited the grand jury testimony of LaChandra Carr (and/or her hearsay recitation of Bowen's statement) that appellant was present at the hospital following the Hodges' shooting, and entered a conspiracy to retaliate at that point. However, the jury was manifestly not persuaded beyond a reasonable doubt that appellant Newborn ever had a weapon, ever fired a weapon, or was ever present at the scene of the fatal shootings. Rather, the jury at most found that appellant Newborn was present, unarmed, in the vicinity of Blake Street and Pasadena Avenue when someone fired a handgun at or near the residence of the Crip known as "Crazy D."

Appellant Newborn was necessarily convicted of the substantive counts of murder and attempted murder on the basis of conspiracy liability, as the jury was instructed that "[a] member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequence of an act of a co-conspirator to further the objective of the conspiracy, even though such act was not intended as part of the agreed upon objective and even though he was not present at the time of the commission of such act." CALJIC 6.11, VI CT 1535.

A conviction of three counts of murder based on a conspiracy theory of liability is insufficient to support a true finding on either the multiple murder or lying-in-wait special circumstance allegations. The Eighth Amendment requires that a finding of capital eligibility entails at a minimum was "a major participant" in the homicidal conduct, and harbored a mental state of either reckless indifference to human life or intent to kill as to the victims. These minimum constitutional requirements were promulgated in Tison v. Arizona (1987) 481 U.S. 137, and are embodied in the current version of CALJIC 8.80.1, but were not included in the version given to appellant Newborn's jury.

The evidence apparently credited by the jury failed to establish that appellant Newborn was present at the Emerson Avenue/Wilson Street shootings. The evidence apparently credited by the jury consisted of his participation in preceding events constituting the formation of the conspiracy at the hospital, coupled with minor participation in the shooting at Pasadena Avenue and Blake Street, as to which the jury found not true that appellant was armed at the time. At most, the jury's findings demonstrate that they believed beyond a reasonable doubt that appellant Newborn harbored intent to kill at an early point in the evening while at the Huntington Hospital, and at that time somehow "abetted" or "counseled" some other defendants to go forth and commit some unspecified murder. That is inherently insufficient to establish guilt of a lying-in-wait special circumstance. While the scope of liability according to the conspiracy instruction would clearly have attributed liability to appellant Newborn for the acts of the individuals who actually perpetrated the shootings at Emerson and Wilson, but the constitutional principle of Tison, supra, precludes such liability. See also Enmund v. Florida (1982) 458 U.S. 782.

The constitutional function of a special circumstance allegation in California is to provide a rational basis for distinguishing capital-eligible

murders from other non-capital first-degree and/or second-degree murders. The special circumstance allegation as to an aider-and-abettor requires proof that the aider-and-abettor was personally involved in the capital murder at the minimum level required by Tison, supra. It does not permit the attribution of a special circumstance to an aider-and-abettor or co-conspirator whose culpability falls short of that. The jury was never so instructed in this case and, therefore, the special circumstance findings must be reversed.

Appellant further argues that the special circumstance findings must not only be reversed, but dismissed as well for insufficiency at evidence under People v. Johnson, supra, and Jackson v. Virginia, (1979) 443 U.S. 307. The prosecution presented no evidence that appellant was present at the Emerson and Wilson shootings, nor that he had any knowledge of the planning and preparation involved in the caravan of cars that eventually parked in the vicinity prior to the shooting. Given the absence of evidence that appellant had any actual knowledge of the fatal shootings, and given that the jury's only affirmative findings put him at a different location at a different time with a different potential victim, there is insufficient evidence to support the special circumstance findings as to the murders alleged in Counts 1, 2, and 3. The circumstances of this case are analogous to those in Benedith v. State (Fla.

1998) 717 So.2d 472, in which the Florida Supreme Court vacated a death sentence "because the evidence was insufficient to withstand an analysis pursuant to Tison v. Arizona." Id. at 476. The evidence was found sufficient to support a first-degree felony murder conviction based on testimony that Benedith was seen "with the victim beside the victim's car within five minutes of the firing of the shots that killed the victim"; appellant had the victim's car on the night of the murder; and appellant had the murder weapon in his possession less than a month later when apprehended for a different crime.

However, the Florida Supreme Court struck the death penalty because "the evidence does not prove that appellant was the actual shooter, that he procured the firearm for use in the robbery, that he possessed a firearm before or during the robbery, that he or [codefendant] had ever used a firearm previously in a robbery, or that he could have prevented the use of the firearm while the robbery was being committed." Id. at 477. Moreover, "a reasonable inference could be drawn that either appellant or [codefendant] did the actual shooting."

The evidence in this case is far less probative as to appellant's role in the events, because there was no evidence that appellant Newborn was even present, much less participating, in the events surrounding the Emerson and

Wilson shooting. His role is at most that of a conspirator, who was elsewhere at the time that some indeterminate group of co-conspirators committed the Emerson and Wilson shootings. That is simply insufficient to satisfy the standard of Tison, and the special circumstance findings must be vacated and dismissed.

PENALTY ARGUMENTS

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS DECISION TO REQUIRE APPELLANT TO WEAR A STUN BELT, AND THE ERRONEOUS DISCLOSURE TO THE JURY THAT APPELLANT WAS REQUIRED TO WEAR A STUN BELT DURING TRIAL.

A. Summary of Facts.

There are two components to this argument: (1) the trial court's erroneous decision to require appellant and the codefendants to wear stun belts in the first place; and (2) the trial court's error in permitting deputy sheriffs to testify before the penalty jury that appellant was required to wear a stun belt. The factual underpinnings for each claim are set forth below.

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1. Facts underlying the trial court's decision to require the defendants to wear stun belts.

During the reading of the jury verdicts at the guilt phase, when the trial court announced that the jury had found Holmes guilty of murder as alleged in Count 1, Holmes interjected, "Fuck you, you mother fuckers. P-9 rules." 45 RT 4752. The court subsequently thanked and excused the jurors and set the case over for 10 days to begin penalty proceedings. At the next hearing on January 3, 1996, the court addressed defense motions to continue the penalty trial, to restrict the prosecutor's jury argument, and other procedural matters, including a renewal of appellant's motion to sever. 45 RT 4765-4782. When counsel for appellant Newborn argued for severance based on the prejudicial effect of McClain's testimony and counsel's "understanding that Mr. McClain utilized a hand gesture with the middle finger of the right hand visible to the jury," 45 RT 4783, the court responded that "I think Mr. McClain used poor judgment and so did Mr. Holmes at that time" because "[i]t doesn't help when you are taking a verdict and people have just listened to months of testimony and then to do those things." 45 RT 4784. The court noted that "I saw the finger go up," but "that is not so uncommon." 45 RT 4785. Counsel argued as follows:

> [I]f we look at the testimony of Mr. McClain with the profanities, that was directed in general not to members of the audience—

pardon me, not the members of the jury. The hand gesture was directly directed to the jurors.

With respect to Mr. Holmes—and again I say to him this is not personal, it is legal argument that I am making in representing my client—I've been informed, and I think the record will bear me out, that Mr. Holmes at the time the verdicts were returned rendered comments relating to the jurors' inferior intellect, their lack of family values, their deviate heritage, and their sexual perversity. There is more explicit language in the record, I believe, to support that.

Now, the problem is, just to sum all of that up, Mr. Newborn did none of those things and yet we are now asked to have this jury decide his fate on an individual basis without concern for outside factors; and these are jurors who have been verbally abused, insulted, and demeaned by the codefendants. 45 RT 4785-4786 (emphasis supplied).

Counsel for McClain asked for a new jury to be impaneled, but the court denied these motions, while inviting counsel to submit a jury instruction to address the issue of potential prejudice. 45 RT 4789. The court admonished McClain and Holmes as to their "gestures and stuff." 45 RT 4791. The court further addressed all three codefendants, and complimented them on their overall courtroom behavior with respect to cooperating with the bailiffs:

Listen, gentlemen—listen to me, Mr. McClain—my bailiffs you never gave them any trouble at all, neither have you. Stay on the same course. All right? They are just here to do their job.

> Don't comment. You have always been gentlemen to my staff, and I appreciate that. So hang in there. 45 RT 4793 (emphasis supplied).

At the next hearing a week later on January 11, 1996, the court stated without preamble that "Mr. McClain, Mr. Holmes, and Mr. Newborn, you were given the Remote Electronically Activated Control Technology Subject Notification form on the activation of the control belt, is that correct?" 46 RT 4798. The court explained that "The security is done by the security people involved, that is, the bailiffs," and "[b]ased on some activity, they have requested that you do this and a document was given to you and you didn't want to sign it." At that point, the court read the document to the defendants, explaining how the stun belt works.[6] The court asked the defendants whether they understood why they were wearing the stun belts. McClain objected, "I understand and I don't agree with those terms, though." 46 RT 4799. The following colloquy then occurred:

> Defendant McClain: I want to say nobody tripping, but now all of a sudden, we get those belts. That

[6] The written warning referred to "an impulse of 50,000 volts" of electricity which would result in "instant and complete immobilization" of the defendant which would be activated based on "an attempt to escape, to make sudden or hostile movements, [or] to tamper with the belt, failure...to comply with verbal commands, [or] any overt acts of aggression or communication with persons in or around my immediate vicinity."

is like a slap in my face. After all, I have been sitting here and I ain't done nothing hostile and none of that shit and still get that.

The Court: Remember that security is done by the sheriffs and if they perceive things that jeopardize your safety or injury to you or them or any staff member, that is what the law provides. So we will review this for later on. 46 RT 4800 (emphasis supplied).

There was no further review, and the defendants wore the stun belts throughout the first penalty trial.

The issue recurred at a hearing on March 15, 1996 following the first penalty mistrial, when the prosecution announced that it would retry the case. There is a notation in the record—"Defendants laughing"—and the following colloquy occurred:

The Court: As comical as it is, gentlemen, we will have to see what the trial brings. All right? Let's proceed. Take them out of here.

Defendant Newborn: Fuck you.

Mr. Meyers: May the record reflect that Mr. Newborn has—

Defendant Newborn: Fuck you. Suck my dick. [The defendants exited the courtroom.]

Mr. Meyers: —has given me the finger and directed the words 'fuck you' to me?

The Court: Which is not unusual for McClain.

Ms. Harris: Mr. McClain did not say that, your Honor. Mr. McClain was the modicum of—

Ms. Callahan: Restraint.

Ms. Harris: Restraint.

Mr. Meyers: That was Mr. Newborn.

The Court: We will have to probably use the restraints again.

For the record, the defendant was facing the court when he said, 'fuck you,' and was also giving a P-9 sign. I want that on the record. 60 RT 5769-5770.

At a subsequent hearing on March 21, counsel for appellant renewed his motion to have appellant's trial severed from McClain's trial, stating the following:

Mr. Jones: I think we have a very good argument that 'we,' Newborn and Holmes, should not be saddled with the obscenities and the profanities that Mr. McClain used during the first trial.

The Court: I agree with that.

Mr. Jones: And with his confession about the intent to kill with premeditation and deliberation.

The Court: And then they shouldn't be saddled with your client's loud-mouthed remarks last week. They are all together. They told the court this and the jury, they're P-9s, and they're damn proud of it.

They won't be severed. I don't find any rational for that argument at all. I am not made at you. I am not happy with their attitude. They are not going to run this court. I am going to run this trial.

Have you got the word? And you will be belted.
60 RT 5777-5778 (emphasis supplied)

That was the extent of the hearing with respect to the stun belt use for the penalty retrial.

2. Facts relating to the trial court's decision to permit disclosing the use of stun belts to the jury.

Toward the conclusion of the penalty retrial, the court was informed that McClain had made a threat to the bailiffs prior to court the previous day, and the prosecutor related that Deputy Browning "personally heard defendant McClain say, 'I will kill you'." 73 RT 7298. The court held an Evidence Code section 402 hearing and heard testimony that McClain made this comment as the stun belts were being placed on the defendants in the holding cell. Counsel for Newborn renewed the motion to sever because Newborn was being dragged

in as an involuntary witness to McClain's misconduct, and could be prejudiced in the process. 73 RT 7311. Counsel for Holmes argued that McClain's misconduct "has such a prejudicial effect against all defendants," and the court replied, "[i]t certainly does." 73 RT 7312. The court nonetheless denied Holmes and Newborn's motions to sever—"Any severance motion at this time is untimely and ridiculous and I won't even consider it." 73 RT 7215. The court then ruled that the evidence of McClain's threat would be admissible. In explaining its decision, the court stated: "The belts, I made the decision on that based on their conduct. They don't make that decision; I make that decision. That's even for their benefit." 73 RT 7314.

The court lectured McClain that "It is repulsive to me that you or anyone else threatened to kill them [the bailiffs] or injury them in any way," and "I think the jury should hear it." 73 RT 7327. The court did agree to defense counsel's request that the deputy's testimony regarding McClain's use of the plural pronoun "we" be "sanitized" to the singular pronoun, "I." 73 RT 7329.

In the presence of the jury, the prosecution called Deputy Browning, who testified that a threat was made to him the previous morning and when asked to describe the circumstances that led up to the threat, he stated, "Every morning as we come in, we put an electronic device on each one of the defendants." 73

RT 7332. Defense counsel for Holmes then asked the court to "instruct the jury that they should not use the electronic device against any of the clients," and the court instructed that "The court makes a decision, based on things the court knows, whether or not to wear this device." The court explained, "It is a security device to assure tranquility in the court, security for everyone," and "It does not mean they are guilty or not guilty." 73 RT 7332. The prosecutor then asked additional gratuitous questions about the stun belts:

Mr. Meyers: Okay. So you put the security device on the defendants, right?

A: All the defendants, yes.

Q: Ones who have been convicted of murder?

A: Yes.

Q: So you are putting the device on. 73 RT 7332-7333 (emphasis supplied.

B. The Trial Court's Errors.

1. The error in requiring stun belts in the absence of evidence of unruly courtroom behavior.

Deck v. Missouri (2005) 544 U.S. 622, 125 S.Ct. 2007 reversed a death sentence because a capital defendant was shackled during a penalty retrial. The court "h[e]ld that the Constitution forbade use of visible shackles during the

penalty phase, as it forbade their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." 125 S.Ct. 2007, 2009 (emphasis in original), quoting from Holbrook v. Flynn (1986) 475 U.S. 560, 568-569. The Supreme Court emphasized that while the issue of guilt or innocence and the accompanying presumption of innocence no longer applied at a penalty phase, the constitutional prohibition against visible restraints at penalty phase applied with equal or greater force because, given the "acute need" for reliable decision-making when the death penalty is at issue, "[t]he appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of commonsense that the court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decision-making, even when the state does not specifically argue the point." 125 S.Ct. at 2014 (emphasis supplied).

The case law that applies this basic principle of due process has recognized that the error in exposing the jury to various forms of physical restraints like shackles applies equally to exposing the jury to electronic restraints including the stun belt. See, e.g., United States v. Joseph (5th Cir. 2003) 333 F.3d 487, 591 ["There is no evidence that the jury was prejudiced by

the presence of these restraints, as the stun belt was not activated during the trial, and both the belt and the shackles were kept out of the view of the jury."]; United States v. Mahasin (8th Cir. 2006) 442 F.3d 687 [Appellant argued that his conviction should be reversed "because the district court improperly ordered his restrained with leg irons, shackles, and a stun belt while he defended himself in the trial," but the argument was rejected because "The district court took efforts to obscure the jury's view of the restraints, and it was only upon Mahasin's voluntary disclosure that the jury learned of the restraints." 442 F.3d at 691]. In fact, case law applying United States Supreme Court precedent, including Illinois v. Allen (1970) 397 U.S. 337, has noted that stun belts have the potential for creating greater prejudice in the minds of a jury and, therefore, require greater justification for use. United States v. Durham (11th Cir. 2002) 287 F.3d 1297 reversed a conviction because the defendant was subjected to stun belt use without any demonstration that the jury was aware of it. However, in analyzing whether stun belt restraint should be treated in the same manner as more conventional shackles, the court stated, "[i]f seen, the belt 'may be even more prejudicial than hand cuffs or leg irons because it implies that unique force is necessary to control the defendant'." 287 F.3d at 1305, quoting State v. Flieger (Wash. Ct. App. 1998) 955 P.2d 872, 874.

Gonzalez v. Pliler (9th Cir. 2003) 341 F.3d 897 vacated a denial of habeas corpus relief to a California defendant who had been subjected to a stun belt during his trial. The Ninth Circuit relied on Durham, supra, to conclude that "A decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints." 341 F.3d at 901. In reaching this conclusion, the Ninth Circuit noted that "California's and the Ninth Circuit's respective physical constraint doctrines are, despite some linguistic distinctions, largely coextensive: under California law, a court directing the use of stun belts must determine that a 'manifest need' justifies the use." Ibid at fn. 1, citing People v. Mar (2002) 28 Cal.4th 1201, which reversed a conviction because the defendant was forced to wear a stun belt without justification on the record.

Mar held that shackling and/or stun belts were permissible only where the trial court made an independent determination of "manifest need" based on evidence contained in the record. However, the trial court in Mar had deferred to the "apparently unilateral decision to require that defendant wear the stun belt" made by the bailiff and jail officials. Id. at 1222. This Court found that "The trial court never made, nor purported to make, a finding or determination that there was a 'manifest need' to impose the stun belt upon defendant because

he posed a serious security threat in the courtroom." Ibid (emphasis supplied). Rather, "The court's comments suggest that its rejection of defendant's objection to the use of the stun belt was based at least in significant part upon the court's determination that the use of the belt would be in defendant's best interest because the belt would help defendant control his emotions and not act in a manner that would be detrimental to his case, rather than being premised on the judicial conclusion that defendant posed a sufficient danger of violent conduct in the courtroom to demonstrate a manifest need for the use of a restraint under Duran." Id. at 1223 (emphasis supplied). See People v. Duran (1976) 16 Cal.3d 282. The trial court in this case made the same type of comment, i.e., that the stun belts provided a benefit to the defendants to help them maintain control. 73 RT 7314 ["That's even for their benefit"; "They know the belts are on; I know the belts are on"; and "It's a temporary thing."]

In this case, there is no evidence whatsoever of any incipient violent or assaultive conduct in the courtroom. Rather, the only "non-conforming behavior," Mar at 1217, that any of the defendants engaged in was, as the court phrased it, "loud-mouth remarks." 60 RT 5778. Episodic instances of "loud mouth" behavior that do not disrupt the flow of the trial on their face cannot justify the use of stun belts, the most repressive type of courtroom restraint.

Mar expressly concluded the intermittent "verbal outbursts" by defendants were not sufficient cause to warrant a stun belt, referring to Hawkins v. Comparet-Cassani (2001) 251 F.3d 1230, and concluding that "Hawkins is consistent with our conclusion that under Duran, a stun belt may not be properly used, over a defendant's objection, to deter defendant from making verbal outbursts that might be detrimental to the defendant's own case." Id. at 1223, fn. 6. Hawkins noted "There is an important difference between verbal disruption and conduct that threatens courtroom security," and deemed the term "security threats" to encompass "the risk of both violence and escape." 251 F.3d at 1240. It affirmed the district court's injunction against the County of Los Angeles from using stun belts to deter or control mere verbal courtroom disruptions. Thus, the trial court's errors in requiring appellant to wear a stun belt were twofold: (1) the court at least initially delegated the decision to use stun belts to the sheriff; and (2) to the extent that the court exercised its independent discretion subsequently, the sole "non-conforming conduct" consisted of isolated verbal comments by the defendants, which may have been profane and offensive, but were in no way disruptive to the security of the court by any objective standard.

2. The error in failing to prevent jury exposure to the stun belts.

For most of the penalty retrial, the stun belt issue lay dormant, and any prejudice that accrued existed below the jury's radar. All three defendants sat in their chairs, and there is no indication on the trial record that the jury may have seen the tell-tale lumps protruding from the defendants' backs that contained the 50,000-volt battery pack.

However, after McClain made the alleged threat in Deputy Browning's presence toward the end of the penalty retrial, the trial court determined that evidence of that threatening behavior was admissible against McClain—and only McClain—under Penal Code section 190.3(b). However, McClain's threat was in no way inextricably intertwined with the stun belts, apart from temporal proximity. There was no logical or legal reason whatsoever to permit the prosecutor to elicit that McClain had made his allegedly threatening comment during the course of the efforts by the deputies to put the stun belts on Newborn and Holmes. The aggravating nature of McClain's comment was independent of whether the deputy was engaged in putting hand cuffs on McClain, putting a stun belt on McClain, or merely gesturing him to leave the holding cell and go into the courtroom in a controlled manner. The stun belt testimony was entirely

extraneous to the prosecution's proof of McClain's threat. At the time McClain made the threat, he had already been outfitted with his stun belt, and had "walked back into the cell in order to retrieve an outer shirt." 73 RT 7303. At the time of McClain's threat, appellant Newborn was standing docile in the outside holding cell as the deputies put his stun belt on. 73 RT 7304.

Unfortunately, both defense counsel on duty at the time for defendants Newborn and Holmes and codefendant McClain, then in pro per, failed to request that the court preclude testimony as to the surrounding circumstances of McClain's threat on relevance, prejudice, and due process grounds. Nonetheless, the trial court has an independent obligation to control courtroom proceedings, "and to limit the introduction of evidence...to relevant and material matters, with a view to the expeditious and effective ascertainment as the truth regarding the matters involved." Penal Code section 1044. People v. Sturm (2006) 37 Cal.4th 1218, 1241 [reversing death penalty because of judicial misconduct; confirming that section 1044 "outlines the duty of the judge to control trial proceedings and limit the introduction of evidence 'to relevant and material matters'"] The trial court should have been alerted to the larger problem of exposing the jurors to the stun belts, when attorney Nishi on Holmes' behalf asked the court to direct the testifying deputies not to use the

plural pronoun "we" in relating McClain's threat, i.e., directing the deputies to relate McClain's alleged threat in the first person singular pronoun. That was a modest effort to protect defendants Newborn and Holmes from an unwarranted inference that they participated in, endorsed, or otherwise joined in the threat. However, the larger issue was the disclosure of the stun belts to the jury, carrying as it did the clear implication that the defendants were deemed so terribly dangerous as to require "unique force" to control the defendants. United States v. Durham, supra, 287 F.3d at 1305.

The courts have recognized that where a trial court "took efforts to obscure the jury's view of the restraints," the prejudice may be lessened. See, e.g., United States v. Mahasin, supra, 442 F.3d at 691. However, the trial court took no action whatsoever to avert the disclosure to the jury of the stun belts. The issue may not have been visual disclosure, as the defendants remained seated in court, but it was a far more damaging testimonial disclosure.

C. The Requirement of Reversal.

This Court has recognized that the standard of reversal applied in federal court "when a trial court without making adequate findings improperly requires a defendant to wear a stun belt," that the standard of reversal is whether the error is harmless beyond a reasonable doubt. People v. Mar, supra, 28 Cal.4th

at 1225, fn, 7. This Court determined in Mar that the error was prejudicial even under the Watson standard—"We need not determine whether the trial court's error in requiring defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted federal constitutional error that is subject to a more rigorous prejudicial error test." Ibid. Appellant here urges the Court to apply the Chapman harmless error analysis because appellant was forced to wear the stun belt without an adequate shoring of danger, and the jury was expressly apprised of the stun belts. However, as in Mar, the circumstances of the case require reversal even under the Watson standard because of the following factors.

1. The closeness of the penalty determination.

In this case, the first penalty jury hung nine to three, demonstrating that the decision regarding the appropriate penalty was far from clear cut, and that the prosecution's evidence in aggravation, while weighty, was far from overwhelming, at least as to appellant Newborn. His role in the shootings was entirely ambiguous, given the jury's refusal to return a true finding on the personal firearm use allegation. At most, the jury made a specific finding that he was present at an earlier shooting near the McFee residence, in which no one was injured, and in which his specific role was unclear. The fact of a prior

hung jury has repeatedly been recognized as a factor demonstrating that a subsequent error resulting in an adverse determination to the defendant was prejudicial. United States v. Paguio (9th Cir. 1997) 114 F.3d 928, 935 ["We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this evidence"]; United States v. Schuler (9th Cir. 1987) 813 F.2d 978 rest of cite [prior hung jury is factor in determining whether error is harmless beyond a reasonable doubt]; Province v. Ctr. for Women's Health and Family Birth (1993) 20 Cal.App.4th 1673, 1680 ["there is an additional reason to hold this conduct is prejudicial—in the previous trial on this matter a mistrial resulted due to a hung jury"].

2. The length of the jury deliberations.

In this case, the jury deliberated for some nine days, and asked a number of questions, some of them relating to the evidence of guilt and to the respective defendant's roles in the shootings. To be sure, there were three codefendants for the jury to evaluate, but even if the jury spent an identical amount of time as to each, that yields a figure of three days' deliberations per defendant, which has in itself been recognized as an indicator that the evidence of aggravation was far from overwhelming. Murtishaw v. Woodford (9th Cir. 2001) 255 F.3d

926, 974 [where penalty jury deliberated for two days and asked various questions, "given the mitigating evidence presented, the jury's apparent interest in it, and the length of the jury deliberations, we are in 'grave doubt' about whether they would have returned a death sentence..."]; In re Sakarias (2005) 35 Cal.4th 140, 167 [reversing death sentence, noting that "[s]ome aspect or aspects of the case evidently gave one or more jurors considerable pause in the sentencing decision, as the penalty jury deliberated for more than 10 hours over three days and, at one point, declared itself unable to reach a unanimous verdict, before finally returning a verdict of death"].

3. The adverse inference from the stun belt as undermining the defense argument for life.

As the Supreme Court noted in Deck v. Missouri, supra, the prejudice in the use of visible restraints at penalty trial is that "[t]he appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to the jury, as a matter of commonsense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decision-making, even where the State does not specifically argue the point." 125 S. Ct. at 2014. Here, a crucial focus of the defendant's presentation in mitigation was that with a sentence to life

without parole, he would not be a dangerous inmate. Counsel emphasized that he had no prior convictions for violent or assaultive conduct involving weapons or third parties; rather, the prosecution's evidence in aggravation consisted of comparatively minor domestic violence, none of which was remotely life-threatening. The erroneous exposure of the jury to appellant's stun belt would have substantially negated the evidence presented, and fomented an inference that appellant Newborn was in fact so dangerous that the courtroom bailiffs could not adequately control him without a stun belt. That was an improper inference antithetical to the evidence presented in mitigation.

4. The improper boost to the prosecutor's argument in aggravation.

Neither McClain's alleged threat nor evidence of the stun belt were directly admitted against appellant Newborn. However, the prosecutor made a point of emphasizing to the jury that the stun belts were an integral part of the deputy's view of the defendants and were necessary for courtroom security. While Deputy Browning could have simply testified regarding McClain's alleged threat, the prosecutor insisted on asking "Can you describe the circumstances that led up to that threat," notwithstanding the absence of any relevance, and Deputy Browning described the use of the stun belt, day in and

day out—"Every morning as we come in, we put an electronic device on each one of the defendants." 73 RT 7332. The prosecutor then pursued the stun belt avenue of questioning, notwithstanding its total irrelevance to McClain's threat:

Q: By Mr. Myers: Okay, so you put the security device on the defendants, right?

A: All the defendants, yes.

Q: Ones who have been convicted of murder?

A: Yes. 73 RT 7332-7333 (emphasis supplied).

There was no legitimate reason for the prosecutor to elicit and then re-emphasize that the stun belts were put on all the defendants. That was plainly prejudicial.

The prosecutor later capitalized on that improper implication of violence potential by repeatedly arguing to the jury that Lorenzo Newborn was a violent individual who deserved the death penalty because of the likelihood that he would attack prison staff if sentenced to life. 74 RT 7397—"I will challenge anybody who speaks in this courtroom to guarantee that Newborn or McClain, based upon their past conduct, based upon the evidence that you've heard, guarantee that they won't harm again. I wonder if anybody would bet their life on that?" The prosecutor describe appellant Newborn as "A very

uncontrollable man," "a very dangerous man," and warned that if sentenced to life in prison, "who are Lorenzo's enemies in jail?," answering this question with the comment that "among others will be the correctional officers—you are at risk." 74 RT 7381.

There is no evidence whatsoever of appellant posing a danger to correctional officers either in any prior incarceration or during the lengthy pretrial custody in this case. Nonetheless, the prosecutor affirmatively argued that appellant would be a danger to correctional officers in the future, and the best support for that obviously came from the implications of appellant's dangerousness inherent in the courtroom deputy's determination to impose a stun belt on appellant during the trial.

5. McClain's exacerbation of the prejudice.

Among the many instances of prejudicial conduct committed by McClain in pro per during the penalty trial, his colloquy with his witnesses and his statements to the jury about the stun belts aggravated the prejudice to appellant Newborn.

McClain's first penalty witness was Clarence Jones, a county jail inmate and long-time friend of McClain. 73 RT 7272. After some innocuous testimony about a shank incident and some cross-examination about Jones' criminal

record, the court asked an open-ended question, and Jones opined that McClain was innocent and the victim of racial discrimination in the criminal justice system. 73 RT 7280. The prosecutor then asked Jones why he had been shackled at his own trial, and posed the rhetorical question, "You're not a dangerous man, are you?" 73 RT 7283. McClain responded with the rhetorical statement, "I mean it's obvious the way they bring you in here with all those chains, they are trying to paint a picture you are some dangerous dude?" The following colloquy occurred:

> Mr. Jones: From my understanding, as far as this Black thing around here, this is a zapper, and this is not supposed to be exposed to the jury. How they got me, they are trying to—I told the sheriff downstairs that the picture they are painting, you know, for the jury on me, you know—
>
> Q: Would inadvertently reflect on me?
>
> A: Yes, exactly. 73 RT 7284.

If any juror had previously managed to avoid the otherwise inevitable realization that stun belts were used on dangerous inmates, McClain eliminated any such vestigial ignorance.

In his argument to the jury, McClain brazenly acknowledged that without the belt, he would express himself "a lot more boisterous than I am now." The trial court immediately countered with "You are wearing a belt because you

have acted up in this courtroom. So don't tell the jury without that belt what you might do." 74 RT 7420. The jury certainly understood that stun belts were reserved for unruly defendants.

6. The inadequacy of the purported limiting instruction.

When the prosecutor began examining Deputy Browning regarding McClain's alleged threat, attorney Nishi interposed, "I was wondering if the court can instruct the jury that they should not use the electronic device against any of the clients; it is just basically a procedure the sheriffs use in these types of cases." The trial court responded with the following admonishment:

> The court makes a decision, based on things the court knows, whether or not to wear this device. It is a security device to assure tranquility in the court, security for everyone. It does not mean that they are guilty or not guilty. Do you understand? 73 RT 7332 (emphasis supplied).

That admonishment was entirely inadequate to prevent prejudice for the penalty determination, because as the trial court had repeatedly informed the jury, guilt or innocence was not at issue. Rather, the issue was the appropriate penalty, which depended largely on the jury's determination of the defendant's potential for a good institutional adjustment if given life, versus the prospect of violent institutional conduct, which would have militated toward a death sentence.

The trial court manifestly failed to instruct the jury that the deputy's testimony regarding the stun belts should not be considered in any way in determining the penalty. While even that would have defied human capacity to implement, it would have at least pointed the jury in the right direction. The admonishment given by the court implicitly authorized the jury to consider the security device for purposes other than whether the defendants were guilty or not guilty of the underlying charges. Nothing in the trial court's admonishment directed the jury not to make an inference of danger to others based on the stun belts. Indeed, the trial court could have instructed the jury that the trial court's reason for requiring stun belts was that the defendants had mouthed off, used profanity, and engaged in nonconforming verbal behavior. That might have palliated some of the prejudice inherent in the otherwise likely inference by the jury that the defendants were physically dangerous to the deputies and other people. Indeed, the prosecutor compounded that inference with his unnecessary questioning about why the stun belts were used.

Under these circumstances, the unjustified use of the stun belts, and the entirely unnecessary exposure of the jury to their use, undermined the heart of appellant's defense, improperly supported the prosecutor's otherwise threadbare

argument of future dangerousness in prison, and was prejudicial under either the Chapman or the Watson standard.

X. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO SEVER HIS PENALTY RETRIAL FROM THAT OF CODEFENDANT MCCLAIN, WHO WAS PROCEEDING IN PRO PER AND SPEWING PREJUDICE ON HIS CODEFENDANTS.

A. Summary of Facts.

1. Pretrial proceedings.

This is an unusual case in which codefendant McClain demonstrated a dramatic capacity for self-destruction in the first guilt trial, testifying about his homicidal intent and retaliatory efforts in a manner that provided rocket fuel for the district attorney in closing argument. Following the hung jury at the first penalty trial, appellant's defense counsel informed the court that a primary objective on appellant Newborn's behalf was "to get away from Mr. McClain":

> I don't want to go to trial with Mr. McClain and, if I do, I don't want them reading the testimony that he gave during this case. And I think we have a very good argument that we, 'we' Newborn and Holmes, should not be saddled with the obscenities and the profanities that Mr. McClain used during the first trial—
>
> The Court: I agree with that.

Mr. Jones: —and with his confession about the intent to kill with premeditation and deliberation.

The Court: And then shouldn't be saddled with your client's loud-mouth remarks last week. They are all together. They told the court this and the jury, they're P-9's, they're damn proud of it.

They won't be severed. I don't find any rational for that argument at all. I'm not mad at you. I'm not happy with that attitude. They are not going to run this court. I am going to run this trial. Have you got the word? And you will be belted.[7] Give me a date. 60 RT 5778.

McClain's appointed attorney, Elizabeth Harris, informed the court that she was not capable of retrying the case at that time because of health reasons, and the court responded, "I will do all I can to work with you, but sometimes you have clients that just want to act that way, so as lawyers you will have to live with it." The court then appeared to address the defendants, stating "We are going to take control of this case and we will do it right now," because "We have had enough of your nonsense." 60 RT 5779. The following colloquy then occurred:

[7] This is the extent of the trial court's hearing with respect to the prior propriety of inflicting the stun belts on the defendants for the penalty retrial. See also 60 RT 5770.

The Court: Listen, you think I will enjoy doing this case again? We have been on many cases, all of us, together. This is not fun for me to do.

Defendant McClain: You shouldn't make this personal.

The Court: I don't want to hear from you. You have a lawyer.

Defendant McClain: You shouldn't make this personal.

The Court: Anything else you want to say?

Defendant McClain: I'm not disrespecting you.

The Court: We've heard all we want to hear from you. 60 RT 5780-5781.

On March 25, 1996, Elizabeth Harris, the attorney appointed for defendant McClain filed a motion to be relieved based on health reasons, which the court granted, and appointed attorney Richard Leonard as standby or advisory counsel. 60 RT 5784. At a trial setting hearing on March 25, 1996, the court stated that even though attorney Harris had been relieved and new counsel appointed, "The case is not going to be severed." The court then asked McClain whether he had spoken to replacement attorney Leonard, and McClain said "I discussed with him the fact that I wanted to represent myself and I wanted to go pro per." 60 RT5791. The court asked McClain whether pro per status was appropriate "with some of the behavior we have had," 60 RT 5791,

and set the time for a hearing on the Faretta motion. When the prosecutor inquired about the amount of time McClain would need to be ready to start trial pro per, the court reiterated "I will not sever," and urged McClain to rethink the wisdom of going pro per. 60 RT 5793. At the conclusion of the hearing, the court asked the defendants, "Who was yelling last time we were here?," and appellant Newborn answered "me." The court asked for a note of apology and appellant Newborn agreed. 60 RT 5796.

At the next hearing on April 5, 1996, the court addressed McClain's written Faretta motion. The court expressed concern about court security issues, and told McClain that if he were permitted to go pro per "You would be in tough restriction," and admonished that "Because of what has happened in the past, you can't move from that chair, and I think it would be awkward for you to do some things." 60 RT 5801.

On appellant Newborn's behalf, Attorney Jones joined Holmes' motion to sever from McClain, and incorporated by reference the district attorney's points and authorities regarding the Faretta motion "which has a dozen pages or so, with direct quotations and page cites of the conduct of Mr. McClain during the trial." 60 RT 5804, referring to the People's pleading found at VII CT 1956. This cited several incidents during the first trial in which McClain directed

profanity toward witnesses, the prosecutor, the court, and the criminal justice system generally. Id. at 1957-1961.

McClain was formally granted pro per status on April 9, 1996. 60 RT 5824. The court then sought to set a trial date. McClain stated that 60 days would be "too much time," and that he could be ready in a week or so. 60 RT 5825. The court commented that advisory counsel Leonard would need more time than that to become familiar with the case. Attorney Jones objected to any continuance on appellant Newborn's behalf, and argued in favor of severance. 60 RT 5827. The prosecutor invoked Penal Code section 1050.1 in support of continuing the trial date for all three defendants, so attorney Leonard to adequately prepare. The prosecutor also argued that severance would require the victim's family members to testify a third time with respect to victim impact evidence. 60 RT 5830. The trial court denied the severance and granted the continuance, stating "I can't find any prejudice, especially in the penalty phase," but the court failed to address in any manner appellant's argument that McClain's personal courtroom conduct was likely to be prejudicial. 60 RT 5832.

On June 28, standby/advisory counsel Leonard stated he was in trial and required a continuance, which was granted over the personal objections of

appellants Newborn and Holmes. 60 RT 5861. Jury selection began on August 13, 1996. 60 RT 5869.

2. Trial events.

a. Pretrial rulings.

During the hearing on in limine motions held on September 30, 1996, following jury selection and prior to the taking of evidence, attorney Jones argued again for severance. 65 RT 6323. Counsel argued that with respect to the gang-related graffiti found in the holding cell adjacent to the courtroom, "In a one-defendant case this argument would have no applicability," but "when you have three people here and motions to sever have been denied and you have a piece of evidence like this that the People want to taint all three defendants with, I think it is a real problem." Counsel pointed out that two defendants were unfairly forced to testify in order to convey to the jury that neither of them wrote it. Counsel invoked Evidence Code section 352 and argued that the evidence failed the test of "basic admissibility." Counsel also argued that it would "prolong and confuse the trial," requiring handwriting expert. 65 RT 6324.

The prosecution argued as to the hearsay objection, "It is an admission or adoptive admission" because "each of the defendant's names are attributed to

the graffiti." Ibid. The prosecutor pointed out that "As to the handwriting expert testimony, at this point from our witness list we have no handwriting expert," but "If the defense wants to bring one in, well, that's on them." 65 RT 6325. Counsel for appellant then argued that there had been other gang affiliated witnesses who had been held in the same holding cell, who had "perhaps the motive, interest, and bias to put those names up there instead of their own." The court responded, "good point," and the prosecutor replied to the effect that "These points, good as they are, are all cured with the admonition that the jury always receives from this Court that you can't consider this to be an aggravating factor unless you personally conclude beyond a reasonable doubt that the defendant to whom this is attributed had participated in some way in putting this information up on the wall." 65 RT 6327. When asked for any further comment, defendant McClain said, "Just by that time the damage would be done." Ibid.

The court also addressed the admissibility of the video of the guilt verdicts in which codefendant Holmes piped up with "fuck you, you mother fuckers," and "P-9 rules." 65 RT 6328. Counsel for Holmes argued that the outburst did not qualify for admission under Penal Code section 190.3 because it is "basically a statement that he made right after the jury had come back, had

very little to do with anything other than his displeasure of being found guilty." 65 RT 6329.

In the course of argument, appellant Newborn's counsel pointed out that "We are here because Mr. McClain wouldn't listen to his lawyer and not take the stand." 65 RT 6336. The court ruled that both the videotape of Holmes and the holding cell graffiti was permissible because "It has, under 352, great impact." 65 RT 6337.

b. McClain's courtroom conduct in pro per.

Codefendant McClain's cross-examination of Pasadena Police Office Thomas Delgado regarding responsibility for the Fernando Hodges' murder was curtailed by the court's intervention. 66 RT 6445-6468. Katrina Evans, the mother of Edgar Evans, testified and on cross-examination, McClain began with the statement, "I don't think there is anything that I could say to give you any kind of comfort." The prosecutor objected on the ground that "That is not a question," and McClain replied "I don't care what these people say up here, but I swear to God and everything I love I didn't kill your son. I didn't have nothing to do with that shit."

The court struck the statement because McClain was not under oath on the stand. 66 RT 6505. McClain kept asking the surviving victims and others whether they had ever heard of a gang called "S.B.Y" or "S.Y.B." 66 RT 6524.

Lawrence Ayers testified regarding the events of Halloween 1993. On cross-examination, McClain asked whether anyone in his group had a "blue rag" with them, and he answered "yes." McClain asked Ayers whether he wanted to warn his friends that "it's dangerous," in that "we don't gang bang so why have we got these gang colors." Ayers answered that "Everybody at the party knows of the gangs, Bloods and Crips," and when asked "With knowing that, why would somebody in that group wear gang rags," Ayers answered, "It was Halloween. People dress up as whatever they want to be." 66 RT 6538.

Antwaun Ayers testified regarding the events of Halloween 1993, and in cross-examination by McClain acknowledged that he took the blue rag from Reggie Crawford's head and stuck it some bushes. When asked why, he answered "I wanted to take it off." 66 RT 6548. Later, after McClain pursued this, Ayers said he was going to come back and get it because "That's the only memory I have of my friend." 66 RT 6550.

McClain cross-examined Roger Boon about his observations of the cars that drove past the scene of the shooting. 66 RT 6598. The prosecutor's

objections to certain of his questions were sustained and he moved on. 66 RT 6601.

Gabriel Pina testified next. 66 RT 6604. The district attorney did not ask him to make any identification of any defendant. McClain cross-examined him about his observations of the people in the four cars he saw gathered around Wilson and Catalina. 66 RT 6631. Pina stated that he "locked mainly on one" person who came running around the corner after the shooting and under McClain's questioning, identified the individual as Holmes. 66 RT 6634. Counsel for Holmes objected and at the sidebar, the court commented that McClain had a right to ask the question, and noted that "He is a pro per defendant and any time you have multiple defendants you have a risk, but that is the problem having pro per defendants." 66 RT 6635-6. McClain exhorted Pina that "My life is on the line," so that "I need your memory to be clear right now," and the prosecutor's objection was sustained. 66 RT 6641. Pina acknowledged that he received $4,500 reward money, but stated that when he first went to the police, a reward "wasn't even on my mind." 66 RT 6642.

Deputy Sheriff Boghosian testified about McClain's jailhouse shank incident on June 19, 1995. 66 RT 6648. On that date, McClain was strip-searched before being taken to the roof for exercise, and then handcuffed for the

walk to the roof. Generally, all inmates had their hands cuffed behind their backs. However, when the cell doors were opened and McClain came out, his hands were cuffed in front of him. He stepped out into the corridor, looked around, and then ran toward another group of inmates who had just come out. McClain charged another inmate with his hands together above his head and after he swung on the other inmate, Deputy Boghosian and another took McClain to the ground. They lifted McClain up and found a knife under him. 66 RT 6655. In cross-examination, McClain asked whether the deputy had ever seen the shank in his hands, and the deputy answered "no." 66 RT 6657.

Pasadena Police Officer Banuelos testified regarding an incident with McClain on September 12, 1992. 66 RT 6685. At about 3:15 a.m., he saw two individuals running out of a housing project across Orange Grove Boulevard, and identified McClain in court and the other person as Bowen. He followed them to a gas station and found them hiding in the rear. 66 RT 6687. He detained McClain, padded him down, and found bullets in his pocket. 66 RT 6688. He also found a 9mm firearm and a .357 revolver in the vicinity. The ammunition in McClain's pocket was identical to the six bullets in the .357 revolver. 66 RT 6689.

McClain cross-examined as to whether the guns had been fingerprinted, and Officer Bonuelos answered that he did not know. When asked whether McClain had been in possession of either one of the guns, Bonuelos answered, "You know...you had thrown it already." 66 RT 6690. Deputy Sheriff Talinko testified to a robbery by McClain in 1990. McClain asked no questions on cross-examination. 66 RT 6732.

Kenneth Coates testified regarding his experience at the time of the shooting and his feelings of loss. McClain asked on cross-examination, "When you was standing know [sic] on the corner and the cars passed you, could you see inside the car?," and he answered "no." 66 RT 6763.

Deputy Sheriff Blankenbaker testified that on November 8, 1989 at about 1:00 a.m., he was on patrol at the Charles White Park in Altadena and noticed two males standing near the bathroom area of the car. When he drove his police car toward them, they ran into the bathroom. He heard a gunshot from inside the bathroom. 66 RT 6816. Four Black males came out and one said, "I shot myself," and Deputy Blankenbaker saw that one of his fingers was bleeding. 66 RT 6817. He found a small caliber handgun inside the bathroom. He identified McClain as having ammunition in his pocket that fit the handgun. 66 RT 6820. On cross-examination, McClain asked whether he personally saw

anyone holding the handgun, which he did not, and whether the gun was fingerprinted, which he did not recall. 66 RT 6821.

Raquel Flores testified that she was robbed of some jewelry on July 27, 1989 in Pasadena by McClain and two others. She had pulled into her driveway when they approached her on foot and McClain grabbed the chains and took off running. 66 RT 6837. On cross-examination, McClain asked whether she pressed charges, and she answered "No, I just went to the police station, that's it." 66 RT 6840. Pasadena Police Office Thomas Gonzalez testified that he arrested McClain for the Flores robbery. On cross-examination, he said no chains were found on McClain when he was arrested. 66 RT 6842.

Joseph Pettelle testified that in May 1986, he worked for the California Youth Authority as a teacher of carpentry, and Lorenzo Newborn attended one of his classes. 66 RT 6894. There was an incident in which he saw appellant Newborn strike another youth authority ward in a gang-related altercation. 66 RT 6895. Following Mr. Pettelle's testimony, the district attorney informed the court as Mr. Pettelle was leaving the courtroom, he had told the district attorney codefendant McClain threatened to kill him as he was walking out. 66 RT 6902. McClain's advisory counsel, Richard Leonard, said McClain said, "You're a dick head." 66 RT 6902. The trial court called Mr. Pettelle to the stand out of

the presence of the jury, and he testified that McClain unequivocally said, "I'll kill you." 66 RT 6904. The prosecutor then asked permission of the court to introduce that evidence as an aggravating factor under Penal Code section 190.2(b), a threat of violence. The court agreed to permit Mr. Pettelle's testimony and a stipulation that attorney Leonard heard a different comment. The trial court told McClain that "You bring things on yourself sometimes because you don't really understand the proceedings," and "Anything you say to any witness can come back to hurt you." 66 RT 6907. The court further admonished McClain:

> I know you don't mean to hurt Mr. Newborn. That is what happens. That is the reality here, and it also affects this man next to you. 66 RT 6908.

Based on this ruling, defense counsel moved to sever from McClain, and in the alternative requested an instruction that the statement is limited only to McClain. The court agreed to a cautionary instruction. 66 RT 6909.

The district attorney then called Pettelle to testify before the jury that McClain had said, "I'll kill you" as he was walking out of the courtroom. 66 RT 6923. Pattelle stated that he was "incensed" and complained to the district attorney about it. 66 RT 6923. McClain's cross-examination was pointless and

unproductive, after which the prosecutor's objection was sustained, and McClain was told "You cannot testify at this time." 66 RT 6924.

Out of the presence of the jury, the prosecutor informed the court of the intention to present a portion of McClain's guilt phase testimony, pages 3984-3992. 66 RT 6927.

Appellant Newborn's defense counsel argued that whether or not McClain's former testimony could be admitted against McClain was one issue, "But under no circumstances is it admissible against me and my client," and the court agreed. 66 RT 6929. During a break in the testimony while court logistics were being discussed, the court requested that defense counsel provide a limiting instruction with respect to McClain's statements:

> I want that CALJIC instruction. It is very important. You all know he is doing things that affect other clients. I may the record clear, that it's difficult for Mr. Jones' client and Mr. Nishi's client.
>
> Of course, he is in pro pria persona so I can't lay you out, Mr. Leonard. You can only do what you can with a pro per. 70 RT 7010.

Out of the presence of the jury, McClain objected to the prosecution presenting portions of his former testimony, and argued "I would rather bring in all of it." 70 RT 7014. The court overruled the objection. The court reporter read the prosecutor's selected portions of the testimony to the jury, 70 RT 7017-

7026, in which McClain said that after he heard Fernando Hodges had been shot by the Crips, he wanted to find some Crips in order to "smoke them, kill them," 70 RT 7026, and to this end "paged Lorenzo" and others. 70 RT 7022. The jury was instructed to consider this evidence only against McClain. 70 RT 7016.

Pasadena Police Officer Derrick Carter testified that he interviewed Robert Lee Price on October 29, 1993 at the Huntington Hospital, after he had been shot in the face. 71 RT 7030. He also had been shot twice in the thigh. Price was a Crip and had been shot at the Community Arms Housing Project. The prosecutor then read to the jury the guilty verdict in the prosecution of McClain for attempted first-degree murder of Price. 71 RT 7032.

Charles Baker testified that he was at Willie McFee's residence on Halloween 1993 and heard gunshots at around 9:30 or 10:00 p.m. 71 RT 7036. Baker heard a thump sound at the time of the gunshots, and the next day saw that there was a hole in the exterior air conditioner. 71 RT 7038.

The defense began on October 15, 1996, with codefendant Holmes making the first presentation. 71 RT 7062. Holmes' counsel called Gabriel Pina regarding factors relating to the reliability of his identification of Holmes

and McClain. McClain's cross-examination brought the following admonition from the court:

> The Court: He [Pina] stated three times at the shooting he identified three people—two people. He told Mr. Uribe on the phone after watching television he saw one of them. He didn't say he saw two at that time. He said he could identify two. He said he could identify possibly two people, not from the radio; TV.
>
> Defendant McClain: I see you got a lot of help now.
>
> The Court: Mr. McClain—
>
> Defendant McLain: I don't like this mousetrap shit.
>
> The Court: I will tell you what I will do. I will let you ask all the questions you want. You already put your foot in it. Keep on going.
>
> Defendant McClain: Let me put my foot in it. I don't need you to help me.
>
> The Court: You put your foot in it all the time because you don't know what you are doing. I told you from the beginning that you have other defendants here you have to take care of.
>
> Defendant McClain: He is lying and you are letting him off the hook. He is lying through his teeth.
>
> The Court: What Mr. McClain says is not evidence. This is very good for him not to be able to take the stand and testify under oath. Do you understand that? 71 RT 7134 (emphasis supplied).

McClain was admonished for additional "testifying" during his purported cross-examination of Detective Uribe. 71 RT 7156.

On Thursday, October 17, as the defense penalty case was coming to a close, the courtroom deputies reported that McClain had made a threat of violence to them in the holding cell. See Argument IX, supra. The court stated an intention to have an Evidence Code section 402 motion, and "If that complies with 190.2 or .3 the court is going to allow it." 73 RT 7296. At the hearing out of the presence of the jury, Deputy Browning testified that on the previous day, October 16, he was in the holding cell before court putting the electronic stun belts on the three defendants. Holmes was belted and came into the courtroom. Deputy Browning then ordered McClain out, and two other deputies proceeded to put the belt on him. McClain asked why his belt was so warm, and Browning said they had tested it. 73 RT 7303. Appellant Newborn was then being belted when McClain said "If you do one of us, you will have to do us all." Deputy Browning said, "What?" For Browning's benefit, appellant Newborn repeated with McClain had said—"Don't get within two feet of me or I'll kill you," and "We'll all have weapons this time." 73 RT 7305. Appellant Newborn then went in to court, followed by McClain.

Following the section 402 hearing, counsel for appellant Newborn renewed his motion to sever because "Even though this doesn't come in against him [Newborn] is being used to corroborate a threat by McClain which would not be the situation in a severed case." 73 CT 7311. Counsel for Holmes argued for severance on the basis that "The problem that I have is, one, it has such a prejudicial effect against all defendants," at which point the court interjected, "It certainly does." The court then asked Holmes' counsel, "Isn't it true, one time your client did something that Mr. McClain had to suffer for?" 73 RT 7313. The court then ruled, "What you want is a severance," but "[a]ny severance motion at this time is untimely and ridiculous and I will not even consider it." 73 RT 7315.

At McClain's request, Deputy Admire testified that from where he was during the incident, he did not hear McClain say "I'm going to kill you." 73 RT 7319. Deputy Tranberg testified that he did not hear McClain say "I'm going to kill you" either. 73 RT 7322. Deputy Tranberg did claim that he heard "You get within two feet of me" and "This time we'll all have weapons." McClain also attempted to call appellant Newborn, who was a percipient witness to this, but attorney Jones claims appellant Newborn's privilege against self-incrimination. 73 RT 7324. The trial court then lectured McClain as follows:

> And this is what the court prefaced when I said these deputies are here to protect you, this Court, the personnel, to service you, to make sure you have food, that you are clothed, that you are comfortable. Yesterday when you needed a doctor, we took you to the doctor.
>
> They are not your enemies, and it is repulsive to me that you or anyone else threaten to kill them or injure them in any way. I think the jury should hear it. 73 RT 7327 (emphasis supplied).

The court directed the prosecutor to tell any deputy who was called to testify regarding the incident to say that McClain said, "I will have a weapon," not "we will all have weapons." 73 RT 7329

Deputy Browning was called as a prosecution rebuttal witness as to McClain only. 73 RT 7331. When Deputy Browning testified to the jury, he embellished appellant Newborn's role in the conversation to say that "Newborn then added to that and said, 'if you push one button, then you better push all three, because you know what I'm going to do'." After that, Deputy Browning said that McClain made the statement, "Don't get within two feet of me or I'll kill you and we'll have weapons this time," 73 RT 7336, a clear breach of the trial court's order. The court interjected, "Was the statement 'we'll have' or 'I'll have'?," and Deputy Browning answered "I'll have." 73 RT 7337. After the testimony from the three deputies, the trial court instructed the jury that the

evidence was admitted against McClain and "is not to be considered as aggravating factors against defendants Newborn or Holmes." 73 RT 7347.

In discussing the format for closing arguments, counsel for appellant Newborn again urged that he be severed from McClain or that McClain's pro per status be revoked. When the court asserted that "So far each one of the defendants at some time during the trial has done something that reflects on the other defendants." Counsel responded that "Mr. Newborn has not one disrupted this Court," and "has not threatened anybody." 74 RT 7355. Defense counsel moved for a mistrial in the alternative to a severance, which the court denied. 74 RT 7356.

The prosecutor focused on McClain's testimony at the first trial and re-read McClain's testimony in its entirety, 74 RT 7373-7377, followed by a concluding claim:

> That's what Herb McClain did with his homies, Lorenzo and Karl Holmes. They went out to smoke and kill Crips and you are here today as a result of that. 74 RT 7377 (emphasis supplied).

The district attorney then played the videotape of Holmes' outburst at the earlier guilt verdicts, and noted "The defendants were kind enough to leave their scripture up 'Boom, Sunday Shoes, Monsta Herb, Anybody Killa, sheriff and police killers'." 74 RT 7378. The prosecutor then invoked McClain's

threat against Deputy Browning "in this courtroom, in this very courtroom," as a prelude to asking "what is fair for people like this?" 74 RT 7378.

The prosecutor urged the jury to consider future dangerousness, and "the lack of any psychological testimony, any expert to say in fact Lorenzo Newborn is something other than evil incarnate, to say he can't help it, there is not one psychologist or psychiatrist or doctor or medical records to indicate any neurological or physiological problem with Newborn other than the fact that he just doesn't care." 74 RT 7381. The prosecutor asked rhetorically, "Who are Lorenzo's enemies in jail," and answered "among others will be the correctional officers—you are at risk." Ibid.

When McClain argued, he asserted to the jury that "I don't know how many times I can tell you that or what I could do to make you believe...I didn't do it," and was advised not to make testimonial statements during argument. The court admonished McClain "Let's not try and get sympathy from this jury," and McClain responded:

> Sympathy ain't my approach. Sympathy is not my approach because I don't care what he thinks or what these people think, you know; and if I didn't have this belt on, I would be able to express it a lot more boisterous than I am now. 74 RT 7420 (emphasis supplied).

The court berated McClain—"So don't tell this jury without the belt what you might do." McClain reiterated his intention to kill somebody after the Fernando Hodges' incident because "I love my homeboy." 74 RT 7422. McClain continued his claims of innocence, and complained that he was being unfairly accused of making violent statements:

> He [Browning] feels that since justice is on his side and you all got his back, society, working class people got his back, that he can basically fuck me over. 74 RT 7426.

At that point, the trial court warned that his pro per status would be revoked if he used any additional foul language. McClain then lost it:

Defendant McClain:	All right. So probably before I get finished with this, they're probably going to take my status, right. Well, before I can finish telling you all how I feel about this, that's cool, that's cool, because I ain't giving a fuck. I'm telling you the truth. I'm telling you the truth that I didn't do it.
The Court:	Sit down, Mr. McClain. The court is going to read the pro per request, petition for pro per. It was dated April 9, 1996. Mr. Leonard, are you prepared to finish this?
Mr. Leonard:	I will, your Honor.
The Court:	Before you go, Mr. Leonard, I a going to read to the jury what his obligations are.

Defendant McClain:	And he can eat one up, too.
The Court:	I'm sorry?
Defendant McClain:	I said you and the jury, too, can eat one up.
The Court:	Is that right? Anything else you want to say for the record?
Defendant McClain:	Yeah. Yeah. You're washing up innocent people. You're washing up innocent people. That's bullshit.
The Court:	Mr. Leonard, I don't want you to argue. That's all right. Thank you.
Defendant McClain:	They're washing up innocent people, and they don't even care about this shit. They don't want the real people who did that shit. They just want some gang bangers. 74 RT 7427-7428.

At that point, the trial court excused the jury.

Out of the presence of the jury, McClain railed on, and counsel for appellant Newborn suggested "a break and hopefully let the situation cool." The court responded, "We all anticipated this"; "...you should have anticipated this"; and "The court anticipated it." 74 RT 7432.

Upon reflection, the court permitted McClain some additional argument, and he made several comments about sympathy for the surviving victims and to

some extent apologized for his attitude, concluding "Except me for who I am, man, right or wrong, right or wrong." 74 RT 7441.

Attorney Nishi on Holmes behalf argued to the jury as follows—"So if Mr. McClain has said or done anything that you feel offensive or feel that it might incriminate him, please do not use that against my client or Mr. Newborn." 76 RT 7441-7442. Defense counsel argued on appellant's behalf. 76 RT 7462-7488.

The severance issue was raised and argued in the motion for new trial that preceded sentencing on January 21, 1997. 76 RT 7567. The court denied the motion for new trial on severance ground and all other grounds. 76 RT 7574.

B. The Trial Court's Errors.

The trial court erred in failing to grant a severance for purposes of the penalty retrial in view of the virtual certainty that codefendant McClain would, in the exercise of his personal federal constitutional right to represent himself and to testify, negate appellant Newborn's right to a fair trial. Counsel for appellants Newborn and Holmes argued for severance virtually from the moment that the first penalty jury hung, and continued that argument through the entire course of subsequent pretrial proceedings and during penalty retrial

itself. Moreover, the trial court understood the extreme risk, if not virtual certainty that McClain would sabotage the trial for the other two in the exercise of his constitutional rights—"we all anticipated this"; and "the court anticipated it." 74 ET 7432. This is an extreme instance of prejudicial spillover that highlights the potential conflict in a case involving a pro per defendant and a defendant represented by counsel.

United States v. Green (D.Mass. 2004) 324 F.Supp.2d 311 granted severance of two defendants for a federal death penalty trial because of potentially conflicting defenses in that "an aggravating factor for one defendant is a mitigating factor for another." Id. at 325. The court noted that one defendant was likely to present ostensible mitigating evidence in the form of a good family upbringing, while the other defendant was likely to present evidence of a deprived family upbringing, and that the jury would be hard-pressed to give each type of presentation individualized attention, given that in effect they offset each other. Moreover, the court was very concerned about a "classic trial by ambush" because "while the government has to give notice of aggravating factors, a codefendant does not," leading to potential Sixth Amendment confrontation issues and "Eighth Amendment concerns about individualized treatment at the punishment face." Id. at 326.

C. The Resulting Prejudice.

The same concerns are clear here, and the prejudice is manifest. Appellant Newborn presented evidence that he struggled with numerous personal and family difficulties as a youth, and was not a fundamentally violent or dangerous person. Codefendant McClain, on the other hand, portrayed himself as a gang member and was proud of it, an antithetical presentation. The jury was far too likely to impute McClain's adult gang bravado to appellant Newborn as well. The prosecutor certainly contributed to this unfair characterization with his repeated argument that the defendants were the "worst of the worst." These concerns were similarly noted in People v. Ervin, supra, although were not found to require reversal based on the facts of that case. 22 Cal.4th at 96 ["We see nothing in the record suggesting the jury assigned undue culpability to defendant after hearing his codefendant's mitigating evidence."].

In this case, McClain's presentation and allocution may have been what he sought to present as mitigation, but it undoubtedly constituted spillover aggravation as to appellant Newborn. In a situation where the trial court acknowledged the virtual certainty that this would occur, the court should have severed the defendants for purposes of penalty retrial, and now this Court must reverse the death judgment.

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY THE ERRONEOUS ADMISSION OF EVIDENCE THAT WITNESS LOUISE JERNIGAN BELIEVED THAT APPELLANT HAD KILLED HER SON, AND BY THE PROSECUTOR'S REPEATED EMPHASIS ON THIS TESTIMONY IN ARGUMENT.

A. Summary of Facts.

Prior to the first penalty trial, all counsel addressed the issue of unadjudicated prior conduct that the prosecution was offering under Penal Code section 190.3(b). Defense counsel addressed the issue of Louise Jernigan's testimony about an argumentative confrontation between appellant and Ms. Jernigan in a beauty supply store:

> Mr. Jones: Yes. Separate from that, I am asking that the incident involving Mrs. Jernigan—you will recall the lady from the beauty store who had a confrontation with Mr. Newborn.
>
> The inference of all that testimony links Mr. Newborn with the killing of her son. Number one, I don't think there was any violence or threat of violence toward Mrs. Jernigan; but even if there was, I don't think Mr. Newborn should be prejudiced by some hearsay allegation that, in effect, charges him with another homicide.
>
> The Court: Let me interrupt. On that one I will let Mr. Meyers respond. Maybe I can get through that one quickly. Mr. Meyers, just as to that one.

Mr. Meyers: Thank you. The killing of Mrs. Jernigan's son by Mr. Newborn, you want me to address that?

The Court: Yes.

Mr. Meyers: It is the circumstance of the violent conduct that is necessary—is at issue. When the jury makes a penalty determination as to the appropriateness of death they are entitled to consider the entirety of the incidents surrounding the 190.3(b) evidence. The fact that Mrs. Jernigan apprised Mr. Newborn that she believe he killed that he killed her son and he nevertheless conducted himself in the manner which he testified surely is relevant, important evidence which a trier of fact needs to consider in determining the appropriateness of the penalty to impose on [sic] the case. Mr. Newborn was warned of Mrs. Jernigan's—by Ms. Jernigan of her state of mind of why it is that she wanted—why it was this conflict was occurring; and yet despite the grief that she apparently is suffering, Mr. Newborn continued to harangue and harass and intimidate her.

So, therefore, it would be relevant, admissible evidence.

The Court: Thank you. Proceed. 50 RT 5043-5044 (emphasis supplied).

The court denied appellant's motion to exclude after further consideration. 50 RT 5050.

Ms. Jernigan subsequently testified essentially as she did at the second penalty trial, and on direct examination by the prosecutor explained that she and

appellant Newborn had an argument about her belief that Newborn had killed her son. 56 RT 5381.

The prosecutor called Louise Jernigan at the penalty retrial, 68 RT 6768, and in response to the question "What happened at the store," she answered:

> He [appellant Newborn] came, he came in, put a gun to my side, my right side. He want to shoot me because he knew that I know that he killed my son Keith. 68 RT 6769 (emphasis supplied).

At that point, the prosecutor asked the court to admonish the jury that the statement "goes to the state of mind of this witness only." Ibid. The court then instructed the jury, "In other words, it doesn't go to the truth of the matter, it's her state of mind, what she's thinking as this process is going on," adding "That's what it's being offered for at this time," but "it may change." 68 RT 6769-6770.

Throughout her testimony, Ms. Jernigan reiterated her belief that appellant killed her son—"I asked him why he was going around killing everybody son," and asking "Can't he talk to them instead of shooting people?" 68 RT at 6772. She repeated this during cross-examination, "After he had called me a bitch, I asked him why he was going around shooting everybody [sic] son," and asking "Can't he talk to people [sic] son instead of going around killing." 68 RT 6783. She elaborated that she and appellant Newborn

exchanged profanities in the parking lot, and she asked appellant "Why he going around killed other people's children"; and "Why you killing our sons." 68 RT 6790.

In appellant Newborn's case in mitigation, defense counsel called Pasadena Police Officer Tracey Ibarra, who was called to the beauty supply store on December 11, 1992. 71 RT 7194. He testified as to prior inconsistent statements made by Ms. Jernigan, specifically that she had never appellant Newborn holding a gun on that occasion. 71 RT 7197. The prosecutor's cross-examination was focused on reiterating the accusation that appellant had killed her son:

Q: And did she tell you exactly what Newborn said?

A: Yes.

Q: What was it?

A: 'Fuck you. You accuse me of killing your son and we're going to get you, too.'

Mr. Meyers: Thank you. Nothing further. 71 RT 7198.

The defense also called Helen Edwards, the proprietor of the beauty supply store regarding her observations of the incident. 71 RT 7241. She

described appellant Newborn coming into the store while Ms. Jernigan was also in the store. Ms. Edwards reported testified as follows:

> Q: What happened next?
>
> A: She said 'You killed my son'. And he said, 'She thinks I killed her son'. And I said, 'You didn't, so don't worry about it'. 71 RT 7244.

Ms. Edwards reported that Ms. Jernigan continued to say, "You killed my son," and appellant kept saying "I didn't kill your son." 71 RT at 7246.

The thrust of the prosecutor's cross-examination was to challenge Ms. Edwards on the underlying validity of her statement to appellant that she knew he had not killed Ms. Jernigan's son, i.e., the truthfulness of Ms. Jernigan's allegation:

> Q: Why did you tell Lorenzo, 'You didn't do it'?
>
> A: If someone comes up to you and says, well, she thinks, that's—I mean it would only be obvious that you didn't do it.
>
> Q: But you didn't know anything about the facts of that case or the killing of which she was accusing Lorenzo, did you?
>
> A: No, I didn't.
>
> Q: So you don't know whether he did it or not?
>
> A: No, I don't. 71 RT 7248 (emphasis supplied).

The prosecutor continued to ask Ms. Edwards questions about Ms. Jernigan's belief that appellant Newborn had killed her son, 71 RT 7249, emphasizing that her belief that appellant had killed her son explained why she was angry at him. 71 RT 7249.

In closing penalty argument, the prosecutor reiterated Ms. Jernigan's accusation that appellant had killed her son:

> Now, there was a defense witness that was called to somewhat contradict Mrs. Jernigan's version of the events; but what was consistent was that this woman who accused Mr. Newborn of killing her son, this woman who is obviously in pain because of this, was treated with contempt by Mr. Newborn. That would be Louise Jernigan in December of 1992. 73 RT 7391 (emphasis supplied).

Defense counsel's closing argument as to the Jernigan incident was that, in light of the consistent testimony by both Officer Ibarra and Helen Edwards that the incident did not occur as Ms. Jernigan described it, the district attorney called her as a witness solely to interject her hearsay allegation that appellant had killed her son:

> Why bring is Ms. Jernigan?
>
> It's because he [the prosecutor] wanted the unsupported, undocumented, unverified, and untrue allegation by Ms. Jernigan that, 'well, I think he killed my son'. That was the reason that lady was brought in here and subjected to that. The judge was very kind and said, well, some people don't adapt to the court

> environment; and that's true. Ms. Jernigan did not adapt well, but also Ms. Jernigan was not telling the truth.
>
> Why was she brought in? So that he [the prosecutor] could throw some mud on the wall with an empty, baseless, groundless allegation that Lorenzo Newborn had something to do with the killing of her son and then drop it. Because that's the only reason she was brought in here. 74 RT 7478-7479.

Finally, at the Penal Code section 190.4(e) hearing, the trial court alluded to the Jernigan testimony and stated on the record that "December 11, 1992, terrorist threat and battery committed upon Louise Jernigan"—the court noted the lasting impact upon Ms. Jernigan of the acts of Lorenzo Newborn, who Ms. Jernigan sincerely believed killed her son." 76 RT 7597.

B. The Trial Court's Error.

In accordance with defense counsel's pretrial objection and argument, the trial court should have excluded any reference to Ms. Jernigan's belief that appellant had killed her son. That part of the interchange was irrelevant to whether appellant Newborn committed a violation of Penal Code section 422, "criminal threats." That section imposes sanctions on "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to

be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of person and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her own immediate family's safety..." Under Penal Code section 190.3(b), the entire focus is on whether the defendant committed a crime that involved violence or the threat of violence. It is not a "victim impact" provision, and the alleged victim's state of mind is entirely irrelevant.

People v. Robertson (1982) 33 Cal.3d 21, 41-42, 53-54, reversed the death sentence because defense counsel had failed to object to a hearsay allegation by a prosecution witness that the defendant had killed two other people. On appeal, the Attorney General recognized that the witness's statement attributing two other killings to the defendant was not admissible for the truth, but argued, as the prosecutor did in this case, that "Her statement was not introduced to prove that defendant had committed other murders but rather was simply 'offered to demonstrate factors that went to [the witness's] state of mind and a context of her rape," such that "Her actions, reactions, and

omissions were important to the jury's assessment of her credibility," so that "The words were admissible." 33 Cal.3d at 41.

This Court rejected the argument, and concluded that "[e]ven if the statement was theoretically admissible for the limited purpose the Attorney General suggests, however, there seems little question but that the statement's prejudicial effect far outweighed its probative value in this regard, and that—upon proper objection—the statement should have been excluded under Evidence Code section 352. Id. at 41-42.

In this case, there was no legitimate basis for admitting Ms. Jernigan's statements of her belief that appellant had killed her son, because her state of mind was simply not at issue. This is not a case where the prosecutor sought to show why a witness may have been reluctant to testify, and to that end introduced evidence of prior threats by a defendant. Here, Ms. Jernigan was ready, willing, and eager to take the oath and bash appellant as vigorously as possible. Her belief that appellant killed her son may have demonstrated a bias on her part against appellant, but that does not entitle the prosecution to offer evidence of underlying alleged misconduct to demonstrate the source of the bias. People v. Morris (1988) 46 Cal.3d 1, 39, held that the trial court erred in permitting a prosecution witness to testify that defendant Morris had previously

killed a friend of the witness, demonstrating bias on the witness's part against defendant Morris. Citing People v. Zemavasky (1942) 20 Cal.2d 56, 62 for the "unquestioned rule of evidence that when any witness admits bias and prejudice on cross-examination, on redirect the reasons for such prejudice cannot be gone into, at least where such reasons involve other alleged offenses outside the issue" (emphasis in original). Morris concluded that "The admission of defendant's prior homicide was erroneous":

> The purpose of the evidence was, in the trial court's own words, 'to corroborate the fear and the reason for the shooting of [defendant] by Mr. West'. Thus, the evidence was admitted to explain West's previously admitted bias against defendant. This was improper under Zemavasky. Id. at 39 (emphasis in original).

Here, the prosecutor's claimed reason for eliciting Ms. Jernigan's belief that appellant had killed her son was admissible because "Mrs. Jernigan apprised Mr. Newborn that she believed that he killed her son and he nevertheless conducted himself in the manner which he testified," because "Despite the grief that she apparently is suffering, Mr. Newborn continues to harangue and harass and intimidate her," such that "It would be relevant, admissible evidence." 50 RT 5043-5044. Her testimony regarding the December 11, 1992 encounter was not that she was a grieving mother whose sadness was compounded by callous conduct on appellant's part. Rather, she

testified that she was angry, not afraid, of appellant and generally ready to give him a piece of her mind. The crime that this encounter allegedly constituted was criminal threats, Penal Code section 422, on which the jury was instructed. 75 RT 7508. The elements of the criminal threat statute contain no basis for admitting the state of mind of the person alleged threatened. Just as a defendant in a criminal threats prosecution cannot introduce evidence that the alleged recipient of the threats was a thick-skinned rhinoceros on whom the threats made no impression, the prosecution cannot introduce evidence that the alleged victim was particularly sensitive or vulnerable to the threats, particularly in the language of Morris and Zemavasky, "at least where such reasons involve other alleged offenses outside the issue." 46 Cal.3d at 39. In sum, while there is even less relevance to the accusation of a prior homicide in this case than there was then, the marginal relevance identified in Robertson, the same potential for unwarranted, unjustifiable prejudice exists requiring the exclusion of the evidence pursuant to Evidence Code section 352, as defense counsel urged.

C. The Requirement of Reversal.

Whether evaluated under the Federal Constitutional due process standard of Estelle v. McGuire (1991) 502 U.S. 62 or the California standard of People v. Watson (1956) 46 Cal.2d 818, reversal is required for the following reasons.

1. The unfounded accusation undermined defense counsel's primary arguments in mitigation.

Defense counsel's opening statement to the penalty jury emphasized certain key points, particularly that appellant had no convictions for assault, for weapons charges, or for any altercations or attacks on custodial staff during his prior time in custody. 64 RT 6396. Counsel acknowledged that there were "girlfriend/boyfriend type things" involving physical altercations with former girlfriends, but no violence toward others:

> He has no unrelated cases of any kind, no unrelated convictions. He has no outbursts, if you can call it that, of any kind. Our evidence will show none of these. He is not writing on walls and he is not flashing signs, doing that stuff there in the cell. 64 RT 6397.

Ms. Jernigan's unfounded and unsubstantiated allegation of a prior murder significantly undermined defense counsel's theory of mitigation and presentation. The jury would have thought that appellant was a multiple murderer who had theretofore escaped his just desserts, rather than a fundamentally nonviolent person without any history of firearm use, deadly assaults, or other serious threats to the lives of others. Indeed, the prosecutor's argument to the jury in favor of the death penalty for appellant Newborn was that the evidence showed he would likely be dangerous to guards in prison, 74

RT 7381, notwithstanding the absence of any evidence of custodial violence on appellant's part:

> And given his past history, another chance like life without parole is going to give him a chance to do something like this again to somebody who is in custody, whether it be a guard, a nurse, a therapist, or just a weaker fellow inmate. He is a very violent man, Lorenzo Newborn, a very uncontrollable man, Lorenzo Newborn, and a very dangerous man. Ibid.

2. The unsubstantiated accusation was virtually immune to defense rebuttal.

Ms. Jernigan's accusations against appellant included her conviction that appellant had killed her son Keith approximately a month before the beauty supply store altercation, coupled with a more general claim that appellant Newborn had previously killed <u>other</u> young people as well—"I asked him why he was going around killed everybody son," adding "Can't he talk to them instead of shooting people," clearly phrasing her accusation in the <u>plural</u>. 68 RT 6772. During cross-examination, she embellished the conversation to include that appellant called her a "bitch":

> Well, after he had called me a bitch, I asked him why he was going around shooting everybody son. Can't he talk to people son instead of going around killing? They are loved ones. What seem to be your problem I told him. 68 RT 6783.

Again, she framed her accusation in terms of a repeated problem. Ms. Jernigan's accusation of multiple prior homicides, although not enumerated, compounded the prejudice.

3. The ineffectiveness of the trial court's instruction.

At the time the prosecutor first elicited Ms. Jernigan's accusation in front of the jury that appellant killed her son, the prosecutor asked the trial court for an instruction that the testimony related to her state of mind. The trial court stated—"In other words, it doesn't go to the truth of the matter, it's her state of mind, what she's thinking as this process is going on. Do you understand? That's what it's being offered for at this time. It may change." 68 RT 6769-6770. This qualified limiting instruction functioned as a fictitious fig leaf as far as protecting appellant from prejudice. Ms. Jernigan repeated the accusation several times, and the two other witnesses who testified regarding the incident were each asked to reiterate Ms. Jernigan's accusation. The prosecutor elicited that exchange from Officer Ibarra, 70 RT 7198, and then dwelled on her accusation when cross-examining Helen Edwards, the store proprietor. 73 RT 7244.

The message must have gotten through to the jury that this was a serious accusation of a prior homicide, because the trial court commented at the hearing

pursuant to Penal Code section 190.4(e) that "Ms. Jernigan sincerely believed [appellant] killed her son." 76 RT 7597.

Under all these circumstances, the repeated charge of a prior homicide for which appellant was not apprehended or prosecuted was all too likely to sway the jury toward the death penalty. The additional facts confirming the existence of prejudice are (1) the prior mistrial after the jury hung nine votes to three; and (2) the length of the penalty deliberations in this case, nine days, from Tuesday, October 22 until Thursday, October 31. 75 RT 7542-7552. The conclusions compel that the multiple repetitions of the unsubstantiated allegation of a prior homicide were prejudicial.

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE OF HOLDING CELL GRAFFITI IN THE ABSENCE OF ANY PROOF OF APPELLANT'S AUTHORSHIP OR ENDORSEMENT OF THE WRITING.

A. Summary of Facts.

Prior to the penalty retrial, all counsel joined in a motion to exclude evidence of graffiti found during the prior trial in the holding cell adjacent to the courtroom. 64 RT 6319. The prosecutor had submitted a written memorandum in support of admissibility. VIII CT 2103-2106. The prosecutor

argued that the graffiti was admissible under Penal Code section 190.3(b) because it "consisted of references to the sheriff and police department in the symbolic gang form of crossing out the names to signify an intention to kill," and "allows jurors' insight into the defendants' future dangerousness and their ability to adjust to prison life." VIII CT 2104. The prosecutor acknowledged that "No one witnessed or could identify defendants Newborn, McClain, or Holmes as having scrawled the threatening graffiti on their cell wall," but that "Each defendant has the choice of taking the witness stand and denying complicity in the desecration of this Court's holding cell." VIII CT 2105. The prosecutor also referred to the phrase, "Anybody Killa" in close conjunction with references to law enforcement officers. Photographs of the graffiti were marked as People's Exhibit 116.

Counsel for appellant Newborn argued that "It may be an admission by the writer; [but] it is not an admission by an observer," referring to the absence of evidence as to authorship. Counsel invoked Evidence Code section 352, and reiterated that the problem stemmed from the joint trial of multiple defendants. 64 RT 6323. Counsel also pointed out that "In addition to these three defendants my recollection is one or more witnesses in this case have been confined in these holding tanks, also P-9s or former P-9s who have knowledge

of these names and perhaps the motive, interest, and bias to put those names up there instead of their own." 64 RT 6326. The prosecutor responded that any problems of proof would be cured by the jury instruction regarding the need to find a section 190.3(b) aggravating factor true beyond a reasonable doubt before considering it in aggravation. 64 RT 6327. The trial court admitted the graffiti with the comment that "I think it has, under 352, great impact." 64 RT 6336.

During penalty trial, the prosecutor called Pasadena Police Officer Carlos Lopez to testify regarding his knowledge of gangs in 1993. 66 RT 6450. Officer Lopez gave his opinion that all three codefendants were active members of the P-9 gang. 66 RT 6457. He was asked about photographs of graffiti in People's Exhibit 116, and he testified that where the word "sheriff" was crossed out and the word "police" was crossed out, "When things are crossed out, it means death, it means murder." 66 RT 6465.

In cross-examination, he acknowledged that he believed that the graffiti was written by a P-9 gang member, but did not know who put it there. 66 RT 6471. He was asked based on his gang expertise whether there was "any clue as to who wrote it" in the text itself, and simply reiterated "In the beginning I said I don't know who wrote it." 66 RT 6472. On redirect, he was asked

whether the fact that the graffiti contained three nicknames attributed to the defendants provided "any clue as to the range of possible individuals who are likely to have put that graffiti up there," and he answered "More than likely those three people that are named." 66 RT 6475.

B. The Trial Court's Error.

The fundamental and irreducible obstacle to admissibility of the holding cell graffiti is that there was insufficient evidence ever to prove beyond a reasonable doubt that any particular defendant wrote or endorsed the graffiti. The best that the prosecution's gang expert could muster was that it was "more than likely those three people that are named," but taking that at maximum evidentiary value, that at most satisfies the "preponderance of evidence" standard, falling demonstrably short of the "beyond a reasonable doubt" standard.

Where the prosecution's evidence in aggravation offered under section 190.3(b) is inherently insufficient to establish proof beyond a reasonable doubt, the trial court is obligated to exclude the evidence by analogy to a judgment of acquittal under Penal Code section 1118. Applying that standard, i.e., that no rational trier of fact could deem the prosecution's evidence sufficient to

establish proof beyond a reasonable doubt, the trial court must eliminate the charge from the jury's deliberations.

This Court authorized pretrial hearings for the specific purpose of determining whether the prosecution had sufficient evidence to meet the beyond a reasonable doubt standard. People v. Phillips (1985) 41 Cal.3d 29, 72, concluded that as a matter of statutory construction and legislative intent, "Evidence of other criminal activity introduced in the penalty phase pursuant to former section 190.3, subd. (b) must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." This Court further noted that "It may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity." Id. at fn. 25.

This Court most recently reconfirmed the viability of the Phillips hearing as a means of filtering out inadmissible allegations from admissible evidence in aggravation in People v. Boyer (2006) ___ Cal.4th ____, 2006 Cal. Lexis 5397, and conducted an independent sufficiency of the evidence test under People v. Johnson (1980) 26 Cal.3d 557, 576, and Jackson v. Virginia, supra. The trial court in this case failed to make any such determination as to the sufficiency of

the evidence, and any independent review by this Court will confirm the inherent insufficiency of the evidence.

The proffered evidence fails for two reasons: (1) the writing in question does not constitute a crime, i.e., no violation of an identifiable penal statute; and (2) insufficient evidence as to the identity of the perpetrator.

The only remotely relevant penal statute applicable to the graffiti is Penal Code section 422, criminal threats, which was the vehicle by which Louise Jernigan was permitted to testify that appellant threatened to kill her. However, a review of the elements of Penal Code section 422 demonstrate that the graffiti in no way qualifies:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in a state prison.

The evidentiary shortfalls with respect to the graffiti are numerous. First, there is no particular person threatened. Officer Lopez testified that the "X"

marking over the word "sheriff" and the word "police" conveyed intent to kill law enforcement agents, but there is no particular person specified as an intended victim. In addition, the graffiti conveys nothing in terms of being "so unequivocal, unconditional, immediate, and specific" as to convey "an immediate prospect of execution of the threat." What the graffiti consisted of was generic gang sloganeering without any specific conduct described or threatened. If the graffiti had read to the effect that "The undersigned author intends to strangle the next law enforcement officer who finds him or herself in this room with the undersigned author," a criminal threat might be established under section 422. However, that formulation is at an opposite end of the spectrum of immediacy, specificity, and clarity from what was actually introduced.

Next, the prosecution failed to prove that the author was necessarily among the three codefendants, as defense counsel pointed out in argument. Other codefendants in the case, including Bowen and Bailey, made periodic appearances in the trial court on days other than appellant's court days and as counsel pointed out, other P-9 gang members were likely held in the holding cell as well. The prosecution conspicuously failed to present evidence that

appellants were the last defendants in the holding cell prior to the appearance of the graffiti.

Finally, the evidence failed to establish beyond a reasonable doubt that one of the three must have written the graffiti, and that the other two aided and abetted. The prosecutor's response to this lack of evidence of the perpetrator's identity was on its face inadequate, i.e., a claim that "If the defendants want to get on the stand and say it wasn't them, they are more than entitled to." 64 RT 6325. However, that ignores the basic lack of prosecution evidence. If the prosecution's evidence is inherently inadequate to satisfy the burden of proof, then the defense should have no burden other than a motion to strike or dismiss. Even if appellant Newborn did so testify, or even if all three codefendants so testified, that testimony would be inherently incapable of supplying the necessary proof beyond a reasonable doubt for the prosecution. See, e.g., People v. Jenkins (1979) 91 Cal.App.3d 579, 585. Jenkins vacated convictions for drug offenses because of insufficiency of evidence, notwithstanding the prosecution's argument that the defendant's false statements showed consciousness of guilt and filled up the evidentiary shortfall. Rejecting the position that "Defendant's falsehoods were evidentiary wildcards with which

the prosecution can turn a pair of duces into a full house," the Court of Appeal reversed.

In this case, neither the defendants' failure to testify as to their participation/nonparticipation in writing or endorsing the graffiti, nor any hypothetical denial that they might have made in accordance with the prosecutor's view, could supply the otherwise insufficient evidence to make the graffiti admissible evidence in aggravation.

C. The Requirement of Reversal.

The test for the erroneous admission of evidence under the Federal Constitutional due process standard and under the California state standard is whether the improper evidence had an adverse effect on the outcome, People v. Watson, supra. Here, the impact of the evidence was to smear all defendants, and suggest that they harbored violent attitudes toward law enforcement officers, and were unrepentant gang members, all without proof beyond a reasonable doubt as to any particular defendant. The trial court's comments in ruling on the admissibility reflect the prejudicial spillover effect—"It may be prejudicial; I think everybody is prejudiced, and the court warned all the defendants and the people here, you are members of a gang, you are joined together, no severance is going to be allowed." 64 RT 6336-6337.

The prosecutor argued to the jury that "The defendants were kind enough to leave their scripture up, 'Boom, Sunday Shoes, Monsta Herb, Anybody Killa' sheriff and police killers. 74 RT 7378 (emphasis supplied). The prosecutor attributed these hostile, homicidal, and antisocial sentiments to the defendants equally, thus spreading the prejudice beyond the author, identity unidentified.

Of note is the prosecutor's subsequent argument relating to aggravation under Penal Code section 193(b) in which the prosecutor correctly stated, "Because these Factor (b) crimes did not result in convictions, you individually have to determine whether or not Mr. Newborn and Mr. McClain committed these crimes...individually; not as a group, but individually." 74 RT 7386 (emphasis supplied). The prosecutor then went through the list of purported Factor b crimes—"Let's go through these Factor (b) crimes," 74 RT at 7387, but conspicuously failed to mention the graffiti, perhaps an implicit concession to the lack of evidence that any particular person wrote or endorsed the graffiti beyond a reasonable doubt. This evidence was particularly prejudicial as to appellant Newborn, because of the prosecutor's argument without otherwise available evidentiary foundation that "Newborn responds with violence, with violence. That is his response. That is Newborn's way, violence, assault,

murder. It hasn't stopped in the past; it's not going to stop in the future." 74 RT 7387-7388 (emphasis supplied). The erroneous admission of the graffiti provided an improper basis for the prosecutor to make his otherwise unsupportable argument regarding appellant Newborn's past and future violence potential. Under these circumstances, the error was prejudicial.

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL UNDER THE VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF A VIDEOTAPE OF CODEFENDANT HOLMES' PROFANE OUTBURST AFTER THE JURY RENDERED HIS GUILTY VERDICT.

A. Summary of Facts.

On December 22, 1995, the first jury returned its guilt verdicts after 16 days of deliberation. The court first read the verdicts as to appellant Newborn, 45 RT 4734; then the verdicts as to McClain, 46 RT 4743; and finally as to Holmes, 46 RT 4752. The clerk began, "We the jury in the above entitled action find the defendant, Karl Holmes, guilty of the crime of murder in violation of Penal Code section 187," at which time defendant Holmes interjected: "Fuck you, you mother fuckers. P-9 rules." Ibid. Holmes' outburst was recorded on videotape by an authorized media cameraman in the

courtroom. The jury that returned the guilt verdicts eventually hung on penalty as to appellant Newborn nine to three.

At the penalty retrial, the defense moved to exclude evidence of Holmes' outburst at an in limine hearing held on September 30, 1996. 65 RT 6325. The prosecutor argued that the profane statement to the jury "would be admissible to rebut mitigating evidence of remorse," and that the "latter portion where he claims P-9 affiliation is admissible as a circumstance of the crime." 65 RT 6328. The prosecutor stated, "This outburst and display by Mr. Holmes demonstrates his P-9 affiliation and, therefore, is a relevant aggravating factor because it helps to establish that he was part of the P-9 gang that retaliated for the earlier killing of Fernando Hodges, which is the heart and soul of the People's theory of the case and is thus a legitimate factor as a circumstance of the crime." 65 RT 6329.

Counsel for Holmes argued that the obscenities were not admissible to "show lack of remorse," which is "not an aggravating factor," and that the statement "P-9 rules" had "very little to do with anything other than his displeasure at being found guilty." Ibid. The prosecutor alerted the jury in his opening statement preceding penalty retrial that "In addition to the evidence of Mr. Holmes' crime there, we will also show you a videotape of Mr. Holmes'

reaction and threats to the jury after the guilty verdicts were read." 65 RT 6371. The prosecutor's first piece of evidence at the penalty retrial was Exhibit 117, the video of the guilt verdicts. 65 RT 6411. After the videotape was played to the jury, the prosecutor read the text of the outburst from the reporter's transcript, because "There is a bleep in the tape." Ibid. No limiting instruction was given that the evidence could be considered against Holmes only.

The prosecutor argued based on McClain's testimony that the three defendants "went out to smoke and kill Crips and you are here today as a result of that. Why did they do it? Because they are P-9 gang members intent on retaliating for the death of a fellow P-9." [At that point, the prosecutor played the videotape of Holmes' guilt verdict outburst.] The prosecutor continued arguing: "P-9. I won't repeated the deleted expletives uttered by Mr. Holmes, but it's all about P-9." 73 RT 7377-7378. Holmes' counsel argued with respect to the tape of the guilt phase outburst that while the prosecutor "initially called that a threat," they were "not calling it a threat any longer" because Holmes "was just angry that from that point on he knew that for his entire life he would be behind bars or he would be killed. 73 RT 7457-7458. The trial court instructed the jury, but nothing in the instructions restricted the jury's consideration of Holmes' outburst to Holmes alone. Rather, the court instructed

that "In determining which penalty is to be imposed on each defendant, you shall consider the murders for which these defendants have been convicted, as well as all the evidence which has been received during the trial of this case." 75 RT 7501.

The trial court did instruct that "evidence has been admitted against one or more of the defendants and not admitted against the others," and noting that "At the time this evidence was admitted you were admonished that it could not be considered by you against the other defendants," such that the jury should "not consider such evidence against the other defendants." 75 RT 7520. However, there was no such instruction given at the time of either the prosecutor's opening statement description of the videotape, nor at the time it was played to the jury. The jury began deliberating on October 22, 1996, and on October 30 asked to again see the videotape of Holmes' outburst. 75 RT 7550.

B. The Trial Court's Errors.

The trial court erred in permitting the prosecution to present the videotape to the penalty jury. It did not qualify under any statutory aggravating factor. The prosecutor's asserted reasons for admission—a preemptive strike as to lack of remorse and affirmative evidence of P-9 affiliation—are both

unsupportable. The tape was first item of prosecutorial evidence at penalty phase, long before Holmes had any opportunity to present any evidence of remorse, and which he in fact never did. With respect to Holmes' membership in the P-9 gang, the prosecution presented ample evidence of that at the earlier trial, without the benefit of Holmes' post-verdict outburst. The evidence had a primarily prejudicial effect, i.e., showing Holmes as an angry Black male spewing profanity at the civic minded citizens who served on the first jury. Even if proof of Holmes' gang affiliation was a relevant factor at penalty retrial, this particular episode should have been excluded because of its prejudicial impact as to Holmes and its prejudicial spillover as to appellant Newborn. There is case law that permits a prosecutor to comment on a defendant's courtroom demeanor in support of a lack of remorse argument, but only where the defendant "put the question of his remorse an issue" prior to the prosecutor's argument. See People v. Heishman (1988) 45 Cal.3d 147, 197. See also People v. Beardslee (1991) 50 Cal.3d 68, 114; People v. Jurado (2006) 38 Cal.4th 72, 141 ["A prosecutor in a capital case may not argue that a defendant's postcrime lack of remorse is an aggravating factor..."]. There, the defendant argued that the prosecutor improperly argued a lack of remorse as an aggravating factor, but rejected the contention because "Three defense

witnesses...all testified on the subject of his remorse." Under these circumstances, "The prosecutor did not introduce the subject and was entitled to comment on the testimony."

C. The Resulting Prejudice.

The Federal Constitutional standard of review for the due process violation from the admission of erroneous evidence is the functional equivalent of the California Watson standard. In addition, the prejudicial impact of this particular error must be viewed in conjunction with that of other errors for a determination of cumulative prejudice. See United States v. Tory (9th Cir. 1995) 52 F.3d 207 ["We hold that the cumulative effect of all the errors bearing on the issue of whether Tory had a gun requires a new trial on Count 1."].

The prejudice to appellant Newborn is evident from the combined factors that (1) there was no instruction limiting the consideration of the evidence to Holmes; (2) the prosecutor argued it as relevant to demonstrating the future dangerousness of all three defendants, see 75 RT 7377-7378; and (3) the jury asked to see the videotape again during jury deliberations.

Particularly where the prosecutor replayed the tape during his penalty argument to the jury; used it to emphasize his theme that three defendants "went out to smoke and kill Crips and you are here today as a result of that"; and

argued that "they are P-9 gang members intent on retaliating for the death of a fellow P-9," prejudice is apparent. The prosecutor clearly intended that the jury consider Holmes' courtroom outburst as indicative of the violent gang mentality shared by all three defendants.

Moreover, the prosecutor himself bundled that argument with an argument regarding adverse inferences based on the holding cell graffiti, as well as attributing McClain's threat against Deputy Browning as the foundation for the rhetorical question, "What is fair for people like this?" 75 RT 7378. The prosecutor made no effort to compartmentalize the evidence introduced to the jury's determination as to Holmes, nor limit the evidence of the Browning threat admitted against McClain only to consideration of McClain's penalty. Rather, the prosecutor lumped together all the improperly admitted evidence together as a reason for imposing the death penalty against all three codefendants.

In addition, this argument was made with the apparent permission of the trial court. When, out of the presence of the jury, the prosecutor argued that there was evidence of a "threat made by Mr. Newborn," defense counsel argued that "There is no evidence in this case of any threat by Mr. Newborn against anybody." The prosecutor referred to page 7336 of the transcript, and argued

that appellant Newborn's response to Deputy Browning's question as to what McClain had said constituted a threat by Newborn. 75 RT 7365. Defense counsel objected, arguing that "There was an instruction drafted by Mr. Meyers where the last line said this evidence is being admitted against McClain and not against Newborn and not against Holmes," but "then to stand up here and cite that without an acknowledgement of that limiting instruction and then to indicate a desire to argue that is admissible evidence against Newborn and to use it as a justification..." Ibid. The prosecutor responded cryptically, "That is not something I can argue to the jury, but is something the court can consider as future dangerousness," to which the court responded, "I understand," but cautioned, "As to Mr. Newborn you put him in a position on that that would be inappropriate." 75 RT 7366.

The prosecutor skirted the apparent intent of the trial court's ruling by referring to the evidence admitted against Holmes individually and McClain individually, and then immediately arguing that the evidence taken as a whole showed the gang affiliation, gang mentality, and gang violence common to all three. Under these circumstances, appellant was deprived of due process.

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XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS EXCLUSION OF THE FAVORABLE DISPOSITIONS GRANTED TO CODEFENDANTS BOWEN AND BAILEY, AND BY THE UNFAIR PROSECUTORIAL MISCONDUCT IN EXPLOITING THE EXCLUSIONARY RULING.

A. Summary of Facts.

The prosecutor moved to exclude the disposition of codefendants of Bailey and Bowen, and the trial court granted the motion. 65 RT 6338. The prosecutor's motion to exclude the evidence, filed September 23, 1996, VIII CT 2089, following the penalty mistrial, noted that "[t]wo codefendants, Bailey and Bowen, subsequently entered into negotiated dispositions in the instant matter." The prosecutor cited People v. Carrera (1989) 49 Cal.3d 291, 343 for the proposition that "The punishment meted out to a codefendant is irrelevant to the jury must make at the penalty phase: whether the defendant before it should be sentenced to death"; and also cited People v. Belmontes (1988) 45 Cal.3d 744, 810.

Codefendant McClain in pro per raised the issue again during penalty trial, and the court reiterated its ruling. 71 RT 7101-7102.

B. The Trial Court's Error and the Prosecutorial Exploitations.

Carrera and Belmontes do not fully address and provide for the Federal Constitutional due process considerations inherent in capital sentencing and recently reconfirmed in Morris v. Ylst (9th Cir. 2006) ___ F.3d ___, 2006 U.S. F. Lexis 11465, 31-32. Morris granted penalty relief to the petitioner because of a Brady violation, and Judge Ferguson filed a concurring opinion in which he expressed concern about the inherent unfairness in prosecutorial discretion in pursuing the death penalty against some capital eligible defendants, while foregoing it against equally culpable others, and leaving the capital jurors ignorant of this process. Judge Ferguson's solution to this inherent anomaly is that "The jury must be permitted to consider, as a mitigating factor in its determination of whether to impose the death penalty, the government's admission that it singled Morris out for capital punishment among three equally guilty perpetrators."

Applied to this case, the trial court erred in refusing to permit the defense to present evidence and in further refusing to instruct that the jury could consider as a mitigating factor the prosecution's determination to pursue the death penalty against appellant Newborn, McClain, and Holmes, while

foregoing it against codefendants Bailey and Bowen, who were alleged in the indictment to have played equally or more culpable roles in the charged crimes.

The inherent unfairness is particularly acute in a case like this where the prosecutor improperly capitalizes on and exploits the exclusion order. Here, the prosecutor argued that the three defendants convicted of these crimes were so bad that "only death will make it just." After laying a foundation that the death penalty is reserved for the "worst-of-the-worst," 74 RT 7398, and that coappellant Newborn, McClain, and Holmes are the worst-of-the-worst, the prosecutor continued:

> I'm asking you to give it [the death penalty] most of all on behalf of yourselves, because if you look into your heart these are the worst-of-the-worst. Their crimes are the worst-of-the-worst, and they killed some of the best-of-the-best. And only death can make it fair; only death will make it just. 75 RT 7415 (emphasis supplied).

That is a patently misleading and hypocritical argument, given that the prosecutor offered very favorable plea bargaining to Bailey and Bowen whose culpability for the murders was equal or greater. As to those two, a punishment far less than death was sufficient to make it "fair" and "just" in the prosecutor's opinion, but then argued a contrary opinion to appellant's jury to improve the prospects of a death verdict. Where, as here, the prosecutor's rhetoric in

support of the death penalty is premised on a patently false factual premise of the prosecutor's own making, the prosecutor cannot simultaneously resist the efforts of the defense to provide relevant factual information. The prosecutor must either forego that inflammatory rhetoric, or permit the jury to be accurately apprised of how justice was actually distributed by the prosecutor in the case.

There is an analogy here to the due process violation condemned by the United States Supreme Court in Simmons v. South Carolina (1994) 5112 U.S. 154, 165. In Simmons, the prosecutor successfully persuaded the court not to instruct the jury that if given life imprisonment, the defendant would be ineligible for parole and would spend the rest of his life in prison. Having obtained that ruling, the prosecutor then implied to the jury that the death penalty was the best choice to prevent the defendant from committing further acts of violence generally. The due process violation occurred because "[t]he State raised the specter of petitioner's future dangerousness generally, but thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he would never be released on parole and thus, in his view, would not pose a future danger to society." The Supreme Court noted that "the state is "free to argue that the defendant will pose a danger to others in

prison," but "the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility." Id. at 165, Fn. 5.

The analogy here is that the prosecutor concealed information about the favorable life dispositions conferred with a prosecutorial blessing to codefendants Bowen and Bailey, and then argued to appellant's jury that the death penalty was the only penalty appropriate for the defendants because they were the "worst-of-the-worst." See also People v. Varona (1983) 143 Cal.App.3d 566 [reversible error for prosecutor to successfully urge exclusion of evidence and then argue that the jury should penalize the defense because of the absence of that evidence]. See also People v. Gaines (1997) 54 Cal.App.4th 821, 825 [federal constitutional error for prosecutor to assert unproven facts under the guise of closing argument]. Gaines found that the error required reversal under the Chapman standard.

The prosecutorial misconduct here is also analogous to that which required reversal of a death sentence in In re Sakarias, supra. There, the prosecutor in sequential trials of two codefendants argued "significantly inconsistent and irreconcilable" versions of the offense to portray each defendant as the actual killer. This Court concluded that the prosecutor's

undisclosed embrace of two incompatible positions violated the defendant's due process rights as to penalty. Id. at 165.

Here, the prosecutor endorsed the position in front of appellant's jury that the crimes were so heinous that "only death" was fair and just as a penalty. In contrast, the prosecutor took the contrary and irreconcilable position at Bailey and Bowen's disposition that a non-capital outcome was entirely consistent with the interests of justice. Had appellant's jury known of the prosecutor's actions with respect to the Bailey and Bowen dispositions, those actions would have spoken far louder in mitigation than the prosecutor's words sounded in aggravation at appellant's trial.

C. The Requirements of Reversal.

Reversal is required here because the crown jewel of the prosecutor's argument was based on a false factual basis that the prosecutor created through an artful manipulation of the evidence. By first successfully excluding any evidence or defense reference to the prosecutorially-approved non-capital dispositions of Bailey and Bowen, the prosecutor then hypocritically argued to the jury with impunity that only death was a fair and just punishment for the perpetrators of the horrible crimes for which the defendants were convicted. Bailey and Bowel were convicted of the same crimes, and at least according to

the prosecution's theory as set forth in the indictment, their culpability was equal or greater than appellant Newborn. This combination of judicial error and prosecutorial misconduct cannot be deemed harmless beyond a reasonable doubt, given the closeness of the penalty decision in this case.

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS REGARDING THE PRESENTATION OF EVIDENCE RELATING TO LINGERING DOUBT.

A. Summary of Facts.

This is a case in which the jury deliberated for 16 days before returning guilt verdicts. There was identification testimony of some sort as to coappellant Holmes and McClain, but no identification testimony at all that appellant Newborn was at the scene of the fatal shootings. Moreover, appellant Newborn presented alibi evidence. While the record does not reflect how much time the jury spent debating appellant's guilt separate from McClain and Holmes, the record does reflect that they asked for a re-read of his girlfriend, Felicia Goodall's testimony, demonstrating their real concern about the validity of his alibi. Under these circumstances, even if the jury devoted equal time to each defendant, the three days allocated to appellant demonstrate a close case as to

guilt. More likely, the jury spent a greater proportion of its time deliberating appellant's guilt because of the lack of any identification testimony.

Any residual doubts as to guilt normally carry over into penalty phase where the same jury was charged with determining the appropriate penalty. Very likely, those residual doubts did carry over into the first penalty trial, because the same jury that found appellant guilty refused to sentence him to death, and mistried with a split of nine to three. The votes of the life-prone jurors may be attributable to appellant's evidence in mitigation, or to residual doubts about his guilt, or to both.

However, the slate was wiped clean when the new penalty jury was convened. In the middle of opening statement on Newborn's behalf, attorney Jones announced his intention to present evidence "directed to the concept of lingering doubt." 65 RT 6377. The trial court interrupted and held a hearing out of the presence of the jury regarding the permissible scope of lingering doubt evidence, and directed all counsel to file trial briefs. 65 RT 6383. See VIII CT 2134 [prosecution]; VIII CT 2141 [defense]. Newborn's attorney was permitted to tell the jury in opening statement that there was no identification testimony placing him at the scene of the homicides, nor any physical evidence connecting him, nor any confessions or admissions. 65 RT 6388-6390.

As the defense case progressed, the court stated that it had not yet determined its admissibility. 72 RT 7191. The court had permitted Holmes' counsel to examine prosecution eyewitness Pina. 71 RT 7064. Counsel for Newborn called Pasadena Police Officer Korpal to testify as to the times of any reports of a shooting in the vicinity of Blake Street, and he confirmed that there were three reports made at approximately 1:00 a.m. on November 1, 1993, and none on Halloween evening. 73 RT 7263.

Following the penalty phase testimony, the district attorney was permitted over defense objection to argue that "We have given them the opportunity to present evidence to show that they weren't there, but no such evidence has been presented." 74 RT 7371. When attorney Nishi was arguing in favor of a life sentence based on lingering doubt, the trial court sustained the prosecutorial objection to the argument that "When we get to that point where we have to determine whether a person lives or dies, we impose another standard, and that's lingering doubt..." 74 RT 7443. The trial court limited Holmes' attorney to arguing lingering doubt as to witness Pina—"You can only argue that point," because "That is all they heard."

The penalty jury instructions consisted of a direct assertion that there was ample evidence of proof beyond a reasonable doubt as to the crimes that the

defendants were convicted of, but also "lingering doubt as to guilt may be considered as a factor in mitigation." 75 RT 7505.

The jury was keenly interested in the strength of the evidence of guilt and on the first day of deliberations, peppered the court with questions: "Can this jury request testimony or evidence from the prior trial and see it?"; "If so, was there any other eyewitness testimony or independent investigation?"; and "Can we see the newspaper with photos?" The trial court answered all these questions with a flat "no," following up with an instruction that "There was ample evidence to convict the defendants beyond a reasonable doubt." 75 RT 7545.

B. The Trial Court's Error.

Oregon v. Guzek (2006) ___ U.S. ___, 126 S.Ct. 1226 recently addressed whether a capital defendant facing a penalty retrial has a constitutional right to present any evidence demonstrating his innocence that he introduced at the original trial. The majority of the Supreme Court did not resolve the underlying constitutional issue of whether there was an independent Eighth Amendment right to introduce evidence of residual or lingering doubt at sentencing, and held that in any case such a right would not confer a right to present new evidence at a penalty phase that was not presented at the preceding guilt phase. The

Supreme Court noted that "The negative impact of a rule restricting defendant's ability to present new alibi evidence is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury all this evidence of innocence from the original trial regardless." 126 S.Ct. at 1233 (emphasis in original). See also People v. Boyer, supra, 2006 D.A.R. 5671, 166 ["defendant was free to argue residual doubt about his degree of culpability..."]. In this case, the trial court precluded the defense from presenting at the penalty retrial much, if not most, of the evidence of innocence that was presented at the original guilt trial. The prosecutor was permitted to pick and choose from among the guilt phase evidence and present whatever it wanted. The defense presented only Pina and Korpal.

The obvious deficiencies in this case are demonstrated by the penalty jury's avid interest in the guilt phase evidence, and underscore the wisdom of the Oregon statute reviewed in Guzek, supra, that "gives the defendant the right to present to the sentencing jury all the evidence of innocence from the original trial regardless." 126 S.Ct. at 1233 (emphasis in original). The trial court's refusal to provide the guilt phase evidence to the jury undermined the reliability of the penalty determination.

C. The Requirement of Reversal.

The penalty jury clearly thought that the guilt phase evidence was relevant and material to its decision, but was refused access to it in accordance with the trial court's rulings. 75 RT 7545. Moreover, the prosecutor exploited the trial court's rulings by the improper jury argument that over defense objection that "[w]e have given them the opportunity to present evidence to show that they weren't thee, but no such evidence has been presented," 74 RT 7371. This exploitation falls within the prohibition of People v. Varona, supra, and compounds the prejudice from the trial court's erroneous ruling. Given that the first penalty jury received substantially more evidence of innocence, and given that the first jury deliberated for 16 days as to guilt, it is highly likely that the second penalty jury would have reached a more favorable result if provided with the full range of guilt phase evidence of innocence.

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XVI. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERRONEOUS RESTRICTION AND DEFENSE COUNSEL'S JURY ARGUMENT REGARDING THE EXERCISE OF MERCY.

A. Summary of Facts.

Appellant's attorney, Carl Jones, began his penalty argument with the straightforward request to the jury—"We ask you to reach a decision based on the evidence, exhibits, and testimony that you have heard and put aside the things that do not help and keep in mind that other things that have happened and will happen are done for a reason but they may or may not help you." 74 RT 7463. Counsel pointed out that the jury that convicted appellant determined that he would "die in prison no matter what your vote is in this case," either sooner or "when his maker decides that it is his time." Ibid. He argued that the holding cell graffiti was "put there by nobody knows who and nobody knows when and nobody knows why," and that it would be unfair to use it against appellant. 74 RT 7465.

Counsel then read CALJIC 8.88 to the jury and urged the jury in conjunction with a handwritten chart that "It is not a matter of simply counting factors like a score in a ballgame, like tonight I think there is both, what, a

Yankees world series game and a Raider football game." Counsel illustrated this illustrated this point by positing four hypothetical relationships between aggravating and mitigating factors and sought to argue that the jury was permitted to vote life without parole in any of them. In the first, counsel posited "a situation where the factors and mitigation totally outweighed the factors and aggravation"; the second "where the factors and mitigation were even"; the third "where the mitigating factors in your opinion were very small compared to the factors in aggravation, small in the qualitative sense, not quantitative [sic]"; and concluded as follows:

> And the last one is if you had only factors in aggravation and little, if any, factors in mitigation, something as little and simple as mercy, you could still vote life without parole. 74 RT 7467.

At that point, the prosecutor objected, "That is a misstatement of the law," and the trial court sustained the objection. Ibid. The court then stated, "You can argue it another way, Mr. Jones," prompting the following colloquy:

> Mr. Jones: I'm sorry, your Honor?
>
> The Court: You can argue it.
>
> Mr. Jones: Is it overruled?
>
> The Court: Yes.
>
> Mr. Meyers: I thought it was sustained.

The Court: It was sustained, but you can argue it another way. 74 RT at 7468.

Defense counsel then referred to Factor (k) and tried to get back on message:

> That is what I am trying to say. And I am asking you to consider all of these things, including everything that everybody has said, including mercy; because mercy is twice blessed. There is an old saying and I hope you don't find it corny—
>
> Mr. Meyers: I will object because it is not a circumstance of the crime, nor is it a character of the defendant, therefore, it is not a mitigating factor.
>
> The Court: I don't think he is arguing mitigation, he is explaining what mercy was in his argument. Overruled.
>
> Mr. Jones: It is twice blessed. It is blessed by the person receiving it but it is also blessed by the—a blessing to the person who gives it. Ibid.

Defense counsel then went to argue the mitigating import of the jury finding of "not true" on the personal use of a firearm allegation, as to each of the charges on which it had been alleged. 74 RT 7471. Defense counsel then launched a lingering doubt argument—"And I'm telling you that that is the doubt that says no death penalty for Lorenzo Newborn." 74 RT 7473.

Counsel then argued at length regarding the difficulties of appellant's upbringing, the adversities he faced, and his efforts notwithstanding these

impediments, including "I ask you to show him some mercy because of the low self-esteem that must have developed as a result of those things, because of all the things that I mentioned to you, the ridicule that he must have been subjected to." 74 RT 7485. Counsel concluded, "Lorenzo Newborn is not the worst of the worst." 74 RT 7484.

The trial court instructed the jury. 75 RT 7499-7541. In accordance with the then operative CALJIC instructions, there was no reference to the exercise of mercy, but rather the generalized directive to "determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances," and that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." 75 RT 7540-7541.

B. The Trial Court's Error.

The trial court erred in sustaining the prosecutor's objection to defense counsel's argument that "If you only had factors in aggravation and little, if any factors in mitigation, something as little and simple as mercy, you could still vote life without parole." 74 RT 7467. In fact, defense counsel's argument was

in complete conformity with the federal constitutional law regarding the appropriate role of mercy in capital sentencing decisions. When the trial court sustained the prosecutor's objection, the message was necessarily conveyed to the jury that defense counsel's argument was wrong. This misdirection was not cured by the comment, "You can argue it in another way," because that simply reconfirmed that the original way counsel had argued it was unacceptable. The bottom line is, the trial court's rulings conveyed to the jury the fundamental misapprehension that the jury, after consideration of all the evidence and assessment of its subjective weight, was precluded from extending mercy and voting for life without parole, when the law permits the exercise of mercy in light of whatever evidence is presented.

Mercy is generally understood as "[f]orbearance and compassion shown to a powerless person, esp. an offender, or to one with no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected." In the new shorter Oxford English Dictionary, that is an entirely permissible and indeed laudable basis for a capital sentencing determination, as long as it is a "reasoned moral response" to the evidence presented. See Penry v. Lynaugh (1989) 492 U.S. 302, 326-327 ["As we made clear in Gregg, so long as the class of murderers subject to capital punishment is narrowed, there

is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant."]. In 1992, Justice Scalia summarized the state of capital jurisprudence emanating from Gregg v. Georgia [1986) 428 U.S. 153 and Woodson v. North Carolina (1976) 428 U.S. 280 as follows—"This Court decreed...[that] the jury must always be given the option of extending mercy." Morgan v. Illinois, supra [Scalia, J., dissenting]." That constitutionally compelled option was erroneously infringed in this case when the trial court sustained the prosecutor's objection. This principle was reaffirmed in a recent federal death penalty appeal, United States v. Higgs (4th Cir. 2003) 353 F.3d 281, 331-332, in which the defendant argued that the prosecutor erroneously argued to the jury that "mercy is not what this case is about"; that "mercy is not in the instructions"; and "it is not something you do in this case." The federal court of appeal confirmed the principle that the defendant was arguing—"Higgs correctly argues that the jury is empowered to show mercy to reject a death sentence," and that the prosecutor's argument "arguably crossed into an argument in contradiction of the district court's instructions." Id. at 332. However, the court found that even if the argument was improper, they did not deprive Higgs of a fair trial because they were "isolated statements" and because "The district court explicitly instructed the

jury that it need not impose the death penalty regardless of the findings on mitigation and aggravation." Id. at 332.

In contrast, the trial court's erroneous response to defense counsel's argument occurred shortly before the case was given to the jury for deliberations, and the import of the argument could not have been missed. Moreover, there was no comparable, curative instruction that conveyed the constitutionally correct principle that mercy could be extended to the defendant "regardless of the findings on mitigation and aggravation." The Ninth Circuit Court of Appeal has repeatedly reaffirmed that a plea for mercy in penalty phase argument is an appropriate penalty phase strategy, either by itself or in conjunction with the presentation of mitigating evidence. See, e.g., Silva v. Woodford (9th Cir. 2002) 279 F.3d 825, 843.

This Court has generally recognized that mercy is a valid consideration in the penalty determination. See, e.g., People v. Nicolaus (1991) 54 Cal.3d 551, 589 ["The prosecutor, in his closing argument, expressly identified mercy as a valid consideration in the penalty determination."]. This Court has also decided in certain cases that a defendant is not entitled to a jury instruction if the defendant "was not entitled to a pure 'mercy' instruction." See, e.g., People v. McPeters (1992) 2 Cal.4th 1148, 1195; People v. Lewis (2001) 26 Cal.4th 334,

393. However, Lewis specifically noted in rejecting the instructional argument that "In closing argument, both defense counsel urged the jury to show sympathy and mercy to the defendant," Id. at 393, confirming that this is an entirely permissible penalty argument.[8]

It is a fundamental principle of Eighth Amendment jurisprudence as applied by this Court that "Under our law, 'the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death'." People v. Sakarias (2005) 22 Cal.4th 596, 638, quoting from People v. Duncan (1991) 53 Cal.3d 955.

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[8] On a related issue, the United States Supreme Court held that the California jury instruction given at guilt phase and directing the jury not to be influenced by "mere sympathy, conjecture, passion, prejudice, and public opinion" did not violate the Eighth Amendment because, "[a]n instruction prohibiting juries from basis their sentencing decisions on factors not presented at trial, and irrelevant to the issues at the trial, does not violate the United States Constitution," and "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against the capital defendant than for him." California v. Brown (1987) 479 U.S. 538, 543. This line of cases does not undercut appellant's argument here, which is directed toward the infringement of defense argument that mercy is a proper vehicle for determining penalty after consideration of the aggravating and mitigating factors.

C. The Requirement of Reversal.

1. The closeness of the case.

The hung jury at the prior penalty phase demonstrates that this was a close case regarding mitigation, notwithstanding the substantial amount of aggravation. In addition to the indicia prior hung jury as demonstrating a difficult jury question, the deliberations at the second penalty trial lasted 6-1/2 days. During the course of those deliberations, the jury made requests for the review of certain items of evidence, including the evidence of guilt at the prior trial, the video of defendant Holmes' outburst at the time of the guilt verdicts, and the testimony of Roquel Flores. These objective factors demonstrate that the penalty determination was far from open and shut with respect to either panel of jurors.

2. The severity of the infringement of a defense argument.

The defendant has a federal constitutional right to have his attorney argue the facts and law in a compelling manner. Herring v. New York (1975) 422 U.S. 853. In this case, the trial court sustained the prosecutor's objection in front of the jury, which conveyed the message that defense counsel's argument was not proper and was not in accordance with the law. Counsel then fell back to a different and watered down version of the argument, in which "mercy" was

described as a good thing in itself, but was not urged as a vehicle by which the jury could reach a life verdict based on the evidence in the case.

3. The absence of any countervailing jury instruction.

In contrast to the cases cited above, the jury instructions given did not convey to the jury that they could extend mercy based on the evidence in the case regardless of the strength of the mitigation, and that once they had evaluated the respective cases in aggravation and mitigation, a merciful response was a legally appropriate one. In contrast to cases where the prosecutor argued that mercy was not permissible, but where the trial court instructed that the jury could return a verdict of life even if there were not mitigation, see e.g., United States v. Higgs, supra, there was no countervailing instruction in this case.

The instruction that the jury could "consider" any factor offered by the defense did not cure the error, because it failed to apprise the jury that it could act upon merciful feelings engendered by the evidence. In other words, jurors could have listened to appellant's case in mitigation; determine that it did in fact militate in favor of a life sentence, but was overwhelmed by the magnitude of the offenses; and feel inclined to exercise mercy to appellant nonetheless, but were foreclosed from that by the jury instructions given and the trial court's

response to defense counsel's argument. Just as this Court has recognized that a jury is not obligated to return a death verdict even if no mitigation is presented if they feel that the weight of the aggravating evidence is insufficient to warrant it, the jury is equally entitled to return a life verdict if it feels there is some mitigation, that the aggravating evidence substantially outweighs it, but nonetheless the exercise of mercy is warranted based on the mitigating evidence. Appellant was deprived of having this jury return a life verdict under those circumstances, which are the most likely given the facts of this case.

XVII. PETITIONER WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS BY THE FAILURE OF PENAL CODE SECTIONS 190.2 AND 190.3 TO REQUIRE THAT THE JURY FIND THE EXISTENCE OF AGGRAVATING FACTORS UNANIMOUSLY AND BEYOND A REASONABLE DOUBT AS A PREREQUISITE TO THE IMPOSITION OF THE DEATH PENALTY AND BY OTHER CONSTITUTIONAL DEFECTS.

Ring v. Arizona (2002) 536 U.S. 584 held that the Sixth Amendment of the United States Constitution required that any aggravating factor necessary to impose the death penalty must be determined by a jury because the enumerated aggravating factors were equivalent to an element of a greater offense. Based on Ring, it necessarily follows that the jury must be instructed that the standard of proof for the finding of an aggravating factor must be a unanimous finding

beyond a reasonable doubt. See, e.g., United States v. Banuelos (9th Cir. 2003) 322 F.3d 700. Moreover, the error in failing to properly instruct the jury under the Eighth Amendment "cannot be overcome by employing 'harmless error'." See, e.g., Esparza v. Mitchell (6th Cir. 2002) 310 F.3d 414.

This conclusion is supported by the results reached in other states following Ring, supra. Johnson v. State (Nev. 2002) 59 P.3d 450, vacated a death sentence because a three-judge panel imposed a death sentence after the jury hung. The Nevada Supreme Court reversed because the Nevada capital sentencing statute requires a factual finding that the aggravating factors outweigh the mitigating factors as a prerequisite to a death sentence. Under Ring, supra, and Apprendi v. New Jersey (2000) 530 U.S. 466, that finding must be made by a unanimous jury beyond a reasonable doubt to sustain a death sentence.

The same finding must be made in California, but appellant's jury was not instructed that it had to be made unanimously and beyond a reasonable doubt. To the contrary, the jury was repeatedly instructed that the prosecution's evidence in aggravation did not have to be proven to the jury's unanimous satisfaction beyond a reasonable doubt before it could be considered in the penalty determination. Even if some type of harmless error analysis were

permissible, it could not save the judgment in this case because the jury was instructed (75 RT 7404-7405) and the prosecutor emphasized (74 RT 7386) that the individual jurors could consider such evidence upon a "personal" finding beyond a reasonable doubt, without any unanimity requirement. The prosecution's case in aggravation was rife with evidence of incidents as to which the prospects of a unanimous finding were negligible.

Moreover, the California capital sentencing statute is unconstitutionally overbroad. The cumulative effect of these defects fails to narrow the overall category of culpable homicide cases to a rationally selected subgroup eligible for capital prosecution. See Furman v. Georgia (1972) 408 U.S. 238; and Godfrey v. Georgia (1980) 446 U.S. 420. The expansion of the lying in wait special circumstance over the past thirty years to an all-encompassing ambit negates its function as a narrowing factor, and violates the Fifth and Eighth Amendment requirements for clarity and specificity. See Clark v. Brown (2006) __ F.3d __, 2006 U.S. App. Lexis 13320. In this case, the perpetrators of the shootings were out trying to find Crips to attack, not lying in wait for victims to come by. The California capital sentencing scheme suffers from multiple infirmities, particularly the over breadth in rendering far too many defendants

capital eligible, compounded by the failure to require unanimous findings as to aggravating factors.

Under the circumstances, petitioner's death sentence must be vacated as a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions.

Dated: June 6, 2006

Respectfully submitted,

ERIC S. MULTHAUP, Attorney for Appellant
LORENZO NEWBORN

CERTIFICATE OF WORD COUNT

I certify that this Appellant Newborn's Opening Brief consists of 72,243 words.

Dated: June 6, 2006

ERIC S. MULTHAUP

APPENDIX A

People v. Newborn, McClain, and Holmes; S058734
Jury Selection and Jury Composition

Seat	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	St
1	5 M-F		5 M-F	JT #1 698	48 F-B		48 F-B		48 F-B		48 F-B	
2	7 M-B		7 M-B		7 M-B		7 M-B		7 M-B		7 M-B	J 7
3	9 F-B		9 F-B		9 F-B		9 F-B		9 F-B		9 F-B	
4	26 F-W		26 F-W		26 F-W		26 F-W		26 F-W	DA#3 728	54 M-B	
5	29 M-W		29 M-W		29 M-W		29 M-W		29 M-W		29 M-W	
6	30 F-H		30 F-H		30 F-H		30 F-H		30 F-H		30 F-H	
7	31 M-W		31 M-W		31 M-W		31 M-W		31 M-W		31 M-W	
8	32 M-H		32 M-H		32 M-H		32 M-H	JT #2 715	53 F-H		53 F-H	
9	45 F-W		45 F-W		45 F-W		45 F-W		45 F-W		45 F-W	
10	34 F-B		34 F-B		34 F-B		34 F-B		34 F-B		34 F-B	
11	35 M-F		35 M-F		35 M-F		35 M-F		35 M-F		35 M-F	
12	37 F-B	DA#1 693	47 F-W		47 F-W	DA#2 705	52 F-W		52 F-W		52 F-W	
	MF=2 MB=1 MW=2 MH=1 FB=3 FW=1 FH=2		MF=2 MB=1 MW=2 MH=1 FB=2 FW=3 FH=1		MF=1 MB=1 MW=2 MH=1 FB=3 FW=3 FH=1		MF=1 MB=1 MW=2 MH=1 FB=3 FW=3 FH=1		MF=1 MB=1 MW=2 FB=3 FW=3 FH=2		MF=1 MB=2 MW=2 FB=3 FW=2 FH=2	

DA—District Attorney JT—Joint Defense CT—Court Excusal
Race: W—White / B—Black / H—Hispanic / F—Filipino / A—Asian / O—Other

Seat	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike
1	48 F-B		48 F-B		48 F-B		48 F-B		48 F-B	DA#6 789	69 F-H	
2	55 F-W		55 F-W		55 F-W		55 F-W		55 F-W		55 F-W	
3	9 F-B		9 F-B		9 F-B		9 F-B		9 F-B		9 F-B	
4	54 M-B		54 M-B		54 M-B		54 M-B		54 M-B		54 M-B	
5	29 M-W		29 M-W		29 M-W		29 M-W		29 M-W		29 M-W	
6	30 F-H		30 F-H		30 F-H		30 F-H		30 F-H		30 F-H	
7	31 M-W		31 M-W	JT #4 753	59 M-W		59 M-W		59 M-W		59 M-W	JT ~~DEF~~ #6 801
8	53 F-H	DA #4 749	56 F-W		56 F-W		56 F-W		56 F-W		56 F-W	
9	45 F-W		45 F-W		45 F-W		45 F-W		45 F-W		45 F-W	
10	34 F-B		34 F-B		34 F-B		34 F-B		34 F-B		34 F-B	
11	35 M-F		35 M-F		35 M-F	DA #5 758	63 F-B		63 F-B		63 F-B	
12	52 F-W		52 F-W		52 F-W		52 F-W	JT #5 772	66 M-H		66 M-H	
	MF=1 MB=1 MW=2 FB=3 FW=2 FH=2		MF=1 MB=1 MW=2 FB=3 FW=4 FH=1		MF=1 MB=1 MW=2 FB=3 FW=4 FH=1		MB=1 MW=2 FB=4 FW=4 FH=1		MB=1 MW=2 MH=1 FB=4 FW=3 FH=1		MB=1 MW=2 MH=1 FB=3 FW=3 FH=2	

DA = District Attorney
JT = Joint Defense
CT = Court Excusal

Race: W = White
B = Black
H = Hispanic
F = Filipino
A = Asian
O = Other

Seat	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	St
1	69 F-H		69 F-H		69 F-H		69 F-H		69 F-H		69 F-H	
2	55 F-W		55 F-W		55 F-W		55 F-W		55 F-W		55 F-W	JT 8
3	9 F-B		9 F-B		9 F-B		9 F-B		9 F-B	DA #9 870	98 F-B	
4	54 M-B		54 M-B		54 M-B		54 M-B	JT #8 845	94 F-B		94 F-B	
5	29 M-W		29 M-W		29 M-W		29 M-W		29 M-W		29 M-W	
6	30 F-H		30 F-H		30 F-H		30 F-H		30 F-H		30 F-H	
7	77 M-W		77 M-W		77 M-W		77 M-W		77 M-W		77 M-W	
8	56 F-W	DA #7 815	79 F-W		79 F-W		79 F-W		79 F-W		79 F-W	
9	45 F-W		45 F-W	JT #7 823	80 F-O		80 F-O		80 F-O		80 F-O	
10	34 F-B		34 F-B		34 F-B		34 F-B		34 F-B		34 F-B	
11	35 M-F		35 M-F		35 M-F		63 F-B		63 F-B		63 F-B	
12	66 M-H		66 M-H		66 M-H	DA #8 832	88 F-B		88 F-B		88 F-B	
	MB=1 MW=2 MH=1 FB=3 FW=3 FH=2		MB=1 MW=2 MH=1 FB=3 FW=3 FH=2		MB=1 MW=2 MH=1 FB=3 FW=2 FH=2 FO=1		MB=1 MW=2 FB=4 FW=2 FH=2 FO=1		MW=2 FB=5 FW=2 FH=2 FO=1		MW=2 FB=5 FW=2 FH=2 FO=1	

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A = Asian
O = Other

Seat	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike
1	69 F-H		69 F-H		69 F-H		69 F-H		69 F-H		69 F-H	
2	100 M-A		100 M-A	JT #10 890	102 F-W		102 F-W		102 F-W		102 F-W	JT #12 911
3	98 F-B		98 F-B		98 F-B		98 F-B		98 F-B		98 F-B	
4	94 F-B		94 F-B		94 F-B		94 F-B		94 F-B	DA #12 907	105 F-B	
5	29 M-W		29 M-W		29 M-W		29 M-W		29 M-W		29 M-W	
6	30 F-H		30 F-H		30 F-H		30 F-H		30 F-H		30 F-H	
7	77 M-W		77 M-W		77 M-W		77 M-W		77 M-W		77 M-W	
8	79 F-W		79 F-W		79 F-W		79 F-W		79 F-W		79 F-W	
9	80 F-O	DA #10 884	101 M-H		101 M-H		101 M-H		101 M-H		101 M-H	
10	34 F-B		34 F-B		34 F-B		34 F-B		34 F-B		34 F-B	
11	63 F-B		63 F-B		63 F-B		63 F-B		63 F-B		63 F-B	
12	88 F-B		88 F-B		88 F-B	DA #11 896	103 F-W	JT #11 903	104 M-H		104 M-H	
	MA=1 MW=2 FB=5 FW=1 FH=2 FO=1		MA=1 MW=2 MH=1 FB=5 FW=1 FH=2		MW=2 MH=1 FB=5 FW=2 FH=2		MW=2 MH=1 FB=4 FW=3 FH=2		MW=2 MH=2 FB=4 FW=2 FH=2		MW=2 MH=2 FB=4 FW=2 FH=2	

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A = Asian
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Seat	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	Strike	Juror	St
1	69 F-H		69 F-H		69 F-H	DA #15 929	116 M-A	JT #13 930	123 M-W		123 M-W	JT 93
2	107 F-B		107 F-B		107 F-B		107 F-B		107 F-B	DA #16 934	124 F-W	
3	98 F-B		98 F-B		98 F-B		98 F-B		98 F-B		98 F-B	
4	105 F-B		105 F-B		105 F-B		105 F-B		105 F-B		105 F-B	
5	29 M-W		29 M-W		29 M-W		29 M-W		29 M-W		29 M-W	
6	30 F-H		30 F-H		30 F-H		30 F-H		30 F-H		30 F-H	
7	77 M-W		77 M-W		77 M-W		77 M-W		77 M-W		77 M-W	
8	79 F-W		79 F-W		79 F-W		79 F-W		79 F-W		79 F-W	
9	101 M-H	DA #13 916	109 F-B	DA #14 922	110 F-W		110 F-W		110 F-W		110 F-W	
10	34 F-B		34 F-B		34 F-B		34 F-B		34 F-B		34 F-B	
11	63 F-B		63 F-B		63 F-B		63 F-B		63 F-B		63 F-B	
12	104 M-H		104 M-H		104 M-H		104 M-H		104 M-H		104 M-H	
	MW=2 MH=2 FB=5 FW=1 FH=2		MW=2 MH=1 FB=6 FW=1 FH=2		MW=2 MH=1 FB=5 FW=2 FH=2		MA=1 MW=2 MH=1 FB=5 FW=2 FH=1		MW=3 MH=1 FB=5 FW=2 FH=1		MW=3 MH=1 FB=4 FW=3 FH=1	

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DECLARATION OF SERVICE

RE: People v. Newborn; S058734
Los Angeles County Superior Court No. BA092268

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

APPELLANT NEWBORN'S OPENING BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

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I declare under penalty of perjury that service was effected on June 2, 2006 at Mill Valley, California and that this declaration was executed on June 6, 2006 at Mill Valley, California.

ERIC S. MULTHAUP