IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL ALLEN and CLEAMON JOHNSON,

Defendants and Appellants.

S066939

CAPITAL CASE

Los Angeles County Superior Court No. BA105846
The Honorable Charles E. Horan, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

After a jury trial, appellants Michael Allen and Cleamon Johnson were found guilty of two counts of first-degree murder (Pen. Code,[1/] § 187, subd. (a)). The allegations that a principal was armed with a firearm (§ 12022, subd. (a)), Allen personally used a firearm, to wit, an assault weapon (§ 12022.5, subds. (a), (b)), and Johnson furnished the firearm to Allen for the purpose of aiding and abetting a felony (§ 12022.4), were found to be true. The special-circumstance allegations that appellants committed multiple murder (§ 190.2, subd. (a)(3)), and Allen had previously been convicted of first-degree murder (§ 190.2, subd. (a)(2)), were also found to be true.[2/] (CT 179-181; CT 916-924, 933.)

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1. Unless otherwise indicated, all further statutory references are to the Penal Code.

2. After the guilty verdicts, Allen admitted his prior-murder conviction in Los Angeles Superior Court case number TA023268. (CT 933.) By separate cover, respondent will request judicial notice of the Court of Appeal opinion affirming that conviction, this Court's denial of review, and the remittitur in that case. Allen does not allege, and respondent is unaware of, any later decision invalidating such conviction.

The jury fixed appellants' penalties at death. (CT 1112-1113.) The trial court denied appellants' motions for new trial (CT 1174, 1228), and their automatic motions to modify the death verdicts (§ 190.4, subd. (e)) (CT 1166-1167, 1176-1177).

Appellants were sentenced to death. (CT 1177, 1186-1191, 1198-1203, 1231.) These automatic appeals follow. (§ 1239, subd. (b).)

STATEMENT OF FACTS

GUILT PHASE

I. PROSECUTION CASE

The 89 Family was a "Bloods"-affiliated street gang that claimed a territory west of Central Avenue in Los Angeles. (RT 3517-3518, 4289-4290, 4293, 4408.) Its territory extended from Central Avenue to McKinley Avenue on the east and west, and Manchester Avenue to 92nd Street on the north and south. (RT 3518, 4292-4293.) In 1991, the gang had approximately 50 to 60 members. (RT 4361-4362.)

The 89 East Coast Crips claimed a territory east of Central. (RT 4289-4290, 4338-4339.) The East Coast Crips were the 89 Family's "arch enemy." (RT 3538, 4294-4295, 4340, 4412, 4448-4449, 4452.) Central Avenue was the dividing line between them. (RT 3553, 4315-4316.)

Appellant Cleamon Johnson, known as "Evil" or "Big Evil," was a member of the 89 Family. (RT 3367, 3531, 4045-4046, 4301, 4353, 4408-4409, 4447-4450.) In August 1991, Johnson was feared by fellow gang members as well as other citizens, and commanded a lot of "respect" within the gang. (RT 3559-3561, 4302-4304, 4306-4307, 4326, 4410.) He was a "shot-caller," had the reputation for being a "disciplinarian" within the gang, and

could direct another member of the gang to perform a "mission."[3] (RT 3624-3625, 4298, 4306, 4326.) As Johnson himself testified in another case, "I don't have to answer to nobody." Rather, other people answered to him.[4] (RT 4445-4447, 4455-4456.) Most rival gangs had heard of Johnson's nickname and reputation. (RT 4307.)

Members of the 89 Family socialized in front of Johnson's house, which was located on 938 East 88th Street, near the corner of 88th and Central. (RT 3514-3515, 3523, 3645-3646, 4046, 4307, 4310-4311, 4409, 4411.) After a motel and an alley, Johnson's house was the second house west of Central, on the south side of the street. (RT 4307.)

Appellant Michael Allen, nicknamed "Fat Rat," was also a member of the 89 Family. (RT 3363, 3530-3531, 4041-4043, 4045, 4299-4300, 4418.) He had a tattoo of the letters "NHF," which stood for Neighborhood Family, on the left side of his face. (RT 4319-4320, 4791.) Allen was not as respected in the gang as Johnson, but was "just another member." (RT 3550, 4302, 4419-4420.)[5] He had been absent from the neighborhood for a while, and returned in the summer of 1991. (RT 3554, 4302-4303.)

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3. A "mission" is an act performed for the gang at the direction of another gang member, and could include the commission of murder. (RT 3624, 4298-4299.)

4. Johnson gave such testimony in May 1992, in the case of *People v. Glass, Mills, and Carroll* (Los Angeles Superior Court case number BA019941). The defendants in that case were Crip gang members, and Johnson was called as a defense witness. (RT 4446-4447.) Portions of Johnson's testimony in that case were read to the jury in this case. (RT 4447-4456.)

5. Allen's Opening Brief erroneously describes Allen as having been one of the "leaders" of the 89 Family. (Allen AOB ["AAOB"] 391-392, 396, 402.)

On August 5, 1991, Freddie Jelks, an 89 Family member known as "F.M.," was in front of Johnson's house near the garage.[6/] (RT 3518-3519, 3521, 3643, 3734, 4310, 4411.) Johnson, Michael Woodmore (aka "K Mike"), Earl Ray Johnson (appellant Johnson's brother, nicknamed "Silent"), and Jesse Frierson (aka "Ya Ya") were also there. (RT 3520-3521, 4073-4074, 4081, 4310, 4428.) While smoking marijuana, the group discussed stealing a "fixed up," older-model, black Chevy that was at a carwash on the west side of

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6. Around 1992, after Johnson had assaulted Jelks over a dispute regarding Johnson's girlfriend, Jelks ceased his affiliation with the 89 Family, and moved out of the neighborhood. (RT 3518-3519, 3627, 3693-3697, 3718-3719, 3734-3736.)

At the time of appellants' trial in 1997, Jelks was in custody. He had been charged with a "serious offense," which carried a possible life sentence. (RT 3514, 3627-3628, 3641, 3682-3683, 3749.) No promises had been made to Jelks regarding his pending case, although he hoped that "something good" would happen to him as a result of his testimony. (RT 3514, 3628, 3638, 3684.) A detective was prepared to say that Jelks had cooperated with the prosecution in this case. (RT 3990.)

Jelks had prior convictions as a juvenile for joyriding and robbery, and as an adult for possession of cocaine, receiving stolen property, and sale of marijuana. (RT 3640-3641, 3681-3682.)

Jelks was nervous about testifying because he feared he may be killed. (RT 3747; see also RT 3629, 3631, 3729-3733, 3736-3739, 4324-4325.) He was being protected while in custody. (RT 3638.) Jelks also was concerned about retribution by the 89 Family against members of his family. (RT 4325.) He explained that he was testifying because

> it's time for something different to happen . . . as far as other people['s] lives . . . . You live in this community so long and you see all the chaos that goes on, . . . it's like somebody ought to . . . tell what happened.

(RT 3628; see also RT 3748.)

Central.[7] (RT 3524-3528, 3535-3537, 3655.) Jelks could see the car underneath a tarp.[8] (RT 3534-3535, 3649.)

During this discussion, Allen approached and joined the group. (RT 3529-3530, 3533-3534.) He was wearing his normal attire: khakis, a T-shirt, and a black windbreaker. (RT 3558, 3708-3709.) Allen also was wearing glasses. (RT 3558.) His hair was "[p]retty short." (RT 3569.)

The conversation subsequently turned to the identity of the Chevy's owner. (RT 3537.) Johnson stated that the car belonged to "Baba," who was an 89 East Coast Crip. (RT 3537-3538, 3655-3657, 3698.) Somebody else said that the car belonged to a guy named Payton. (RT 3540-3541.) Payton was associated with the East Coast Crips, and was known for having money and helping that gang. (RT 3540-3542, 3552.)

Johnson hated Crips. (RT 4450.) He and the rest of his group were upset that a Crip might have brought his car onto Central.[9] (RT 3542, 4417.) Johnson asked the group who wanted to "serve," i.e., shoot, Payton. (RT 3542, 3550.) Shooting Payton would send "a message" to the East Coast Crips. (RT

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7. Jelks regularly smoked marijuana. (RT 3655.) When he smoked marijuana, it did not affect his ability to see or hear. (RT 3524-3525.)

8. According to Detective Christopher Barling of the Los Angeles Police Department, who had been assigned to Southeast (formerly South Bureau) "CRASH" (the acronym for the police department's gang unit) from 1989 to 1993, parts of the carwash could be seen from Johnson's house in 1991. (RT 4288-4289, 4330-4333.)

9. According to 89 Family member Donnie Ray Adams, it was disrespectful to the 89 Family for a Crip to go to that carwash in the middle of the day. (RT 4407-4408, 4416-4417.) Detective Barling explained that Central Avenue was not necessarily a "danger zone" in the middle of the day. (RT 4365.) Major thoroughfares such as Central were "kind of neutral territories." (RT 4362-4363.) If a Crip gang member patronized a business on the west side of Central, it technically would constitute the breaking of a boundary, but would not necessarily cause a reaction. This was a "gray area," and whether there would be a reaction depended on the perceiver. (RT 4343, 4363-4365.)

3552; see also RT 4316.) Allen volunteered.[10] (RT 3542-3543, 3550.) Johnson went to the back of his house, and returned a couple of minutes later with an Uzi.[11] (RT 3543-3546.)

Woodmore suggested that Allen go straight up 88th Street to Central to commit the shooting. (RT 3546-3547, 3692.) Johnson then "stepped to the side" with Allen. (RT 3555.) Jelks, who was about 10 feet from them, heard Johnson tell Allen that he should "go through the alley and come up on 87th," and then "[g]o down to where they were in the car." (RT 3556-3558, 3623-3624.)

At this time, a car with a Swan gang member inside drove into Johnson's driveway. (RT 3561.) The Swans were another Blood gang with whom the 89 Family was friendly.[12] (RT 3561-3562, 4294.) Johnson and Allen walked over to the driver's side of the car, and Johnson talked to the driver. (RT 3562-3563.) Johnson handed Allen the Uzi. (RT 3555, 3558-3559, 3653-3654, 3704.) Allen entered the car, and the car exited the driveway and went north through the alley. (RT 3562, 3564-3565, 3657-3658.) As the car drove away, Johnson told the group, with a "smirk on his face," that Allen was "going to go serve him." (RT 3564.)

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10. Jelks testified that committing this shooting would have constituted a mission. (RT 3624.) According to Detective Barling, the consequence of having been out of the neighborhood for a while "usually means that you have to . . . do something to reshow that you are . . . still down for the [']hood and . . . willing to do stuff for that gang." (RT 4303.) Performing a mission was a show of loyalty to the gang, as well as a show of respect to the person directing the mission. (RT 4299.) Having a violent reputation also increased a gang member's level of respect. (RT 4296-4297.) Respect was "the most important thing" to gang members. (RT 4296.)

11. The 89 Family stored guns in a pigeon coop behind Johnson's house. (RT 3544, 3568, 3654, 4314-4315, 4336-4337, 4359-4360.)

12. At some point, the 89 Family changed its name to the 89 Family Swans. (RT 4294.)

Eulas Wright, who was known as "Judge," owned Judge's Hand Carwash on 88th and Central. (RT 3258-3259, 3265, 3868.) The front of the carwash faced Central. (RT 3261.) On August 5, 1991, at about 12:30 or 1 p.m., a man brought in a 1965 Chevy to be detailed. He had brought this car to Wright once before. The car had custom black paint, a convertible top, and "Dayton" rims. (RT 3285-3286, 3342, 3786-3787, 3868-3870, 3875-3876.)

Carl Connor was at an auto repair shop, which was located next to the carwash, on the same lot.[13/] (RT 3334, 3338-3340, 3441, 3784-3785, 3872, 3877.) Connor was talking to the repair shop's owner, and looking at the 1965 Chevy at the carwash. (RT 3340-3341, 3398.) There were about 20 people around the carwash, and "everybody" was looking at that car. (RT 3345, 3423, 3439, 3442.)

A white Toyota Supra was parked on the west side of the street near the front of the carwash, facing southbound. (RT 3263-3265, 3343, 3475, 3766,

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13. In August 1991, Connor lived in Gardena. (RT 3390.) He was employed at that time as a porter at Don Kott Ford. (RT 3391.) Connor did not work on August 5, 1991. (RT 3394.) He admitted that he and a coworker would sometimes falsely punch in each other's timecard, in order to "[g]et an extra day," and the two had been fired for doing that. (RT 3395-3396.)

Connor did not want to testify. (RT 3334-3335, 3381-3382, 3974, 3987.) He had seen "paperwork" with his name on it in the neighborhood, and did not want his name "circulating around the neighborhood as being a snitch." (RT 3380, 3382.) In his neighborhood, "snitches" were viewed as "outcast[s]," and could "get killed." (RT 3361-3362.) Connor knew that Nece Jones had been killed for testifying against someone. (RT 3382-3383.) Connor acknowledged that, by testifying, he was making himself a snitch. (RT 3361.) Connor had expressed fears regarding the 89 Family to detectives. (RT 3974, 3987-3988, 4324.) He testified that he was not afraid for himself, but for his family. (RT 3384-3385.)

In or about January 1997, Connor testified in the case involving Nece Jones's death. A conviction was obtained, and Connor received a $25,000 reward from the City of Los Angeles. (RT 3385-3386, 3389, 3449, 3975-3977, 3992.) Connor had not been offered anything for his testimony in the present case. (RT 3389-3390, 3978.)

3784, 3874, 3894-3895, 3908, 4013.) Payton Beroit, the Chevy's owner, was sitting in the Toyota talking with Donald Loggins. (RT 3263-3265, 3337-3338, 3342-3343, 3398-3399.) Loggins was in the driver's seat and Beroit was in the passenger seat. (RT 3343.)[14] Beroit and Loggins lived on the east side of Central. (RT 3336, 3817, 4796.) Connor had grown up with them. (RT 3336-3337; Supp. IV CT 372-373, 380, 386.)

Connor saw a "chubby guy," with short hair and glasses, walking east on 88th Street toward Central. (RT 3344, 3346, 3406, 3415, 3431.) Connor recognized him from the neighborhood as "Fat Rat" (i.e., appellant Allen). (RT 3345-3346, 3349.) When Allen reached the corner of 88th and Central, he turned around. (RT 3448-3449.)

A few minutes later, Connor saw Allen walk up to the Toyota, point an Uzi or "Mack 10"[15] at the driver's side of the car, and start shooting into the car. (RT 3344, 3346, 3350-3351, 3354, 3377-3378, 3422, 3450.) Allen was standing in the street, off to an angle in front of the Toyota. He was about 10 feet from the car. (RT 3346-3347, 3350, 3378, 3421, 3472-3473.) When the shooting started, Connor ran and took cover at the carwash. (RT 3351, 3353, 3356-3357, 3402-3404, 3475-3477.) Wright and his employee, Willie Clark, lied on the ground by the Chevy. (RT 3258-3259, 3264-3266, 3273, 3292, 3294, 3869, 3872-3873, 3878, 3894.)

Approximately 10 to 30 gunshots were fired in rapid succession. (RT 3265, 3272, 3302-3304, 3353-3354, 3357, 3378-3379, 3477, 3568, 3873.) When the shooting stopped, Clark got up, and saw a short, heavyset Black male, wearing a black windbreaker with a hood, standing on the passenger side

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14. Baba had also been in the Toyota, but he exited the car before the shooting to get his car from the carwash. (RT 3398-3399; Supp. IV CT 373-374, 377, 380.)

15. A Mac 10 was a typical assault weapon. (RT 3850-3851.)

of the Toyota. (RT 3266-3267, 3274-3275, 3303-3304.) The man was approximately five feet, seven inches to five feet, eight inches tall, and about 200 or more pounds. (RT 3274, 3303-3304.) His hair was very short, but not shaved. (RT 3279, 3283.) The man ran north on Central, then turned left on 87th Place. (RT 3275, 3277, 3303-3304.)

When Wright got up, he saw "a short guy, real kind of chunky like," wearing a black "Raiders" jacket with the hood over his head, running north up the street. (RT 3873-3875, 3888, 3890-3893.) Wright walked over to the Toyota, and saw two men slumped over inside the car. (RT 3875.) Wright recognized the driver as someone who had come to his carwash when it was located on Vermont. The passenger was the man who had brought in the 1965 Chevy. (RT 3874.)

After the shooting stopped, Connor approached the Toyota, and saw Allen walking west on 88th Street, toward the alley. (RT 3349, 3357-3360, 3424-3427.) Connor also saw a number of people outside Johnson's house. (RT 3366, 3370.)

About one or two minutes after Allen left Johnson's house, Jelks heard gunshots. (RT 3566-3567.) Johnson told the group to go to the back of the house. (RT 3567-3568.) About two minutes after the shooting stopped, Allen, sweating and breathing heavily, walked into Johnson's backyard. (RT 3568-3570, 3575, 3658.) Allen removed his jacket and a black baseball cap, and handed Johnson the gun. (RT 3569-3570, 3575.) Johnson then handed the gun to Louie Thomas, a friend of the gang, and Thomas left with the gun. (RT 3570-3571, 4323-4324.)

The group walked toward the front of Johnson's house. (RT 3571, 3575-3576.) Allen, appearing nervous and "jittery," said that he had "served them." (RT 3572, 3574.) As the group approached the front of the house, Angie Williams (the sister of 89 Family member Keith Williams, aka "K

Rock") drove up. (RT 3573-3574, 3576, 4323.) Johnson spoke to Angie at her car. (RT 3573-3574, 3576.) Allen got into the car, and the car left. (RT 3572-3574, 3576-3577.) Johnson, who seemed anxious to see what had happened, got on a bicycle and rode toward Central. (RT 3572, 3574-3576.)

At 3:41 p.m., the Los Angeles Police Department received a 9-1-1 call regarding the shooting. (RT 3764, 3999.) Los Angeles Police Officer Diana Salcido and her partner, Officer Duane Hayakawa, arrived at the scene at 3:51 p.m. (RT 3906-3909, 3917-3918, 4002, 4009-4012.) When they arrived, some sheriff's units and fire department personnel were already there. (RT 3908, 4012.) The crime-scene tape was not up yet. (RT 3918.) There was a crowd of approximately 50 to 100 people near a white Toyota Supra, which was parked on the west side of the street. (RT 3766, 3908-3911, 3914, 3919, 4012-4013, 4020.) Officer Hayakawa requested additional units to assist with crowd control and setting up a crime scene. (RT 3909-3910, 3912, 3920, 4002-4003, 4013, 4015-4017.)

While trying to control the crowd, Officers Salcido and Hayakawa saw a Black male on a bicycle next to the victims' car. (RT 3910-3911, 4023, 4033, 4035.) Everybody else was on foot. (RT 4023.) The man was "[t]hinner set," bald, with very dark skin. (RT 3910.) His build and complexion were similar to those of appellant Johnson. (RT 3913.)

Officer Salcido looked in the driver's seat of the Toyota, and saw a Black male with his "eyeball hanging out." Both he and the passenger had sustained multiple gunshot wounds. (RT 3908.) Fire department personnel removed the passenger, Beroit, from the car, and he was transported to the hospital. (RT 3771-3772, 3911, 3915, 4013.) The victim in the driver's seat, Loggins, was already pronounced dead. (RT 3772, 4015.) When Detective James Tiampo (the initial investigating officer) arrived at the hospital, Beroit was dead. (RT 3761-3763, 3772, 3789.)

Nine expended shell casings, and two expended bullet fragments, were recovered at the scene. (RT 3766, 3768-3769, 3778-3782.) The casings were predominately located on the front passenger side of the Toyota, near the curb. (RT 3778-3780, 3782-3783.) Based on where the casings were found, a firearms examiner opined that the shooter could have been standing on the passenger side of the car, but could not have been in the street. (RT 3860-3861.)

There was a bullet hole, which was most consistent with an exit hole, on the driver's side of the Toyota. (RT 3579, 3774-3775, 3803, 3846-3847.) Detective Tiampo did not recall finding any other damage to the car's exterior. (RT 3803-3804.) The passenger and driver's side windows were down. (RT 3774, 3912.) There was no broken glass around the car. (RT 3579, 3774-3775, 3912.)

Two partially-smoked marijuana cigarettes, and a beer can, were found inside the Toyota.[16/] (RT 3776-3777, 3791-3793.) Another beer can was in the street near the curb. (RT 3777-3779.) The sum of $132 was found in Loggins' pants pocket, and $800 in his sock. (RT 3794-3796, 3801-3803.) Two pagers were also recovered, one from the front passenger compartment and the other from Loggins' waistband. (RT 3794-3795.) No guns were found inside the car or on the victims' persons. (RT 3790-3791.)

The officers attempted to interview at least 25 or 30 people at the scene, but they were uncooperative. (RT 3772-3773; see also RT 4311-4312.) There was an "atmosphere of fear." (RT 3773.) According to Detective Barling, who had investigated gang-related crimes in 89 Family territory, citizens were legitimately afraid of retaliation if they spoke to the police. (RT 4311-4314.) The 89 Family "disdain[ed]" witnesses who cooperated with the police, and

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16. A marijuana cigarette was on the lap of one of the victims. (RT 3793.)

would rather "see [snitches] dead" than have them testify against the gang. (RT 4313, 4317.)

After learning of the shooting, 89 Family member Donnie Ray Adams drove to the area of 88th and Central to see what had happened.[17] (RT 4408, 4412-4413, 4425-4426, 4435-4436.) When he arrived, the crime-scene tape had been removed. (RT 4413.) Johnson was standing in the front yard of his house. (RT 4413-4414, 4427.) Adams walked over and asked Johnson what had happened. Johnson said that Baba and someone else had gotten shot. (RT 4413-4416, 4432.) Johnson told Adams that the shooting had involved a "mission." (RT 4414.) He stated that he had provided the shooter with a gun, and that the shooter had worn a ski mask. (RT 4414, 4433, 4438-4439.) Johnson remarked to Adams, "That's two crabs gone."[18] (RT 4415.)

On or about the next day, Allen described to Jelks how he had committed the shooting. (RT 3579-3580, 3623.) Allen said that he had walked up to the victims, "stooped over," and started firing at them. The victims never saw him coming. (RT 3580-3581, 3623.) Allen shot the passenger first and then the driver. (RT 3581, 3622-3623.) As he was shooting, Allen could see the passenger's flesh "popping off." (RT 3580, 3622-3623.) He also mentioned that he had not hit the car. (RT 3581-3582.)

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17. At the time of appellants' trial, Adams was in federal custody. (RT 4407-4408, 4420-4421.) He had pled guilty to engaging in a continuing criminal enterprise, involving the distribution of cocaine, and was awaiting sentencing. (RT 4407, 4421-4422.) Adams faced a sentence of 20 years to life. (RT 4422.) After he had pled guilty, agents from the Federal Bureau of Investigation contacted him about this case. (RT 4425, 4432-4433, 4437.) Adams hoped that, by testifying, he could somehow reduce his sentence. (RT 4422-4423, 4425.) However, nobody had promised him anything in exchange for his testimony. (RT 4417-4418, 4437-4438.)

18. "Crabs" was a derogatory term for Crips. (RT 3740, 4415-4416.)

Autopsies of the victims revealed the following: Beroit suffered three gunshot wounds. (RT 4094.) One bullet, which was recovered, entered his right ear and lodged in the central part of his head. (RT 4094, 4096, 4099.) A second bullet entered Beroit's right cheek and exited the left side of his nose. (RT 4094-4096.) This gunshot would have caused Beroit's eye to dislodge or be destroyed. (RT 4097.) A third bullet, which was recovered, entered the right side of Beroit's back. (RT 4095-4096, 4099.)

Loggins also suffered three gunshot wounds. (RT 4100-4101.) Two of the bullets, which were recovered, entered close together behind his right ear. (RT 4101, 4103-4104.) A third bullet entered Loggins' right shoulder. (RT 4101.) The victims' wounds were consistent with the shooter having been positioned adjacent to the car, parallel to the passenger door. (RT 4114.)

A firearms analysis revealed that all of the ballistic evidence was nine-millimeter caliber, manufactured by Winchester, and could have been fired from an Uzi. (RT 3833-3834, 3836-3837, 3853-3854.) Each of the cartridge cases recovered at the crime scene had been discharged from the same firearm. (RT 3833, 3849.) It was also determined that the coroner's bullets, and one of the bullets recovered at the scene, had been fired from the same firearm. (RT 3834, 3838-3839, 3849.) The other bullet recovered at the scene was too damaged to determine if it was a match, but it had the same general rifling characteristics as the coroner's bullets. (RT 3838-3839.)

In November 1991, Clark was shown a six-pack photo display, and selected Allen's photograph as looking like the man who had committed the shooting. (RT 3270, 3280-3283, 3318-3322.)

Marcellus James (nicknamed "Na Na") used to associate with the 89 Family.[19/] (RT 4041, 4072, 4321-4322.) He heard rumors that Allen had committed the carwash shooting. (RT 4082-4084.) In 1992, James saw Allen

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19. James moved out of the neighborhood in 1992. (RT 4046, 4074.)

down the street from James's house on 88th Place, and asked Allen if he had done it. Allen said, "Yeah." He told James that he had walked up to the victims and shot them. Allen stated that the victims were from the "wrong neighborhood." (RT 4040-4044, 4073, 4075-4078, 4081, 4083-4085, 4088, 4159, 4162-4163, 4240.) Allen added that when he shot the victims, the eyes of one of them "popped out of his head." (RT 4084.) Johnson's brother, Earl Ray, was present during this conversation.[20] (RT 4073-4074, 4081, 4085.)

In June 1994, Los Angeles Police Detectives Brian McCartin, Eugene Tapia, and Thomas Mathew[21] spoke to Johnson at Ironwood State Prison.[22] (RT 4173, 6040-6041, 6061.) They asked Johnson about an unrelated matter involving Albert Sutton. (RT 4173, 4176-4177.) Johnson stated that Sutton should not have brought Crips into the neighborhood. The detectives asked Johnson whether he knew that one of those Crips was Sutton's brother. (RT 4177.) Johnson replied: "It doesn't matter. You don't bring Crips into the 'hood." Johnson said that Sutton had to be "disciplined." (RT 4178.) When Johnson made these comments, he was "[n]onchalant," as if "[t]hat is just the way business is." (RT 4173, 4178.)

On August 11, 1994, Detective Rosemary Sanchez contacted Connor while investigating an unrelated murder in the neighborhood. Because Connor did not want to be seen talking to the police, Detective Sanchez dropped her business card on the ground near him. (RT 3970-3972.) The next day, Connor

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20. Allen erroneously states in his Opening Brief that James claimed that Allen had "privately confessed" to him. (AAOB 365, 375.)

21. Detective Mathew's name appears in the record as both "Matthew" and "Mathew." The latter is the correct spelling.

22. The detectives attempted to tape-record this interview, but the recorder malfunctioned. (RT 4186, 4236-4237.) A report summarizing the interview was prepared within 24 hours thereof. (RT 4187, 4237.)

called Detective Sanchez, and they scheduled a formal interview. (RT 3972-3973.)

On August 15, 1994, Connor came to the police station. (RT 3973, 3991.)[23] According to Detective Sanchez, Connor "didn't seem excited or happy" to be there, "but he was there willing to talk to us." (RT 3973.) One of the topics they discussed were the murders at the carwash on 88th and Central. (RT 3973-3974.) Connor did not know that his interview was being tape-recorded. (RT 3374, 3974, 3978.)

Connor said that he was scared for his family in the neighborhood, and that he did not want to testify. He asked if his name could be changed. (RT 3974.) Connor selected Allen's photograph as the shooter in the carwash case. (RT 3373-3375, 3986; Supp. IV CT 371, 383-384, 386-387.) Connor stated: "No. 5 is Fat Rat. He is the person who shot Donald and Payton." (RT 3375-3376.) Connor also said that he had seen Allen walk back to Johnson's house to get the gun, and return to Johnson's house after the shooting.[24] (Supp. IV CT 372, 374, 376, 378-382.)

In September 1994, while in custody on a probation violation involving an assault with a deadly weapon, James talked to the police about this case and other incidents in the neighborhood.[25] (RT 4044, 4049, 4054-4056, 4156-

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23. Detective Sanchez did not tell Connor about a reward on August 15, 1994. Such a reward, which pertained to murders unrelated to this case, was approved by the City Council on August 17, 1994. (RT 3975-3976.) To the best of Detective Sanchez's knowledge, no reward had ever been offered in this case. (RT 3978.)

24. At trial, Connor disavowed his statements implicating Johnson. (RT 3377, 3379-3380.) Before coming into court, Connor told Detective Sanchez that he would testify against Allen, but not against Johnson because Johnson had "too many followers." (RT 3987-3988.)

25. The police did not make James any promises. (RT 4044, 4160.) Detective McCartin, who conducted the interview, was not aware of James's

4158.) The interview was secretly tape-recorded. (RT 4159, 4238-4239.) Because he was afraid of retaliation from the 89 Family,[26] James initially lied to the police that he "didn't actually hear it from [Allen]" that Allen had committed the carwash shooting, but just heard it from somebody in the neighborhood. (RT 4044-4045, 4069-4072, 4080-4081, 4159-4160, 4234, 4240, 4325.) Later in the interview, James truthfully stated that Allen himself had told James about his commission of the shooting. (RT 4085.)

In December 1994, Detectives McCartin, Tapia, and Mathew interviewed Jelks about the carwash shooting and various other incidents, including the offense for which Jelks was in custody at the time of appellants' trial. (RT 3628, 3630, 3646, 3684, 3729, 3731, 3738, 4165-4166, 4168.) Detective McCartin picked up Jelks from his sister's house, said that the police needed to talk to him, and brought him to the police station for questioning. (RT 3628-3629, 3659-3660, 3684-3685, 4165-4166.) Jelks appeared "[v]ery scared and reluctant" to accompany the detective. (RT 4165-4166.)

The interview was secretly videotaped. (RT 3630-3631, 4178.) Jelks was not forthcoming at the beginning of the interview. (RT 4166.) He said to the detectives, "Man, you don't know what you are asking me to do." (RT 3731-3732.) Jelks was afraid of being labeled a snitch, and "end[ing] up dead." (RT 3629, 3631, 3729-3733, 3736-3739, 4165-4166, 4169, 4234.) He was also concerned for the safety of his relatives who still lived in 89 Family territory. (RT 4166, 4234.) In the opinions of Detectives McCartin and Barling, Jelks's fears were legitimate ones. (RT 4171, 4324-4325.)

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receipt of any benefit in exchange for his testimony. (RT 4154, 4156-4158, 4163, 4165.) According to Detective McCartin, James was not under arrest at the time of this interview. (RT 4157-4159.)

26. James feared retaliation despite having moved out of the neighborhood. (RT 4045-4047.)

The detectives asked Jelks to tell the truth, and had to pressure him to cooperate. (RT 4166-4167, 4171, 4188.) Jelks was told that if he did not cooperate, he would be arrested on his traffic warrants. (RT 4167, 4178-4179.) Detective McCartin asked Jelks about his children, reminded him that Christmas was approaching, and asked, "[Y]ou want to be home for Christmas, right?" (RT 3717, 3720-3721, 4181-4182.) Jelks was concerned about being arrested, and not being able to be home for Christmas. (RT 3630, 3717, 3732-3733, 4167-4168, 4179.) Detective McCartin told Jelks, "[W]e need to hear what happened," and, "We want to keep a nice flow of information coming." (RT 3717-3718, 3721, 4182.) Detective McCartin was suggesting that if Jelks did not provide information, he would be arrested. (RT 4182.)

Detective McCartin also told Jelks:

> You give me all the truth that you know on this stuff and I will know if you are lying. You will go home today. [¶] I'm going to show all this to the District Attorney and I'm going to tell them how you cooperated. [¶] I can't promise you that they won't file on you later on. . . . [¶] I can promise that you can go home today. [¶] I'll let you go if you give me truthful information and I will work with the D.A. and whoever else and keep you out of jail.

(RT 4184-4185.) Detective McCartin was referring to Jelks being arrested for a very serious offense, which carried a potential life sentence. (RT 3715-3716, 4185-4186.)

After giving conflicting statements about his involvement, Jelks incriminated himself on his own case. However, he did not provide enough information for Detective McCartin to arrest him at that time. (RT 4235-4236, 4238, 4247.) Jelks also identified Allen as the shooter in the carwash case, and said that Johnson had given Allen the gun. (RT 3739-3742.)

When the interview ended, Jelks was allowed to go home. (RT 3722, 4238.) He felt "more nervous" after he left the police station than he had felt before being allowed to leave. (RT 3749, 3755.) Jelks told the police the truth, and knew "it would get back to the street somehow" that he had cooperated with the police. (RT 3631, 3727, 3754-3755.)[27]

After Jelks spoke to the police, someone known as "Face" told Jelks that Johnson had sent him to find out if Jelks was "talking." Jelks told Face, "[N]o, I didn't say nothing." (RT 3631-3632.) Face stated that there was "a hit" out for Jelks. (RT 3633.) Another person, known as "Bat Mike," told Jelks that Johnson wanted Jelks to be shot. (RT 3631, 3633.) A female named Belinda told Jelks the same thing. (RT 3633-3634.) Jelks's niece and sister were also threatened. (RT 3634-3635, 3638.)

While in custody at the county jail, Johnson's telephone calls were intercepted by a wiretap. (RT 4772-4773.) On August 10, 1995, Johnson had a three-way telephone conversation with "Bill"[28] and "Denise." (RT 4774-4775, 4778; Supp. IV CT 388-389.) Johnson (identified in the transcript by his middle name Demone)[29] said, "Hello, this is Evil," and asked for Bill. (Supp. IV CT 388.) Johnson told Bill that it would be "beneficial . . . to school him." Bill responded that he had been doing so. Johnson replied: "I'm talking about a crash course." (Supp. IV CT 393.) Johnson also explained that, since he was facing the death penalty:

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27. Jelks was later arrested for the serious offense in August 1995, and had since been in custody. (RT 3682, 3749, 4172, 4238.)

28. Carl Connor had a brother named Bill, who associated with members of the 89 Family. (RT 3987, 4318.)

29. It was stipulated that the person identified in the wiretap transcripts as Demone, Cleamon, or "D" was appellant Johnson. (RT 4783-4784.)

[W]hat people fail to realize is, . . . looking at it from my position right now, what do the fuck I got to lose? . . . I mean they can get me for . . . talking on the phone or whatever. That's the fucking misdemeanor. That's five years max.

(Supp. IV CT 395-396.)

In a telephone conversation on August 30, 1995, Johnson told an unidentified female that he had to get in contact with Bill regarding Bill's brother. The female asked what Bill's brother's name was, and Johnson said it was Carl. (RT 4775-4776, 4780-4781; Supp. IV CT 397.) Johnson stated: "He told Bill that he don't even know me. But here it is in black and white down here. . . . Got his whole family. Got his wife and his kids." Johnson referred to an "hour and a half statement" that Carl Connor had given. (Supp. IV CT 398.) Johnson also said: "He the one that got Reco in jail. . . . Then he say he was up at the car wash when Fat Rat supposedly had done whatever they said he did . . . ." (Supp. IV CT 399.)

On September 12, 1995, Johnson had a telephone conversation with Bill Connor, inquiring about Carl Connor's statement. (RT 4776, 4873; Supp. IV CT 402-403.)

During another telephone conversation on September 14, 1995, Johnson asked an unidentified male whether he had "r[u]n into" Bill Connor's brother. (RT 4785-4786.) The unidentified male responded in the negative. Johnson complained that there was "nowhere to find his ass at." (RT 4786.)

On October 21, 1995, a handwritten note was seized from Johnson at the county jail.[30/] A portion of the note read:

Tell him that you handle most of my calls and contacts and you know for a fact that if I wanted him dead that it could have been done.

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30. It was stipulated that this note did not refer to the victims or witnesses in this case. (RT 4803-4804.)

[¶] You have personally heard people from all types of other sets swear to me that they will handle him, his family and anybody else that I needed handled, because I've done favors for them and they know I'll do it for them. But I told them don't sweat it, don't even trip on him.

(RT 4804; Peo. Exh. 44.)

II. DEFENSE CASE

A. Johnson's Defense

Records from Don Kott Ford reflected that on August 5, 1991, Carl Connor punched in at 7 a.m., punched out for lunch at 1:30 p.m., punched back in at 2:12 p.m., and punched out for the day at 5:18 p.m. (RT 4859-4860.) According to the general manager of the Don Kott Auto Center, Connor was terminated in 1992 due to a Department of Motor Vehicles investigation. (RT 4854-4856, 4858.)

James Galipeau, a Los Angeles County deputy probation officer, who was an expert on South Central Los Angeles street gangs, characterized Central Avenue as a "demilitarized zone." People were allowed to patronize the businesses on Central. It was unlikely that a gang-related killing would occur there. (RT 4868-4869, 4871-4872, 4876-4877, 4884.)

According to Galipeau, in gang-related shootings, it was "standard operating procedure" for one of the perpetrators to yell out a gang name or slogan to let others know who had committed the shooting. (RT 4878.) However, such a message would also be sent if a known member of the shooting gang rode his bicycle by the victims' car in front of a crowd that had gathered. (RT 4880.) The absence of gang slogans or colors does not mean that a crime was not gang-related. (RT 4885.)

If a "low level" gang member had been out of the neighborhood for a while, he would be required to do something when he returned to show that he was still "down with the 'hood." (RT 4889.)

In Galipeau's experience, a snitch would have reason to fear for his life. (RT 4889, 4893.) It was common for people suspected of being witnesses to be pressured by gang members. (RT 4890.)

Galipeau would consider the trustworthiness of information provided by a person in custody to be "low," as such a person too often would have a motive to lie in order to help himself. (RT 4893-4894.) But the mere fact that a person was in custody would not make his information "per se unreliable." (RT 4895, 4898.) According to Galipeau, informants who had been in custody for a period of time, and wanted to get something that was bothering them "off [their] chest," could be "extremely useful." (RT 4897-4898.) Galipeau also acknowledged that "sometimes . . . the only time you get people to talk, is when they are in custody." (RT 4898.)

A black Oakland Raiders' jacket was an item of clothing associated with Crip gangs. (RT 4944-4946, 4955-4956.) Galipeau had known Blood gang members to wear black windbreakers, but not black Raiders' jackets. (RT 4953-4954.) Although Galipeau had never seen a Blood in a black Raiders' jacket, he was "sure there have been, but they [would be] taking a chance if they did that." (RT 4954.)

The 89 East Coast Crips and Kitchen Crips were rivals.[31] (RT 4958.) Crip gangs "war[red]" as much with other Crip gangs as they did with Blood gangs. (RT 4876.) A Kitchen Crip would be just as likely to shoot an East Coast Crip as would an 89 Family Blood. (RT 4959.)

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31. The Kitchen Crips were also located on the east side of Central. (RT 4875.)

Allene Johnson, appellant Johnson's mother, passed by the crime scene as she was driving home. (RT 4960-4964.) When she arrived home, Mrs. Johnson saw Johnson and several other people outside her house. (RT 4964-4965, 4974-4975.) She was certain that Jelks was not there. (RT 4971, 4975.) Mrs. Johnson asked what had happened, and someone said they did not know, but had just heard shooting. (RT 4965.) Because she could not see the crime scene from her yard, Mrs. Johnson walked to the motel near the corner of 88th and Central to see what was happening. (RT 4966, 4970.)

Johnson did not have a bicycle, but Mrs. Johnson's husband had one. (RT 4978-4979.)

Mrs. Johnson had heard her sons being called by their nicknames. Johnson was known as "Evil," Earl as "Silent," and Timothy as "Sinister." (RT 4974.)

While this case had been pending, Mrs. Johnson spoke to Johnson many times. (RT 4975.) She denied that Johnson had asked her to find out where "FM" (Jelks) was. (RT 4976-4977.)

B. Allen's Defense

It was stipulated that the transcript of Jelks's interview with Detectives McCartin and Tapia did not contain the name Angie in reference to this case. (RT 5049.)

III. PROSECUTION REBUTTAL

During a telephone conversation between Johnson and his mother on September 2, 1995, Johnson stated: ". . . I'm gonna try to call him 'cause I need . . . somebody to . . . call and see if . . . F.M. . . . moved, or . . . where he housed at." (RT 5026-5028; Supp. IVA CT 326.) Mrs. Johnson said that Jelks may be in protective custody. (Supp. IVA CT 327.)

On September 5, 1995, Johnson had another telephone conversation with his mother, in which he asked: "[D]id . . . you call on, check on FM?" Mrs. Johnson replied that "[y]ou told me to tell Ray [to] do it," but "[h]e haven't been in here long enough for me to tell him." (RT 5027, 5029-5032; Supp. IVA CT 328.)

In a telephone conversation between Johnson and his mother on September 8, 1995, Johnson asked: "What, you ain't heard nothing about Freddie, FM?" Mrs. Johnson responded, "No, I ain't heard nothing." (RT 5032.)

According to Detective Barling, when the Oakland Raiders moved to Los Angeles in the early 1980's, both Crip and Blood gang members began wearing Raiders' jackets. Detective Barling had seen Bloods wearing Raiders' jackets. (RT 5033-5034.) Black was "kind of a neutral color." (RT 5034, 5043.) Johnson was shown in a photograph wearing a black jacket. (Peo. Exh. 47.) The jacket was similar in style to a Raiders' jacket, without the Raiders' logo on it. (RT 5035-5036, 5042.) In a photograph of a group of individuals making hand signs, one had on a black long-sleeve shirt with "89 Family" written on the back. (RT 5035, 5038-5039, 5042; Peo. Exh. 48.) In another photograph of four 89 Family members, one was wearing a Raiders'-style jacket. (RT 5035, 5039-5041, 5043; Peo. Exh. 49.)

One of the people in the latter photograph, Melkean Huff (aka "Base"), was a large person who could be described as "muscular over weight." (RT 5044-5045.) Allen was a little "rounder" and shorter than Huff, however. (RT 5046-5047.)

In other crimes committed by members of the 89 Family that Detective Barling had investigated, the perpetrators did not consistently wear red, or any other particular color. (RT 5034.)

Allen would be 25 years old in September 1997. Johnson was older than Allen. (RT 5041.)

PENALTY PHASE

I. PROSECUTION CASE

A. Evidence In Aggravation Against Johnson

1. Forcible Lewd Conduct With Children

Shina Parker was 19 years old at the time of appellants' trial. (RT 5841-5842.) From about age eight to 13, she lived with her grandparents, uncles, and siblings at her grandparents' house on 938 East 88th Street. (RT 5842-5844, 5910-5912.) Appellant Johnson was one of Shina's uncles. (RT 5843, 5856.)

When Shina was around eight or nine years old, and Johnson was about 20 or 21, Johnson told Shina to go in the back room of the house. (RT 5846-5848.) He sat Shina on the bed, laid her down, and removed her pants and panties. (RT 5848-5849.) Johnson then unzipped his pants, and had sexual intercourse with her. (RT 5849-5850.) Shina "didn't want [this] to happen," but she obeyed Johnson because he was older. (RT 5849-5851.) The intercourse lasted a few minutes. Shina did not remember how it felt. (RT 5851.)

When Johnson finished having intercourse with Shina, she got dressed and went into the den. She did not tell anybody what had happened, because Johnson said that if she did, she would get in trouble. (RT 5852.)

At some point, Shina told her mother, and her friend TaShanna Sowell, about the incident. (RT 5852-5855, 5891, 5893.) TaShanna revealed that she had had a similar experience. (RT 5856.)

TaShanna testified that when she was about 10 or 11, she rode her bicycle to Shina's house, but Shina was not home. (RT 5894-5895, 5904.) While there, TaShanna spoke with Johnson. (RT 5895.) She had known

Johnson for a while, and felt safe with him. (RT 5897.) Johnson was "older than a high school person." (RT 5900.)

TaShanna and Johnson rode their bicycles around the corner, and lied on the grass behind a house. (RT 5895-5897.) While they were talking, Johnson pulled down TaShanna's pants and underpants. (RT 5897-5898.) TaShanna felt "awkward" because she did not know what was happening. (RT 5897-5898.) Johnson unzipped his pants, and had sexual intercourse with her. (RT 5898-5899.) TaShanna was scared. (RT 5899, 5901.) She "was little. It wasn't supposed to happen." (RT 5900.) The intercourse lasted about a couple of minutes. (RT 5899-5900.) Johnson then left TaShanna on the grass, and rode off on his bicycle. (RT 5901.)

TaShanna got dressed and went home. (RT 5901-5902.) She did not tell anybody about the incident because she "didn't know how and . . . didn't want to get in trouble." (RT 5902.) Several years later, when TaShanna was 15, she told Shina and Shina's mother what had happened. (RT 5902-5904, 5907.) TaShanna cried when she remembered the incident. (RT 5902.)

Emerald Parker was Shina's younger sister. (RT 5893-5894, 5910-5911.) In about 1989, when Emerald was eight or nine years old, she "got[] into" Johnson's Noxema. (RT 5912-5915, 5923.) Johnson was an adult at the time. (RT 5913.) When Johnson found out, he called Emerald and her siblings into a back bedroom, and asked who was responsible. Emerald admitted that she was. Johnson told the others to go to a different part of the house. (RT 5914.)

After the others left, Johnson told Emerald to "suck his dick," or he would whip her with an extension cord. (RT 5915.) Emerald was scared, and started crying. (RT 5915, 5920.) She was afraid that she would get beaten if she did not do what Johnson said. (RT 5920.) Johnson unzipped his pants, put his penis in Emerald's mouth, and had Emerald orally copulate him. (RT 5915-

5917.) The bedroom door was open, and Shina glanced into the room. (RT 5918.) She saw Johnson standing in front of Emerald, making Emerald "suck" his penis. (RT 5856-5858.)[32/]

Johnson told Emerald not to tell anybody what had happened. (RT 5917.) Emerald thought that if she did, Johnson would hit her with the extension cord. (RT 5917-5918.) When Emerald went into the den, Shina asked her what she had been doing in the other room. Emerald told Shina what had happened, but said not to tell anyone. (RT 5918.) Later, the two told their mother about the incident, and a social worker had Emerald removed from her grandparents' home. (RT 5858-5859, 5918-5920.)

In January 1995, Detective Paula Feinmark interviewed Shina, Emerald, and TaShanna, but they were unwilling to cooperate. (RT 5859, 5903, 5921-5923, 5925-5927.) Emerald told Detective Feinmark that she feared for her and her family's safety. (RT 5927.) Shina stated that she did not want Johnson to go to jail. (RT 5927, 5932.) TaShanna explained that Shina did not want her to testify, and TaShanna did not want to damage their relationship. (RT 5932-5933.)

TaShanna later agreed to talk to Detective Feinmark, and she gave a videotaped interview. (RT 5903-5904, 5928, 5933.) When describing the incident, TaShanna stated that Johnson had pushed her shoulders to the ground. (RT 5929.) TaShanna did not resist because she was "frozen and could not speak or move." (RT 5931.)

Because of the victims' unwillingness to testify, and lack of corroborating evidence, the District Attorney's Office declined to prosecute. (RT 5906, 5929-5930, 5933-5934.)

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32. This occurred sometime after Shina's incident with Johnson. (RT 5857-5858.)

2. Murder Of Tyrone Mosley, And Attempted Murders Of Kim Coleman And Kenneth Davis

One evening in September 1991 (the month following the charged murders), Marcellus James was present when Johnson, Jelks, and "Jelly Rock" (89 Family member Leandre Hewitt) were discussing a party that was taking place in the 97 East Coast Crips' neighborhood.[33/] (RT 6195, 6210, 6306-6307.) Johnson decided to do a drive-by shooting. (RT 6208.) Johnson, Jelks, and Jelly Rock got into a black four-door Mazda. (RT 6196, 6198.) Jelks was the driver, Johnson was in the front passenger seat, and Jelly Rock was in the back seat.[34/] (RT 6198-6199, 6216-6217, 6223.) Johnson and Jelks were armed with .38- and .45-caliber firearms. (RT 6196-6198.)

The car left, and returned about five minutes later. (RT 6199.) When Johnson got out of the car, he bragged that they had "gotten the 97's." (RT 6200-6201.) Johnson stated that they "caught the 97 slipping on 97th Street." Two females were in the street arguing, and some 97's were trying to break up the fight. Jelks flashed his headlights on and off to make the 97's think that they were their "homeboys." (RT 6200.) When they got alongside the two females, Johnson "opened up" with the .45-caliber pistol. (RT 6201.)

On September 14, 1991, Kim Coleman was at a party at her cousin's house, which was located on Avalon and 97th in 97 East Coast Crip territory. It was predominately an East Coast Crip party. (RT 6238, 6245, 6264-6265,

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33. On cross-examination, James testified that he did not remember when this incident occurred, but it had to be around 1992 or 1993. (RT 6209.)

34. In 1994, James told the police that Jelly Rock was the driver, Jelks was in the front passenger seat, and Johnson was in the back seat. (RT 6213-6216, 6304, 6308.) James was mistaken when he said that. He explained, "It was a while before. . . . I didn't really remember." (RT 6223; see also RT 6308-6309.)

6268.) Coleman went to the party sometime between 10 and 11 p.m. (RT 6265.)

During the party, Coleman and several of her cousins got in a fight with two females, and the fight moved out into the street. (RT 6267, 6269-6271.) There were close to 20 people outside. (RT 6270-6271.) While in the middle of the street, Coleman saw a large white four-door car with its lights off approaching. The car was traveling east (i.e., from McKinley toward Stanford). (RT 6271-6273, 6284.) Coleman heard gunshots. (RT 6273.) She got down on her knees, then realized that she had been hit. (RT 6273-6274.) Coleman was shot in the back. (RT 6264, 6279.)

When the car passed by, Coleman saw "the heads and the guns hanging out" of the car. (RT 6273.) Two heads were on the passenger side. (RT 6284.) There appeared to be at least three or four Black males in the car. (RT 6284-6285.)

After the shooting, Johnson sent an 89 Family member back to 97th Street in a white Chevy, to "see what was up." When he returned, he told Johnson that they must have killed somebody, because the police were there and the yellow crime-scene tape was up. (RT 6201, 6208.)

Sometime after 3 a.m., Detective Jerry Johnson responded to the scene. (RT 6227-6228.) The shooting had occurred about 12:05 a.m. (RT 6240, 6244.) Three people -- Tyrone Mosley, Coleman, and Kenneth Davis -- were wounded by gunshots. Mosley, an East Coast Crip gang member nicknamed "Soul," was killed. (RT 6229-6231, 6236-6238, 6268-6269.) He died from a through-and-through gunshot wound to the side of his body. (RT 6557-6558.)

Four spent .45-caliber shell casings (which were determined to have been fired from the same gun), and one spent .380-caliber shell casing, were recovered on the north side of 97th Street. An expended .45-caliber bullet was also recovered. (RT 6231, 6556-6557.) Based on his observations, Detective

Johnson opined that the person firing the shots had been moving in an east to west direction. (RT 6234-6235.) Assuming this was a drive-by shooting, the shots were most consistent with having been fired from the passenger side of the car. (RT 6232.)

In July 1994, Detectives McCartin and Tapia interviewed Keith Williams, aka "K Rock," following his arrest on a narcotics warrant.[35/] The interview was secretly tape-recorded. (RT 6317-6318, 6521-6523, 6527-6528, 6531.) Williams indicated that the day after the Mosley murder, Johnson told Williams and several others who were present: "[W]e shot these niggers up last night." (Peo. Exh. 84A at pp. 6-7, 12-14.)[36/] Johnson said that the 97 East Coast Crips were having a party, and "we rolled up" and flashed the headlights. (*Id.* at pp. 9-10, 14.) Johnson shot and killed the victim when "the fool walked up . . . to the car." (*Id.* at pp. 9, 11, 14-15.) Johnson stated that he "[g]ot that one for sure." (*Id.* at pp. 15-16.) Johnson laughed about the shooting. (*Id.* at p. 25.)

According to Williams, Johnson was feared, and if he "put the word out" to do something, members of the gang had to do it or "face the consequences." (Peo. Exh. 84A at pp. 11-12, 16-17, 20-21.) They knew Johnson would "kill you and won't think nothing about it." (*Id.* at pp. 12, 16.)

Sometime before August 11, 1995, Williams was subpoenaed to appear before the grand jury. (RT 6516-6517.) In a tape-recorded telephone conversation on that date, Johnson directed Williams to appear. Otherwise, Johnson explained, it would "look as though I'm some type of shot caller and

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35. No promises were made to Williams other than that the detectives would not tell anybody that he had talked to them. (RT 6527-6529.) Detective McCartin never interceded in Williams' narcotics case. (RT 6228.)

36. The transcript of Williams' interview (Peo. Exh. 84A) does not appear to have been included in the Clerk's Transcript. By separate cover, respondent will move to augment the record with that transcript.

I told you not to come to court." (RT 6496-6498, 6510, 6512-6513, 6519; Supp. IV CT 449, 451-453.)

Johnson instructed Williams to tell the police that he would cooperate, but then "blurt . . . out" on the witness stand that he "went along with whatever . . . [the police] said" because they had threatened to put him in jail for something he did not do. (Supp. IV CT 453-454, 456-457, 465.) Johnson told Williams to testify that the police were conspiring against Johnson, and trying to get Williams and others to "make up stories" against him. (Supp. IV CT 458.) According to Johnson, this would "automatically discredit[] [Williams] as a witness." (Supp. IV CT 459; see also Supp. IV CT 462.) Johnson also directed Williams to tell Johnson who he saw at the grand jury proceedings. (Supp. IV CT 461.)

The day he testified before the grand jury, Williams was "reluctant and agitated." He expressed fear of retaliation from the 89 Family. (RT 6517.) Williams told the grand jury the truth. (RT 6330, 6339.)

In October 1995, the following note written by Johnson was recovered at the county jail:[37]

> Things I would like for you to try and do.
>
> Number 1. You pull K Rock [Williams] to the side and get at him proper as if you know that he gave a fucked up statement against me. . . .
>
> Tell him that you handle most of my calls and contacts and you know for a fact that if I wanted him dead that it could have been done.
>
> . . . Tell him that he could call my lawyer and investigator and tell them that he did tell the police and the grand jury what he told them, that he was lying on me because that's what the police wanted to hear[,] to

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37. A portion of this note was introduced during the guilt phase. (RT 6564.)

tell them that the police told him that the[y] would get the D.A. to go easy on him for his dope case if he would put the finger on me about some murders.

So he told them that I told him about the 97 ECC [East Coast Crips] murders. And the truth is . . . that Lil . . . Evil is the one [who] told him about 97 . . . ECC and that I have never talked to him about any murders. . . .

. . . Get his ass . . . on the phone talk[ing] to my lawyer while you was right there in his face . . . . Get at Madd . . . and Sticks[38/] . . . to see if they would get at my lawyer and for Madd to say that he was there when FM, Lil Evil and Jelly Rock drove over to the . . . ECC block party and shot it up and killed Soul from 97. . . .

Sticks, FM told him one day since he been out that him, Lil Evil and Jelly Rock did the 97 ECC.

Before they do it let me know what's up first.

(RT 6564-6568; Peo. Exh. 85.)

On October 5, 1995, during a tape-recorded telephone conversation with an unknown person, Johnson stated: "[A]ll of my shit . . . is like adding a little gas to the fire. A little drop here, a little drop there. . . . It ain't nothing . . . a lawyer can't, they ain't gonna be useable . . . ." (RT 6497-6498, 6505; Supp. IV CT 471.) "But . . . Bill['s] brother. . . . I need somebody to holler at [that] dude man, 'cause Bill ain't doing shit. . . . Bill's scared of [Detective] Mathews." (Supp. IV CT 471-472.) Johnson further stated:

[T]his mother fucker man, . . . I talked to him he tell me he got a . . . subpoena for a grand jury indictment against me . . ., I talked to the boy,

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38. There was a person in the neighborhood nicknamed "Madman." (RT 6217.) "Sticks" was an 89 Family member whose real name was Theodus Givans. (RT 6520-6521.)

> . . . I schooled him on what time it is and . . . everything . . . . I said what you do is you go in there and tell them mother fuckers that the police made you say that shit, which they did, they've been harassing you . . . . So . . . he tell me . . . all this old shit, . . . which sounded real good . . ., dude go in there and . . . man he put it on thicker than what he did before I was [in] the state.

(Supp. IV CT 472.)

In a tape-recorded telephone conversation on October 22, 1995 with a person nicknamed "Gadget," Johnson said that he "need[ed] somebody to talk some sense in to" Williams. (RT 6511-6512; Peo. Exh. 83A at pp. 2-4.)[39] Johnson told Gadget: "I need some love homie. . . . I ain't gonna speak it to you over the phone. . . . Ain't nothing that you ain't done before." (Peo. Exh. 83 at p. 4.)

At trial, Williams denied knowledge of the Mosley murder, and testified that he had lied to the police in 1994. (RT 6317-6318, 6324.) He acknowledged that "it's a bad thing to tell on your brothers." (RT 6331.) Williams also admitted that he was afraid of Johnson, but believed, "As long as I don't cross his path I'm cool." (RT 6333; see also RT 6540.)

Before he testified, Williams was scared, and did not want to enter the courtroom. (RT 6317, 6517-6518.) He told Detective McCartin that his mother still lived in the neighborhood, and he did not want anything to happen to her. (RT 6518.) Williams was afraid both for himself and his family. (RT 6540.)

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39. The transcript of this telephone call (Peo. Exh. 83A) also apparently was not included in the Clerk's Transcript. Respondent will move to augment the record therewith.

3. Solicitation Of Murder Of Nece Jones

Georgia Denise (aka "Nece") Jones was a "smoker"[40] who lived in the neighborhood. (RT 6016, 6023, 6042.) She would have been considered one of the neighborhood associates of the 89 Family. (RT 6016-6017.)

In 1993, Willie Bogan was murdered on Manchester and Wadsworth. (RT 6115-6116.) Charles Lafayette, a Swan gang member nicknamed "Lil Batman," was arrested for the murder. (RT 6014, 6116.) Lafayette was one of Johnson's "homeboys." (RT 6015, 6125.)

Jones provided Detective Gary Aspinall with information regarding the Bogan murder, and identified Lafayette as Bogan's killer. (RT 6115-6117.) Because she had expressed legitimate concerns for her safety, Jones was provided safe housing away from the neighborhood. (RT 6117-6119.) Jones testified at Lafayette's trial on May 25, 1994. (RT 6118.) On June 6, 1994, the jury hung and a mistrial was declared. The case was rescheduled for trial, and Jones was ordered back as a witness. (RT 6118-6119.)

On June 8, 1994, Detectives Tapia, McCartin, and Mathew interviewed Johnson at Ironwood State Prison. (RT 6041, 6061.) The detectives left the prison at about 2:30 p.m. (RT 6063-6064.) At about 3:30 p.m., Johnson had a tape-recorded telephone conversation with fellow gang member Reco Wilson (aka "Little K Mike").[41] (RT 5991-5996, 6017-6018; Supp. IV CT 438.) Johnson stated: "Hey, this an emergency, dog. The motherfucking homicide police just left from up here sweating a nigger." (Supp. IV CT 438.) Johnson instructed Wilson: "You know what I'm saying, . . . them three smokers out

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40. A "smoker" was a term used for a person who frequently smoked cocaine. (RT 6016.)

41. Ironwood State Prison officials routinely monitored inmates' telephone calls. (RT 5992.)

there? . . . [P]ut a leash around their ass, by any means necessary."[42] (Supp. IV CT 440.) Johnson added: "[I]t's . . . up to . . . the streets. If they can't pull no fish up out the water, then they don't eat." (Supp. IV CT 441.)

Five days later, on June 13, 1994, Nece Jones was killed.[43] (RT 6041-6042, 6119.) Carl Connor witnessed the shooting. (RT 6150-6151.) Connor was in his friend Derek Battle's backyard, when he saw a person in the alley who he recognized from the neighborhood as Reco, pull a red rag over his face. (RT 6142-6144, 6146, 6154.) Connor thought that "[s]omething was going to happen," so he ran to the front of the house to see if any of his family was out front. (RT 6147, 6188.) He then saw Reco Wilson running with a gun toward Jones. (RT 6147-6148.) Jones was with another woman, who was carrying a bottle of wine in a bag. (RT 6148.)

Jones ran across the street, and Reco Wilson ran after her and shot her. He fired about six or seven shots. (RT 6149-6150.) Jones fell by the curb across the street. (RT 6150-6151.) Reco next "got right up on [Jones]," and shot her in the head. (RT 6151.) He then ran back into the alley. (RT 6152, 6185-6187, 6189.)

Approximately 15 minutes later, Connor saw Reco Wilson and another male drive up to the crime-scene tape. (RT 6189.) About 30 or 40 minutes after the shooting, Connor made an anonymous telephone call to the police. (RT 6152, 6176, 6190.)

The shooting was reported at about 11:30 a.m. (RT 6043.) Detective Tapia responded to the scene, which was in 89 Family territory on 87th Place

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42. The phrase, "put a leash around" someone, meant to control that person. (RT 6023-6024.)

43. In the days preceding June 13, 1994, Detective Aspinall lost contact with Jones. (RT 6119.)

and Wadsworth. (RT 6041, 6043, 6119.) Jones's body was lying in the gutter on the northwest corner of the intersection. (RT 6042, 6059-6060.)

Six expended shell casings, and two expended bullets, were recovered within five to six feet of Jones's body. (RT 6049-6050, 6054-6056, 6060.) This indicated that the shooter was very close to the victim at the time of the shooting. (RT 6060.) The shell casings were the same caliber. (RT 6049-6050.) A broken liquor bottle inside a bag was found on the sidewalk on the northeast corner of the street. (RT 6057-6058.)

Jones suffered six gunshot wounds. (See RT 6072-6073, 6075-6077.) One bullet entered the back of her head. (RT 6072.) The presence of soot in the wound indicated that the muzzle of the gun was either at the site of the wound, or very close thereto, when the gun was fired. (RT 6077-6078.) The bullet was recovered behind Jones's jaw. (RT 6073.) There were two entry wounds on the left side of Jones's face. One of the bullets exited the right side of her nose beneath her eye, and the other exited her right cheek. (RT 6073.) Jones had two gunshot wounds in her left arm. (RT 6075-6077.) She also sustained a gunshot wound above her right breast. The bullet, which was recovered, had re-entered her right arm. (RT 6075-6076.)

On June 30, 1994, Detective Aspinall conducted a tape-recorded interview of Johnson at Ironwood State Prison. (RT 6120.) At first, Johnson denied knowing anything about Jones's killing. (RT 6121.) Later in the conversation, however, Johnson admitted that he knew what had happened. (RT 6121-6122.) "Kill or be killed," Johnson remarked. (RT 6123.)

Johnson added:

> [I]f I run into anybody that has . . . testified or has the power to put one of my homies down[,] . . . [a]nd . . . if I'm gonna expect for him to do the same for me, then that witness is expendable to me. My homie's life becomes more important . . . than his. So you got to weigh it.

(RT 6124.) Asked if he would "kill that associate," Johnson replied: ". . . I would -- that would be my action." (RT 6124-6125.) Johnson commented, "Snitches die." (RT 6138.) He denied responsibility for Jones's death, however. (RT 6127-6128.)

During a tape-recorded telephone conversation in September 1995, Johnson was told that the police had a tape of him talking to Reco Wilson from prison. (RT 6497, 6500; Supp. IV CT 466.) Johnson responded: "I ain't never talked to . . . R[e]co from no pen." (Supp. IV CT 466.) Johnson then acknowledged, "Damn, I probably . . . did. Haaaaaa." (Supp. IV CT 467.) Johnson said to "tell R[e]co, don't even trip, if I did call him or not 'cause . . . all he got to do is subpoena me . . . . And I'll get up on the stand and say, I ain't never talked to that man in my life." (Supp. IV CT 468.)

Reco Wilson was convicted of Jones's murder. (RT 6018, 6154.)[44/]

4. Solicitation Of Murder Of Detective Mathew

Detective Mathew was a gang officer of East Indian descent, about whom Johnson had complained to Detective Barling on more than one occasion. (RT 6006-6008, 6010-6013.) Johnson was upset that Detective Mathew was always "messing with" him. (RT 6010-6012.)

In August 1994, during a tape-recorded telephone conversation from Ironwood State Prison, Johnson stated: ". . . I'm down to something like 50 something days . . . . I'm gonna be able to have a scope for old Matthews . . . . And after that motherfucker would be able to kick back . . . ." (RT 5991-5992, 5997-5998; Supp. IV CT 443.) The phrase, "put a scope" on somebody, meant to look at that person through the scope of a gun and shoot him. (RT 6025-6026, 6028-6029.)

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44. Lafayette was retried for Bogan's murder, and convicted. (RT 6015, 6119.)

During another tape-recorded telephone conversation from prison in October 1994, Johnson said: "I need one of them Barlim Barlims. . . . And put an eye on that motherfucker. . . . [P]ut a . . . glass -- put a pair of binoculars on that mother." (RT 5991-5992, 5998-6000; Supp. IV CT 445.) Johnson also stated: ". . . I wanna hook up something . . . for your friend." The other person asked: "Who, Matthews?" Johnson replied: "Yeah, fucking Indian. . . . I don't want him to see me till it[']s too late. (Laughter[.])" The other person added: "When he see you it'll be the last time." (Supp. IV CT 446.) Johnson said: "Yeah, he be talking about 'Why me?' (laughter) 'Why me?' . . . But ah, why don't you price one out for me. Tell David I say get it." (Supp. IV CT 446-447.)

A "Barlim" was a disrespectful term used by Bloods to refer to a Crip gang called the Harlem 30's. (RT 6026-6027.) In the context of the above conversation, "Barlim Barlim" referred to a "3030" rifle. (RT 6027-6028.) The phrases "put an eye," "put a glass," and "put binoculars" on somebody meant the same thing as putting the scope of a gun on that person. (RT 6027-6028.)

5. Possession Of Shank In Custody

In November 1995, during a random search for contraband at the Men's Central Jail, a metal "shank" was found in a pair of pants in Johnson's cell.[45] (RT 5936-5938.) The object measured four and three-quarter inches long, and approximately half an inch wide. It was sharpened to a point at one end, and had a piece of cloth tied to the other end. (RT 5938-5939; Peo. Exh. 50.)

In Deputy Robert Maybury's experience as a jailer at the Men's Central Jail, inmates typically tied a cloth to one end of a shank to aid in hiding the weapon. (RT 5935-5936, 5939-5940.) Deputy Maybury explained: "We will

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45. Johnson was housed in a single-man cell. (See RT 5936.)

look in certain areas and we will see a string and figure it's just string and in actuality it is a tether for the . . . stabbing device." (RT 5939-5940.)

B. Evidence In Aggravation Against Allen

On March 9, 1993, Roderick Lacy and his friend Chester White, nicknamed "Stupid," were shot. (RT 6287, 6301, 6395.) Lacy and White were members of the Avalon Garden Crips. (RT 6300-6301, 6395-6396, 6416.) The shooting occurred in the daytime, as Lacy and White were leaving a market on 89th and Avalon. (RT 6288, 6396, 6399.)

After purchasing some items, Lacy and White left the store and walked toward 89th Street. (RT 6397-6399.) Lacy heard gunshots coming from behind him, and was hit in the back of the leg. (RT 6399-6400.) He turned around to see who was shooting, and saw a couple of guys. (RT 6403-6404.) Lacy ran. When he reached a safe distance, he looked back and saw White lying on the curb by the grass, bleeding. (RT 6399-6400.) Somebody with his face covered stood over White, shot him, then ran. (RT 6400-6401.)

On the date of the shooting, the police talked to Lacy in the hospital. (RT 6423, 6473, 6490.) He selected Allen's photograph from a six-pack photo display. (RT 6474, 6476-6477, 6480.) Lacy stated that Allen was "one of the guys who was armed with a handgun and was involved in the shooting. He was a male Black, [six] feet tall, over 200 pounds." (RT 6478-6479, 6492-6493.) Lacy described Allen's gun as a nine-millimeter "Uzi-type" weapon. (RT 6479.)

Lacy testified that he merely had identified Allen's photograph as being someone he knew. (RT 6402, 6423-6424.) He admitted, however, stating earlier that morning on the way to court that Allen was the person who had shot

at White. (RT 6402.) Lacy also acknowledged that he was concerned for his safety.[46] (RT 6413-6415.)

In March 1993, at about 2 p.m., Earl Woods and his son were on their way to the market on 89th and Avalon, when they heard shooting. (RT 6426-6428.) Woods saw people running from the market. He also saw White run partway across the street, and then collapse. (RT 6428-6429, 6435.)

Woods talked to the police about a half an hour after the shooting, and told them what he saw. (RT 6429, 6433, 6477, 6490.) Woods indicated that Allen and a person named Marvin, aka "Psycho," had approached the market at the same time White did. (RT 6429-6430, 6433, 6480.) Woods had known Allen and Marvin for about two years. (RT 6433.) Allen was carrying a gun that looked like an Uzi. (RT 6433-6434.) Woods told the police that Allen lived in some apartments near 89th and Avalon. (RT 6437.) He selected Allen's photograph from a six-pack photo display as being one of the people involved in the shooting. (RT 6434, 6477, 6480.) Woods also signed a written statement. (RT 6431-6432.)[47]

Approximately nine spent casings were recovered at the scene. (RT 6289-6290.) Six of the casings were nine-millimeter caliber, and three were .40 caliber. (RT 6290.) Two spent .40-caliber bullets were found underneath White's body, below his head. (RT 6290, 6293-6294, 6489-6490.) White's face was covered with blood. (RT 6293-6294.)

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46. Lacy testified at Allen's prior-murder trial that he was unable to identify the shooters. (RT 6419.) Later, at the county jail, he heard some Blood gang members say that he had "snitch[ed]," and they were going to "have his head." (RT 6407, 6411-6415.) When he heard these statements, Lacy felt concerned for his safety. (RT 6413-6414.) He still "look[ed] over [his] shoulders every day." (RT 6415.)

47. Woods testified that he had lied to the police, and had not seen Allen. (RT 6429, 6433-6434, 6438.) Woods still lived in the neighborhood, and was concerned about his family's safety. (RT 6438-6439.)

A nine-millimeter "machine pistol," which looked like an Uzi, and a .40-caliber semiautomatic pistol, were found the day of the shooting in some ivy or bushes on the side of Allen's uncle's house. (RT 6294-6295, 6298-6299.) The house was located on East 90th Street, about a block from the murder scene. (RT 6295-6296.) The two guns were ballistically matched to the shooting. (RT 6295, 6559-6560.)

White suffered five gunshot wounds. (RT 6561.) One bullet entered the left side of his chest and exited his left shoulder area. (RT 6561-6562.) A second bullet entered his left shoulder and exited his right arm. (RT 6562.) A third bullet entered his left cheek, and was recovered on the right side of his neck. (RT 6296-6297, 6562.) There was soot in the wound, which indicated a "close shot," meaning that the muzzle of the gun had been 18 inches or less from White's face. (RT 6297, 6562.) A fourth bullet entered White's left hip and exited his buttock. (RT 6562.) And a fifth bullet entered the back of his left thigh, and was recovered from his right thigh. (RT 6562-6563.) The bullets recovered during the autopsy had been fired from the nine-millimeter machine pistol. (RT 6296, 6559-6560.)

Allen was convicted of White's murder. (RT 6302.)

II. DEFENSE CASE

A. Allen's Evidence In Mitigation

Allen was born on September 2, 1972 to Rebecca Allen and Booker Cole. (RT 6625, 6627-6628.) Rebecca was 17 years old. (RT 6628.) She was no longer in a relationship with Cole when Allen was born. (RT 6628-6629.)

Rebecca lived with her parents, Walter and Diane Blackledge,[48/] in their house on 729 East 90th Street. (RT 6625-6627, 6635, 6643.) After Allen was born, Rebecca moved with him to 729 1/2 East 90th Street, a one-bedroom

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48. Walter was Rebecca's stepfather. (RT 6627.)

apartment behind her parents' house. (RT 6626-6627, 6629, 6640.) Rebecca supported herself and Allen through AFDC (Aid For Dependent Children).[49/] (RT 6630.)

In 1973, Rebecca had a relationship with Arthur King. She got pregnant and had another child, Derek, on January 3, 1974. (RT 6631.) Rebecca did not live with King, but he remained her boyfriend for a number of years. (RT 6632.) Both Derek and Allen were included in family events at King's mother's house. (RT 6632-6633.)

When Allen was about five, Rebecca moved with her children to a two-bedroom residence in Avalon Gardens. She moved there because it was a bigger place, and "[i]t was time for [her] to get independent and branch out a little bit" from her parents. Rebecca's "focus was to . . . get [herself and her children] into a . . . better place than what [she] was in." (RT 6633-6634, 6636, 6671.)

Rebecca's mother was involved in Allen's upbringing. Allen was "the first grandchild," and "[s]he took time with him and played with him." (RT 6634.) Rebecca's stepfather also played with Allen, but he worked a lot. (RT 6634-6635, 6669.)

From kindergarten through the first or second grade, Allen attended a Catholic school in Compton. Rebecca sent Allen there because she had had a Catholic education, and wanted him to have one too. (RT 6637.) Rebecca believed that a Catholic school would give Allen a better education. (RT 6667-6668.)

When Allen was around five or six, Rebecca married Louis Jordan. (RT 6638.) King was upset about the marriage, and as a result, Allen was no longer

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49. Other than giving Rebecca $100 when Allen was about 10 or 11 years old, and giving Allen a bicycle when he was about 11 or 12, Cole made no financial contribution toward Allen's upbringing. (RT 6629-6630.)

welcome at King's mother's house. (RT 6638-6639.) Rebecca was married to Jordan for four months. (RT 6639.) She left him after he had hit her during a fight. (RT 6639-6640.) Rebecca's children later told her that Jordan had kicked them. (RT 6639-6640.)

Rebecca and her children moved back to 729 1/2 East 90th Street. (RT 6640-6641.) Shortly thereafter, when Allen was around six, Rebecca's mother died of a heart attack. (RT 6641.) Rebecca's mother had continued to help raise Allen until her death. (RT 6641-6642.)

In or about the second grade, Rebecca removed Allen from Catholic school because she could no longer afford it. Allen was enrolled in the 93rd Street School, which was a public school. (RT 6645.)

In the fifth or sixth grade, Allen got teased because he was a lot bigger than other kids. (RT 6648-6650.) He got called "big boy" or "fat boy." At the time of his sixth grade graduation, Allen wore a man's shirt with a 16-inch neck. (RT 6649.) Allen was unable to play Pop Warner football because he was too big for his age group, but too young for the next age group. (RT 6655-6656.)

While living at 729 1/2 East 90th Street, Allen was across the street in front of a friend's house, when a boy who belonged to a Crips gang approached and asked Allen where his friend was. (RT 6650.) When Allen said that he did not know, the gang member began harassing him. (RT 6650-6651.) An older boy got the gang member away from Allen. (RT 6650-6651.)

In 1980, Rebecca and her children moved two blocks from 729 1/2 East 90th Street, to a two-bedroom residence on 616 89th Street. (RT 6652-6653.) Rebecca moved there because she needed a bigger place. (RT 6653.)

Rebecca started working part-time for the bus company in 1982, and began working there full-time in 1983. (RT 6651.) She worked hard, and

earned a "fairly decent" income driving a bus. (RT 6653, 6669.) Rebecca was still employed as a bus driver. (RT 6651-6652.)

When Allen misbehaved as a child, Rebecca would verbally reprimand him and, if necessary, withdraw privileges or spank him. The spanking was done with a belt. That was how Rebecca was raised. (RT 6646-6647.) Rebecca would strike Allen with the belt on his buttocks or legs, possibly as much as 10 times or so. This did not happen often. (RT 6647-6648.) Rebecca's goal in disciplining Allen was never to injure him, but to teach him right from wrong. (RT 6672.)

To celebrate Allen's graduation from elementary school, Rebecca took him and a friend to the restaurant of Allen's choice, and treated Allen as "the big man for the day." (RT 6672-6673.)

After Allen graduated elementary school, Rebecca had him bussed to Sutter Junior High School in the Valley. (RT 6653-6654.) Rebecca did so because she wanted Allen to get a better education. She also wanted to "let him know that there was something else north of the Harbor Freeway," i.e., something other than South Central Los Angeles. (RT 6654, 6673-6674, 6681-6682.)

Allen's problems because of his large size continued. Once in the seventh grade, a teacher called Allen "baby refrigerator."[50/] (RT 6654.) Allen got really upset, and the teacher later apologized. (RT 6654-6655.)

Because Rebecca frequently had to take time off from work to deal with Allen's problems at Sutter, she and the school both decided that it would be best for Allen to leave that school. (RT 6656.) Rebecca put Allen back into a Catholic school, but her finances did not permit him to remain there long. (RT 6656-6657.) Allen was subsequently enrolled at Charles Drew Junior High

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50. In 1983, there was a professional football player nicknamed "Refrigerator Perry." (RT 6674.)

School. He continued to have problems in school, however, and had to leave schools. Eventually, Allen had problems with the juvenile authorities. (RT 6657.)

Between the ages of 12 and 14, Allen enjoyed positive family experiences. (RT 6662-6663.) Rebecca and her sons would play cards, Nintendo or Atari. They had "all that stuff." (RT 6663.) The three would watch television together in Rebecca's room. They would go to places such as Knott's Berry Farm. Rebecca's sister would also take Allen and Derek to restaurants. (RT 6664.)

Rebecca became aware of Allen's association with appellant Johnson when Allen was about 13 or 14. (RT 6657-6658.)

In 1988, Allen was removed from Rebecca's custody and placed in a juvenile institution. (RT 6658, 6675-6676.) He was returned to her custody in 1990 under certain conditions, including that he obey the people supervising him. Allen did not always do so, and he was removed again from Rebecca's custody. (RT 6676.) Rebecca tried her best to work with the people supervising Allen to insure that he got "back on track." (RT 6677.)

Allen was returned to Rebecca's custody in June 1991, when he was 18. (RT 6658, 6665-6666, 6676.) They resided at Rebecca's home on 89th Street. (RT 6658, 6666, 6676.) Allen hung out on 88th Street where members of the 89 Family associated. (RT 6659.) To Rebecca's knowledge, Allen was a member of that gang. (RT 6666.)

Allen tried to shield Rebecca from the "dark side" of his life. When he first started getting involved in gang activity, "a lot of times [she] didn't know what was going on." (RT 6679.) Rebecca reacted "very strongly," however, when she noticed the "NHF" tattoo on Allen's face, which stood for Neighborhood Family. (RT 6677, 6683-6684.) She was disappointed when she saw that tattoo. (RT 6678.)

About six weeks after Allen returned home, he committed the two murders for which he was found guilty in these proceedings. (RT 6659-6660.) Two years later, Allen was arrested for another murder. He was convicted of first-degree murder in that case, and sentenced to prison for 30 years to life. He had been in prison ever since. (RT 6660.)

Nevertheless, according to Rebecca, "there were a lot of good things that [Allen] did, and [Allen] is." (RT 6665.) Once, Allen pushed a handicapped woman to the store in her wheelchair, then pushed her back home and helped her with her groceries. Allen also included handicapped children in his group of friends; there was one boy who was deaf, and an older boy who was mentally about 10 years old. (RT 6663.) If Rebecca was sick, Allen would tell her to call him if she needed anything. (RT 6664-6665.) Allen was also a very good cook. (RT 6665.)

Rebecca's other son had not suffered the same fate as Allen. According to Rebecca, "he's not doing too much of anything, . . . but he's not . . . in jail . . . ." (RT 6680.)

Rebecca tried to give Allen a good home, and "every possible benefit" that she could. (RT 6667-6668.) She raised him to know the difference between right and wrong, including that it was wrong to hurt other people. (RT 6678.) In Rebecca's opinion, Allen knew the difference between right and wrong. (RT 6680.) However, she believed that the neighborhood had something to do with how he turned out. (RT 6683.) Rebecca also blamed herself. (RT 6665.)

In August 1997, Allen got married. He met his wife, Rosalind, while he was incarcerated. (RT 6621-6623.) Rosalind loved Allen, had sympathy for him, and wanted him to live. (RT 6622.)

Robert Douglas was a pastor, and the director of outpatient services for the Inglewood Behavioral Health Sciences. (RT 6685-6686.) Over his

professional career, since 1977, he had come into contact with thousands of Crip and Blood gang members. (RT 6687-6688.)

Douglas defined a shot-caller as a "centralized figure that would lead the activities of a particular gang or group . . . ." (RT 6694.) A shot-caller had to be "charismatic," "very manipulative," and have "more extreme behaviors and characteristics of maturity" than his subordinates, who would be "more [or] less subject to his commands or . . . influence." (RT 6695.) There could be more than one shot-caller within a gang. (RT 6706.)

According to Douglas, gang membership is a "dominating factor" in a gang member's life. (RT 6704.) In Douglas's opinion, Allen was under the 89 Family's domination from 1991 until he was taken into custody in 1993. (RT 6703, 6709.) Douglas also opined that Allen

> had no other choice. . . . If you look at [Allen's] universe, it's about the size of a telephone booth. . . . And he's going to have to do what it takes to survive in that particular geographical locale.

(RT 6710.) Allen told Douglas that he had been shot at about 20 or 30 times in his lifetime. (RT 6715-6716.)

B. Johnson's Evidence In Mitigation

Johnson was born on October 15, 1967. (RT 6731.) His parents are Allene Johnson and Cleamon Johnson, Sr. (RT 6731-6732, 6778.) At the time of trial, Johnson was 29 years old. He had three older stepbrothers -- Ivan Parker, 40, James Parker, 39, and Ricky Parker, 38, and two younger brothers -- Earl Ray Johnson, 28, and Timothy Johnson, 27. (RT 6731-6732.)

Johnson testified in his own behalf. (RT 6866-6937.) When he was about seven years old, he witnessed the drive-by shooting of a family friend. (RT 6867-6868, 6930-6931.) At that time, Johnson's family lived in an apartment on 84th Place and Avalon. (RT 6733, 6867.) The victim had just left his house when a car pulled up, and somebody jumped out and shot him in

the head. Johnson remembered how shocked he was as a child to see that. (RT 6931.)

In 1975, when Johnson was about seven or eight, his parents purchased a house on 88th Street. (RT 6731-6734, 6778, 6867, 6869.) Johnson's father was employed by a furniture manufacturer. He also had a night job with a maintenance company. (RT 6734-6735, 6778-6779.) In 1976, the furniture manufacturer went out of business. (RT 6779-6780.) Johnson, Sr. then began working full-time, "day and night," for the maintenance company. He delivered supplies in the daytime, and supervised at night. (RT 6735, 6780.) Johnson, Sr. worked for that company for about 18 years. (RT 6781.)

The Johnsons were a close family. (RT 6736.) They tried to do things together as a family when they could, such as going camping on weekends. (RT 6737-6738, 6781.)

Johnson, Sr. saw his family mostly on weekends. (RT 6735, 6780.) He tried to provide his children with a strong role model. (RT 6784-6785.) Johnson, Sr. instructed his older sons, Ivan, Ricky, and James, to "look out" for their younger brothers in his absence. (RT 6785.)

When his family moved to 88th Street, Johnson attended Miramonte Elementary School. (RT 6869.) In the fourth grade, he got in a fight with someone who was picking on his younger brother, Earl Ray.[51/] As a result of this fight, Johnson was transferred to Russell Elementary School. (RT 6732-6734, 6871-6872.) Mrs. Johnson also had Earl Ray and Timothy transferred to that school. (RT 6873-6874.)

Russell Elementary was located east of Central Avenue. (RT 6734, 6872.) Many of the children at Russell had older brothers in the junior high

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51. Earl Ray was in the special education program. (RT 6869, 6733, 6737.) Due to an automobile accident, he had suffered brain damage and was partially paralyzed on his right side. He had to wear a helmet and leg braces. (RT 6732-6733, 6736-6737, 6869-6870.)

school next door, who belonged to the Crips. (RT 6872-6873.) Because Johnson's family lived on 88th Street, he and his younger brothers got "jumped on" in elementary school practically every day. Johnson would tell his brothers to run, then take the brunt of the beatings himself. When Earl Ray got far enough away, Johnson would also run. (RT 6873-6875.)

Johnson's mother drove Johnson and his younger brothers to and from school. (RT 6734-6736, 6877.) Eventually, however, she was unable to do so because the family needed another income, and she had to get a job. (RT 6736, 6877.) Mrs. Johnson would work "off and on." (RT 6736.)

From the fourth grade through junior high school, Johnson had to "fight [his] way home from school on a constant basis." He frequently got beaten up and had clothing taken from him. (RT 6875-6876, 6879.) Johnson would not tell his parents about his problems coming home from school, unless they inquired due to his injuries or damaged or missing clothes. (RT 6741-6742, 6782, 6875-6876.) Neither of Johnson's parents could come up with a solution to this problem. (RT 6743.) Johnson, Sr. thought the problem would "go away." (RT 6782-6783.)

While at Russell Elementary, Johnson received a service award for making "top scout" in the Boy Scouts. (RT 6738-6740, 6876.)

Johnson's aunt, Juanita Norman, had a mentally-retarded son named Michael. (RT 6853-6854.) Johnson had contact with Michael when Johnson was between the ages of nine and 12.[52/] (RT 6860.) Johnson's family would accompany Norman's family to the Special Olympics. (RT 6855-6856, 6862.) Johnson would cheer for Michael, and run alongside the track giving Michael encouragement. (RT 6856-6857.) Johnson also participated with the rest of the

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52. When Johnson started junior high school, Norman's family moved to another area, and Johnson and Michael no longer had much contact with each other. (RT 6865.)

family in Michael's bowling league, where he offered Michael the same type of encouragement. (RT 6857.) On occasion, Johnson would spend the weekend with Norman's family. During such visits, Johnson treated Michael like a "normal child," and made him feel he was part of the group. (RT 6857-6858, 6862.)

The Johnson and Norman families were very close. The adults shared parental responsibilities for each other's children. (RT 6861.) Norman did not want Johnson to receive the death penalty. (RT 6859.)

When Johnson was 10 or 11, he returned from a family camping trip and learned that "Keeta" (phonetic), a good friend of his from the neighborhood, had been killed. (RT 6882-6883, 6932-6933.) Keeta was 12 or 13 years old. (RT 6884.) Johnson and Keeta did "everything" together. (RT 6933.) Johnson found out about Keeta's death when he went to Keeta's house and his mother answered the door. Keeta's mother started crying, grabbed Johnson, and told him that Keeta was dead. (RT 6883-6884.) Johnson was "devastated." (RT 6934.) He later learned that Keeta had been shot and killed by Crip gang members. (RT 6884, 6934.)

After graduating Russell Elementary, Johnson attended Charles Drew Junior High School, which was located east of Central, next door to the elementary school. (RT 6740, 6877.) Sometimes, Johnson's parents would drop him off at school, or his aunts would drop him off and pick him up. (RT 6740-6741, 6858, 6877.) Otherwise, Johnson walked or ran to and from school. (RT 6877.)

Johnson's problems due to where he lived grew more severe at Drew Junior High, because he now had to contend with gang members. (RT 6878-6879.) If Johnson could not get home from school without the gang members seeing him, or if his family did not pick him up, Johnson had to fight. (RT 6879.) Norman recalled several occasions in which she saw Johnson running

from the school yard, like he was trying to get away from someone. (RT 6858-6859, 6863.) Several times, Johnson came home with garbage on his clothes, after having been beaten up and thrown in a dumpster. (RT 6741, 6879-6880.)

Johnson sought protection from two security guards at the school, but they were members of the Crips. (RT 6889-6890.) The teachers also provided no assistance. They seemed scared, and as if they did not want to get involved. There were several incidents where teachers had been beaten up by Crip gang members. Johnson felt that the teachers were "in the same position [he] was in." (RT 6890-6892.)

Johnson later transferred to Samuel Gompers Junior High School. (RT 6881.) At Gompers, the attacks on Johnson continued, but they were less frequent. (RT 6882, 6892.)

Johnson got involved in gangs in 1980 or 1981. (RT 6913.) He started hanging out with members of the Swans. (RT 6915.) In 1982 or 1983, Johnson began associating with Barry Williams, of the Neighborhood Family. (RT 6915-6916.) Williams was known as "Big Time," and had a lot of respect on the street. (RT 6916, 6918.)

After graduating junior high, Johnson went to Fremont High School. (RT 6744, 6754, 6908.) Fremont was predominately a "Blood" school. (RT 6908.) One day, Johnson left Fremont carrying a knife, and went to Jefferson High School to hang out. (RT 6908-6909.)

Johnson later attended Jefferson High. (RT 6884, 6908.) On one occasion, Johnson and another person were walking home from school, when two cars pulled up and cut them off. (RT 6884-6886, 6893.) Members of the Bloodstone Villains gang[53/] jumped out of the car, pointed guns at Johnson and his companion, and asked what gang they were from. Although Johnson did not belong to a gang at that time, he told them he was a Family Blood. The

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53. The Bloodstone Villains was a Bloods gang. (RT 6892-6893.)

Bloodstone Villain gang members then withdrew their guns, and drove Johnson and his companion back to the neighborhood. (RT 6885-6886, 6892-6895.) Eventually, Johnson became a member of the 89 Family. (RT 6896-6897.)

After Mrs. Johnson found out that Johnson was in a gang, she had discussions with him about it. (RT 6745-6746.) She tried to persuade Johnson not to associate with the gang. (RT 6746.) Mrs. Johnson also invited Johnson's friends to her house to try to keep an eye on what they and her son were doing. (RT 6746, 6755, 6763.) While she did not want Johnson to be in a gang, Mrs. Johnson believed that "once you join a gang, you can't get out of it unless you leave the neighborhood," and Johnson's family did not have the financial resources to do that. (RT 6745.)

While in high school, Johnson got into trouble, and was removed from his parents' home. He was later released to his parents under certain conditions. (RT 6754.) Johnson "sometimes" complied with those conditions. (RT 6754, 6765.) At some point, Johnson was placed in "camp," where he fought a lot. (RT 6909.)

In January 1992, Johnson was convicted of robbery. A month later, he was convicted of possession for sale of cocaine base. (RT 6912.) Johnson violated his probation and was placed in prison. (RT 6766, 6910.)

In 1993, Johnson married Denise Darby. (RT 6747, 7073.) Denise loved Johnson, and hoped that the jury would spare his life. (RT 7073.)

In June 1994, Johnson talked to Detective Aspinall at Ironwood State Prison. (RT 6925.) During their discussion, Johnson stated: "[T]he people that was gang banging from my neighborhood seemed like they all went to jail about the same time. So it was, like, I was one of the first ones out of the second generation." (RT 6925-6926.) Asked whether Barry Williams was "first generation," Johnson responded, "Yeah."[54/] (RT 6926-6927.) Johnson

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54. Williams was on death row. (RT 6927-6928.)

further stated: "When my wave came in, it was a whole new ballgame." (RT 6927.) Asked whether he was getting the "respect" that Williams did, Johnson replied, "Right. . . . People are saying they know me and don't know me." (RT 6928-6929.) Johnson added, however, that "[a] lot of people build up my reputation more than what it is." (RT 6929.)

In December 1994, Johnson wrote a note in prison indicating that he had been a gang member since 1975. (RT 6919-6920.)[55/] According to Johnson, that was a lie. He was told if he did not write that, he would not go home. (RT 6920-6921.) Johnson was released from prison in December 1994. (RT 6748.)

Mr. and Mrs. Johnson worked hard, and tried to provide a good home for their children. (RT 6751-6752, 6766, 6790-6791, 6935.) They also served as parental figures for other kids in the neighborhood. (RT 6787-6788.) The Johnsons' children would "open the doors for other kids." Mr. and Mrs. Johnson would wake up and find these kids in the house asleep, because "the parents put them out, or something like that." (RT 6788, 6790.)

At times, Mr. and Mrs. Johnson also served as parents for their grandchildren. Ivan Parker's children lived with them for five years. (RT 6788.) The girls were removed from the Johnsons' house shortly after the incidents about which they testified. (RT 6788-6789.) Shina Parker had forgiven Johnson, and hoped that the jury would not sentence him to death. (RT 6850-6852.)

Johnson, Sr. tried to help Johnson "get back on track." (RT 6791.) He provided Johnson with a job. (RT 6790.) Although Mr. and Mrs. Johnson raised Johnson to know the difference between right and wrong, according to

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55. The note read:

> I'm from East Side Swans and I have been since '75. My street name is Evil and it always will be a part of me. I am an active member of Swans for now. Now get off my back.

(RT 6919-6920.)

Mrs. Johnson, "What you teach at home don't help on the street a lot of times[,] especially in [that] environment." (RT 6763-6764, 6767, 6791.) Mr. and Mrs. Johnson still loved their son, and hoped that the jury would spare his life. (RT 6749, 6784, 6792.)

Johnson acknowledged that he had had advantages that some of the other kids in his neighborhood did not have. (RT 6905.) Because of his parents, Johnson had "a real good household to come home to." (RT 6906.) Johnson also admitted that he had had the opportunity to know right from wrong, and that his family "tried to keep [him] on the straight and narrow." (RT 6911, 6935.)

Johnson's older brothers, who also had attended public school, did not end up in a gang. (RT 6747, 6755-6756, 6906, 6911-6912.) Mrs. Johnson attributed this to the fact that gangs were not as prevalent when her older sons were young. (RT 6747.)

The defense retained Dr. Adrienne Davis, a forensic psychologist, to evaluate Johnson. (RT 6969-6972, 6975.) According to Dr. Davis, Johnson experienced a lot of pressure to become involved in a gang. (RT 6979-6980.) Johnson initially tried to resist this pressure. He frequently got into fights, and was chased home from school. But Johnson "finally just gave up that resistance and ended up embracing" gang activity. (RT 6980.)

Dr. Davis explained that "as a young person[,] [Johnson] saw his options as being pretty limited." (RT 6980.) Even though his parents "clearly made a concerted effort to instill appropriate values" in him, in Dr. Davis's opinion, the negative forces that Johnson experienced in the community were "much more powerful." (RT 6980-6981.) One of the factors that made those negative forces more powerful was that Johnson was experiencing them during a developmental stage, when it was "too difficult to fight against [them] effectively." (RT 6981.)

However, Dr. Davis acknowledged that Johnson was in a similar position as any other 11- or 13-year-old growing up in that neighborhood at the time. (RT 7001.) And once Johnson became involved in the gang lifestyle, he made choices to pursue that lifestyle "with vigor." (RT 7005.) Johnson did not have a psychological diagnosis that prevented him from making choices. (RT 7000.)

Dr. Davis found Johnson to have some positive qualities. (RT 6982-6983.) He was an intelligent person. (RT 6982.) Johnson also appeared to have the capacity to be sensitive to the needs of others, especially people with deficits. (RT 6982-6983.)

Johnson expressed regret about some of the decisions he had made, and hoped that his son, who was currently three years old, would make different choices. (RT 6886, 6897-6898, 6936, 6983-6984.) Johnson intended to guide his son away from the gang lifestyle. (RT 6898, 6936.) But since joining a gang, Johnson himself "never backed off it." (RT 6930.)

Derek Battle's January 9, 1997 testimony, in the case of *People v. Reco Wilson*, was read to the jury. (RT 7074-7107.) According to Battle, Carl Connor was with him in the backyard during the shooting. (RT 7076-7077, 7082-7083, 7085.) After hearing the gunshots, Battle saw a man with a bandanna around his face, holding a chrome pistol, running through the alley. (RT 7082-7086.) Battle "knew of" Reco Wilson, and Wilson was not the person Battle saw. (RT 7086-7087, 7098.) The person running was "quite a bit" taller than Wilson. (RT 7099.) It was after this person ran by that Connor went to the front of the house. (RT 7087-7088.)

In about February 1996, Battle told Detective Sanchez that he was alone in his living room when the shots rang out. (RT 7091-7092.) Battle lied to Detective Sanchez because he was aware of gang activity in the neighborhood, and he feared for his and his family's safety. (RT 7093, 7101-7102.)

On January 3, 1997, Connor offered to split the reward with Battle $12,000 apiece, and turn Wilson in. (RT 7094-7098.) Battle thought that Connor was "crazy" because he knew Connor had not seen the shooting. (RT 7099.)

Battle's wife and four-year-old child still lived in the neighborhood. (RT 7101.) Battle was aware that Wilson was a member of a gang in that neighborhood. (RT 7102.) He denied that he used to sell Wilson marijuana. (RT 7100-7101.)

III. PROSECUTION REBUTTAL

Detective Talbot Terrell had been a Los Angeles police officer for more than 24 years. (RT 7108-7110.) In 1977, he began working a CRASH assignment in the 77th Division. (RT 7109, 7122.) Detective Terrell worked a CRASH assignment from 1977 to 1988 (with the exception of a six-month period in 1978). (RT 7123.) Fremont High School was one of the schools that he had been assigned to patrol. (RT 7110, 7122-7123.)

According to Detective Terrell, from 1977 to 1985, gang activity at the elementary school level "wasn't a factor." (RT 7112, 7114.) Detective Terrell was not familiar with Russell Elementary, as that school was in the sheriff's department's jurisdiction. (RT 7112, 7115.) However, had there been a gang-related incident at Russell Elementary, it would have been discussed at the monthly meetings between the police and sheriff's departments' gang units. (RT 7111, 7115.) That school "never came up." (RT 7115.) If a person left the campus of Russell Elementary, he would be in Crip territory. (RT 7125, 7127.)

From 1977 to 1985, the police "didn't get a lot of calls to" the junior high schools. (RT 7113, 7121.) Detective Terrell believed that the only junior high they had a "little bit of a problem with" was Markum Junior High, which was on 103rd and Compton. (RT 7113.) Although Charles Drew Junior High

did come up in the monthly gang meetings, in Detective Terrell's opinion, a person who lived in 89 Family territory would not have had a problem attending that school unless he claimed an affiliation with a particular gang. (RT 7115, 7121-7122.)

During the above years, students from both Crip and Blood neighborhoods attended Samuel Gompers Junior High. (RT 7117-7118, 7120.) Asked whether a person who lived on 88th Street, just west of Central, would have to go through Crip territory to get home from that school, Detective Terrell responded: "Most Bloods have to always travel through Crip neighborhood, because [the Blood neighborhoods] are islands." There are more Crips than Bloods in Los Angeles. (RT 7134.)

According to Detective Terrell, the gang problems were mostly at the high school level. (RT 7121.) As of 1977, Fremont High was considered a "Blood" school. (RT 7118-7119.)

In January 1997, Detective Rosemary Sanchez spoke to Derek Battle in connection with the murder of Georgia Denise Jones. (RT 7137.) At first, Battle denied knowing Reco Wilson, but then admitted that he used to sell him "weed." (RT 7137-7138.) Battle also told Detective Sanchez that Wilson's physical stature was the same as the person he saw running through the alley after the gunshots. (RT 7140.)

In connection with the investigation of Nece Jones's murder, the police distributed fliers advertising a $25,000 reward. (RT 7141-7143.) From the time Detective Sanchez interviewed Carl Connor in 1994 to the time he testified, Connor never raised the issue of a reward with Detective Sanchez, or anybody in her presence. (RT 7141-7142.) Detective Sanchez did not talk to Connor about a reward until either late January or early February 1997, after Wilson's conviction. (RT 7140, 7142.)

ARGUMENT

GUILT PHASE CLAIMS

I.

APPELLANTS DID NOT ESTABLISH A PRIMA FACIE CASE THAT THE COMPOSITION OF THEIR GRAND JURY VIOLATED EQUAL PROTECTION

Johnson contends that appellants established a prima facie case that the underrepresentation of women on their grand jury violated equal protection. (Johnson AOB ["JAOB"] 91-100.)[56] Respondent disagrees.

A. Relevant Proceedings Below

Appellants were indicted by the Los Angeles County Grand Jury in December 1994. (CT 179-181.)

In February 1995, Johnson's counsel filed a motion to set aside the indictment under section 995, on the ground that the underrepresentation of females on the grand jury violated equal protection. (CT 238-242; 261-262.) Allen's counsel joined in the motion. (RT 157.) An evidentiary hearing was held in April 1995, at which Gloria Gomez, the Manager for Jurors Services, testified. (RT 227-266.)

Gomez oversaw the activities required to impanel the grand jury. (RT 228.) She explained that there were two methods by which a person could become nominated to serve on the grand jury. The first, and more common, method was by submitting an application. The second method was through direct nomination by a superior court judge. (RT 228-229, 253.) Under either method, grand jury service was voluntary. (RT 253, 259.) Service was for one year. (RT 259.)

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56. Appellants have joined in each other's arguments on appeal. (JAOB 365; AAOB 764.)

Applicants were interviewed and rated by judges from the Grand and Trial Jurors Committee. (RT 229, 234, 254-256.) Very few applicants were rated as unqualified. (RT 256.) The applications contained a space to indicate gender, but gender did not form part of the selection criteria. (RT 256-257, 263.) After the interview and rating process was completed, individual judges could nominate two people from the list, or their own direct nominees, to the grand jury pool. (RT 229, 254-255.)

The nominees were placed on a "tentative list of grand jurors." That list was then circulated to give judges an opportunity to object to any of the nominees.[57] (RT 255.) Very few objections were lodged against tentative grand jurors. Since Gomez began her tenure in February 1992, there had been only one such objection. (RT 255-256.) The tentative list eventually became the "final list for grand jury," from which the final 23 grand jurors and four alternates were randomly drawn. (RT 230, 255-256.)

For the 1988/1989 grand jury, there were 157 people in the grand jury pool, 63 females and 94 males. (RT 237.) The grand jury consisted of two females and 21 males. (RT 235.)

For the 1989/1990 grand jury, there were 146 people in the pool, 63 females and 83 males. (RT 238.) The grand jury consisted of nine females and 14 males. There were three female alternates and one male alternate. (RT 235-236.)

For the 1990/1991 grand jury, there were 121 people in the pool, 52 females and 69 males. (RT 238.) The grand jury consisted of eight females, 14 males, and one person whose gender was unidentified. There was one female alternate and three male alternates. (RT 236.)

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57. If an objection was determined to be valid, the person's name would be removed from the tentative list. (RT 255.)

For the 1991/1992 grand jury, there were 178 people in the pool, 76 females and 102 males. (RT 238.) The grand jury consisted of eight females and 15 males. There were three female alternates and one male alternate. (RT 236.)

For the 1992/1993 grand jury, there were 175 people in the pool, 62 females and 113 males. (RT 238.) The grand jury consisted of nine females and 14 males. There were two female and two male alternates. (RT 236.)

For the 1993/1994 grand jury, there were 183 people in the pool, 61 females, 120 males, and two whose gender was unidentified. (RT 238.) The grand jury consisted of eight females and 15 males. There was one female alternate, two male alternates, and one unidentified. (RT 236.)

And for the 1994/1995 grand jury, there were 261 people in the pool, 86 females, 172 males, and three whose gender was unidentified. (RT 238.) The 76 direct nominees consisted of 20 females, 55 males, and one unidentified. (RT 238-239.) The 185 volunteer applicants consisted of 66 females, 117 males, and two unidentified. (RT 239.) The grand jury had eight females, 14 males, and one unidentified. There was one female alternate and three male alternates. (RT 236-237.)

Gomez did not know why the number of females in the grand jury pool, as well as those selected for the grand jury, remained "pretty much the same" since 1989. (RT 244-246.) She acknowledged that there appeared to be an underrepresentation of women both in the grand jury pool and on the grand jury. (RT 247.) According to the 1990 census for the County of Los Angeles, the population 19 years of age and over was 50.6 percent female, and 49.4 percent male. (RT 241-242.)

Nor did Gomez know why women did not apply for the grand jury in larger numbers. (RT 246.) There were a large number of women's organizations, as well as women individually, to whom notices were sent in an

attempt to obtain volunteers for the grand jury. (RT 259-261.) In addition, announcements for grand jury service were on the affidavits circulated to all prospective petit jurors (approximately four million people), and on notices posted in every jury assembly room in Los Angeles County. (RT 260-262.) Gomez understood that social and economic factors beyond her control could affect whether a person was willing to volunteer for one year of grand jury service. (RT 258-259.)

Gomez admitted that the presiding judge could select grand jurors by the same method petit jurors were selected. (RT 250.) In a 1991 study, it was found that approximately 50 percent of the people in the petit jury pool were female. (RT 240, 251-252.)

Johnson's counsel argued that the test articulated in *Castaneda v. Partida* (1977) 430 U.S. 482 (*Castaneda*), applied to appellants' equal protection challenge. (CT 241; RT 162-164, 166-167, 269-271.) The prosecutor disagreed, arguing that the test set forth in *Duren v. Missouri* (1979) 439 U.S. 357 (*Duren*), applied.[58] (CT 268-269; RT 168, 173.) The trial court found *Duren* to be the appropriate standard. (RT 174, 269, 274.) In denying appellants' motion, the court explained:

> I do find that the appropriate standard here is [*Duren*]. I would note personally I never particularly cared for the way the grand jury is selected on the state side. I think it leaves open the possibility of abuse.
>
> But my personal preference is not dispositive. The question is does the court standard meet constitutional must[er]. It does meet

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58. As discussed *infra*, in order to establish a prima facie case under *Castaneda*, the defendant must show that "the procedure employed resulted in substantial underrepresentation of . . . [an] identifiable group," and was "susceptible of abuse or . . . not [gender] neutral." (*Castaneda,* 430 U.S. at p. 494.) Under *Duren*, it must be shown that the underrepresentation was due to "systematic exclusion" of the group. (*Duren,* 439 U.S. at p. 364.)

constitutional must[er]. There has been no showing of any type of systematic exclusion and I believe under [*Duren*], the burden has not be[en] met. I do believe that the attempts and successes that have resulted in the grand jury with the current gender makeup is not really substantial but is of some concern.

Be that as it may the 995 is denied.

(RT 274-275.)

B. General Principles

It is well settled that the exclusion of persons from grand jury service based on membership in a cognizable group violates equal protection. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 262-263; *Rose v. Mitchell* (1979) 443 U.S. 545, 556; *People v. Corona* (1989) 211 Cal.App.3d 529, 534.) Women are a cognizable group. (*Duren,* 439 U.S. at p. 364; *Taylor v. Louisiana* (1975) 419 U.S. 522, 531.) "While the earlier cases involved absolute exclusion of an identifiable group, later cases established the principle that substantial underrepresentation of the group constitutes a constitutional violation as well, *if it results from purposeful discrimination.*" (*Castaneda,* 430 U.S. at p. 493 [italics added]; see also *ibid.* ["an official act is not unconstitutional solely because it has a racially disproportionate impact"]; *Campbell v. Louisiana* (1988) 523 U.S. 392, 400 [to assert rights of venirepersons excluded from serving on grand jury, defendant "must prove their exclusion was on account of intentional discrimination"].)

In *Castaneda*, the United States Supreme Court set forth the applicable test as follows:

[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of . . .

the identifiable group to which he belongs.[59] The first step is to establish that the group is one that is a recognizable, distinct class . . . . [Citation.] Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. [Citations.] . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. [Citations.] Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

(430 U.S. at pp. 494-495.) A prima facie case is rebutted by showing that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." (*Id.* at p. 494; internal quotation marks omitted.)

Under the high court's decision in *Duren*:

In order to establish a prima facie violation of the fair-cross-section requirement [of the Sixth Amendment], the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

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59. In *Campbell v. Louisiana, supra,* the United States Supreme Court later held that a White defendant had standing to raise an equal protection challenge on behalf of Blacks excluded from his grand jury. (523 U.S. at pp. 397-400; see also *Powers v. Ohio* (1991) 499 U.S. 400, 415 [defendant can raise third-party equal protection claims of petit jurors excluded by prosecution because of race].)

(439 U.S. at p. 364.) Underrepresentation is "systematic" where it is "inherent in the particular jury-selection process utilized." (*Id.* at p. 366.)

"[O]nce the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, . . . the State . . . bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." (*Duren,* 439 U.S. at p. 368.)

The *Duren* Court explained that equal protection cases such as *Castaneda* were "not entirely analogous to the case at hand." (439 U.S. at p. 368, fn. 26.) In those cases,

> the significant discrepancy shown by the statistics not only indicated discriminatory effect but also was one form of evidence of another essential element of the constitutional violation -- discriminatory purpose. Such evidence is subject to rebuttal evidence either that discriminatory purpose was not involved or that such purpose did not have a determinative effect. [Citations.] In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement.

(*Ibid.*)

C. Appellants' Claim Fails On Appeal Due To The Absence Of Prejudice

In *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, this Court held that

> irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise

> suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects.

(*Id.* at p. 529; see also *People v. Stewart* (2004) 33 Cal.4th 425, 461 [accord].)

In *Pompa-Ortiz*, the defendant's statutory right to a public preliminary hearing had been violated, but he was not entitled to relief on appeal because he failed to show that he was denied a fair trial or otherwise prejudiced by reason of the error. (27 Cal.3d at p. 530.)

The *Pompa-Ortiz* court observed that "[w]e follow this approach in other contexts." *Pompa-Ortiz, supra,* 27 Cal.3d at p. 529, citing, inter alia, *People v. Wilson* (1963) 60 Cal.2d 139 [denial of right to trial within statutory time period]; *People v. Chavez* (1980) 26 Cal.3d 334 [error in refusing representation by attorney of choice].) The *Pompa-Ortiz* court further noted that its "resolution is consistent with the United States Supreme Court's treatment of constitutional error at the preliminary examination. Thus, even in a situation as extreme as the denial of counsel, the U.S. Supreme Court has held that the harmless error rule is applicable." (*Pompa-Ortiz, supra,* 27 Cal.3d at p. 530, citing *Coleman v. Alabama* (1970) 399 U.S. 1, 11.)

Later, in *People v. Towler* (1982) 31 Cal.3d 105, this Court held that "[t]he reasoning in *Pompa-Ortiz* applies with equal force in the grand jury context." (*Id.* at p. 123; see also *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1325-1326; *People v. Laney* (1981) 115 Cal.App.3d 508, 513 [accord].)

Here, appellants could not conceivably have been prejudiced by the alleged underrepresentation of females on their grand jury. Nor would a mere underrepresentation of a group to which appellants did not belong be

considered "jurisdictional in the fundamental sense." (See *Pompa-Ortiz, supra,* 27 Cal.3d at p. 530; compare *People v. Stewart, supra,* 33 Cal.4th at p. 462, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [unlawful exclusion of members of *defendant's race* from grand jury identified as structural defect]; *People v. Burgener* (2003) 29 Cal.4th 833, 861, citing *Castaneda,* 430 U.S. at p. 494 ["A defendant asserting a denial of equal protection 'must show that the procedure employed resulted in substantial underrepresentation of *his* race or of the identifiable group *to which he belongs*[]'" (emphasis supplied by *Burgener* court)].)

To preserve their challenge to the composition of their grand jury, it was thus incumbent on appellants to seek pretrial writ review of the trial court's ruling. However, during the more than two-year period between the denial of their section 995 motion in April 1995 (CT 281), and the commencement of trial in July 1997 (CT 635), appellants apparently never did so. (See JAOB 91-93.) Had appellants filed a pretrial writ petition, and been found to have established a prima facie case, the prosecutor could have timely sought to offer evidence to rebut the prima facie showing. And, if unsuccessful, the prosecutor could have cured the alleged defect by filing a felony complaint and proceeding by way of a preliminary hearing.

Consequently, under the reasoning in *Pompa-Ortiz,* appellants' claim must fail on appeal due to the absence of any showing of prejudice.

D. There Was No Prima Facie Case Of Intentional Discrimination

In any event, there was no prima facie showing of intentional discrimination.

Preliminarily, because appellants raised an equal protection challenge, Johnson appears to be correct that the test set out in *Castaneda* was the proper test. (JAOB 93-94.) *Castaneda* was an equal protection case, whereas *Duren* was a Sixth Amendment fair-cross-section case (*see Castenada,* 430 U.S. at p.

494; *Duren,* 439 U.S. at p. 364), and the *Duren* Court explained that the two were "not entirely analogous" (*id.* at p. 368, fn. 26). (See also *People v. Brown* (1999) 75 Cal.App.4th 916, 923-924 [using *Castaneda* test].) Nevertheless, the requirements for making a prima facie case under *Castaneda* and *Duren* are substantially the same. (See *People v. Corona, supra,* 211 Cal.App.3d at p. 535 ["The distinction is not particularly important with regard to methods of proof: the prima facie tests for the two claims are nearly identical, although the claims differ in the way the prima facie case is rebutted"]; *Davis v. Zant* (11th Cir. 1983) 721 F.2d 1478, 1482 ["The prima facie tests for an equal protection claim and a fair-cross-section claim are almost identical"].) Under *Castaneda*, appellants were required to show that "the procedure employed resulted in substantial underrepresentation of . . . the identifiable group . . ., by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time." (*Castaneda,* 430 U.S. at p. 494.) Because those who served as grand jurors were drawn at random from the grand jury pool (RT 230, 255-256), the composition of the pool is the relevant focus for determining whether there was substantial underrepresentation.

The percentages of females in the grand jury pools from 1988/1989 through 1994/1995 were as follows: 1988/1989, 40 percent; 1989/1990, 43 percent; 1990/1991, 43 percent; 1991/1992, 43 percent; 1992/1993, 35 percent; 1993/1994, 34 percent; and 1994/1995, 33 percent. (See RT 237-238.)[60/] Assuming, arguendo, that females represented 51 percent of the grand-jury-eligible population in Los Angeles County (see RT 240-242), there was an

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60. In calculating these statistics, potential grand jurors whose gender was unidentified were not included.

"absolute disparity" of 11 percent in 1988/1989,[61] eight percent in 1989/1990, 1990/1991, and 1991/1992, 16 percent in 1992/1993, 17 percent in 1993/1994, and 18 percent in 1994/1995. These figures yield an average disparity of 12 percent from 1988/1989 to 1994/1995.

"Neither [this Court] nor the United States Supreme Court has decided . . . what degree of disparity is impermissible." (*People v. Ochoa, supra,* 26 Cal.4th at p. 427.) In rejecting the defendant's fair-cross-section and equal protection claims in *People v. Ramos* (1997) 15 Cal.4th 1133, this Court noted cases in which absolute disparities of 10 percent and 11.5 percent were not found to be constitutionally significant. (*Id.* at p. 1156.) Johnson also cites a case in which a 14.1 percent absolute disparity was found only to be of "borderline significance," i.e., "at the margin of the range found acceptable by the courts." (*Ramseur v. Beyer* (3rd Cir. 1992) 983 F.2d 1215, 1232; JAOB 95.) Thus, the 12-percent average disparity presented here should not be deemed "substantial underrepresentation."

Moreover, service on the grand jury is entirely voluntary. (RT 253, 259.) Of those who submitted applications to serve on the 1994/1995 grand jury, which indicted appellants, only 36 percent were women. (See RT 239.) That a lesser number of women than men desired to participate in grand jury service, resulting in an underrepresentation of women in the grand jury pool, is not a constitutional infirmity. As this Court explained in *People v. Ochoa, supra*:

> [T]he United States Constitution "forbids the *exclusion* of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of

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61. "Absolute disparity" is calculated by subtracting the proportion of the underrepresented group in the pool from the underrepresented group's proportion of the population. (*People v. Ochoa* (2001) 26 Cal.4th 398, 427, fn. 4.)

> selection from a representative cross-section of the population." [Citation.] . . . [T]he failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state. [Citation.] So long as the state uses criteria that are neutral with respect to the underrepresented group, a defendant cannot satisfy *Duren's* third prong by showing the state could have adopted other measures to improve further the group's representation. [Citation.]

(26 Cal.4th at pp. 427-428; italics in original.)[62/]

The voluntary and random aspects of the grand jury selection process are also inconsistent with a claim of purposeful discrimination. (See *Castaneda,* 430 U.S. at p. 493 [substantial underrepresentation constitutes constitutional violation "if it results from purposeful discrimination"].) That the court sent notices to a large number of women's organizations, as well as women individually, in an attempt to obtain volunteers for grand jury service (RT 259-261) further undercuts appellants' claim. Indeed, as the trial court found, "[t]here has been no showing of any type of systematic exclusion." (RT 275.)

Accordingly, appellants failed to establish a prima facie equal protection violation.

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62. It is therefore immaterial whether the wholly random system used for selecting petit juries would more accurately reflect the gender makeup of the population. (See JAOB 96, 98-99.) In any event, given the one-year duration of grand jury service (§§ 901, 908.2; RT 259), a wholly random procedure may well have been found impracticable.

E. Assuming, Arguendo, That Appellants Made A Prima Facie Case, And Their Claim Is Cognizable On Appeal Notwithstanding The Lack Of Prejudice, A Limited Remand Would Be The Appropriate Remedy

Assuming, arguendo, that appellants made a prima facie case of purposeful discrimination, and their claim is cognizable on appeal notwithstanding the absence of prejudice, the appropriate remedy would be a limited remand to give the People an opportunity to rebut the prima facie showing. (See § 1260; *People v. Braxton* (2004) 34 Cal.4th 798, 818-819; *People v. McGee* (2002) 104 Cal.App.4th 559, 571-572.) Johnson acknowledges that a limited remand generally would be an appropriate remedy, but argues it is extremely unlikely due to the passage of time that a fair hearing could be held, and the People would be unable to rebut the prima facie case in any event. (JAOB 98-99.) Respondent disagrees. If necessary, additional documentary and testimonial evidence may well be obtainable to explain the alleged underrepresentation of women. In lieu of an outright reversal, the People should be given an opportunity to investigate and present such evidence.

As stated by this Court in *People v. Braxton, supra*:

> Generally, . . . if there is any reasonable possibility that the parties can fairly litigate and the trial court can fairly resolve the unresolved issue on remand, reviewing courts have ordered the remand with directions that the defendant must receive a new trial if, for one reason or another, a fair hearing is no longer possible.

(34 Cal.4th at p. 819; cf. also *People v. McGee, supra,* 104 Cal.App.4th at p. 572, fn. 3 [if trial court concludes the passage of time makes it impossible for prosecutor to explain reasons for challenges at issue, or for court to adequately evaluate those reasons, the judgment must be reversed and a new trial granted].)

Based on the above, appellants' equal protection claim must be rejected. However, should this Court disagree, a limited remand, not reversal, would be the appropriate remedy.

II.

THE TRIAL COURT PROPERLY DENIED ALLEN'S SEVERANCE MOTION[63/]

Allen contends that the trial court abused its discretion by denying his motion to sever his trial from Johnson's. (AAOB 586-619.)[64/] Respondent disagrees.

A. Relevant Proceedings Below

Prior to trial, Allen filed a severance motion on the grounds of "prejudicial association, antagonistic defenses and denial of confrontation of witnesses." (CT 470.) The motion contained a long list of other crimes allegedly committed by Johnson, which the prosecutor may seek to offer as evidence in the penalty phase, and possibly the guilt phase as well. (CT 472-473, 476, 479.) The motion also referenced tape-recorded telephone conversations in which Johnson was heard plotting additional crimes, including solicitation of murder. (CT 473-474.) Allen argued that if he and Johnson were jointly tried, Allen would be prejudiced by such evidence. Further, if Johnson's extrajudicial statements were introduced, and Johnson did not testify, Allen would be denied his right of cross-examination. (CT 474.)

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63. Allen moved to sever both the guilt and penalty phases of the trial. The issue of severance of the penalty phase is discussed in Argument XIV, *infra*.

64. Allen's argument heading reads: "The trial court abused its discretion when it denied Appellant's Motion to Select Two Juries or Motion to Sever his Case from that of co-defendant Johnson . . . ." (AAOB 586.) However, Allen only presents argument on the issue of severance. Respondent will therefore limit its discussion to that issue. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11 ["matters are not properly raised" if "perfunctorily asserted without argument or authorities in support"].)

The prosecutor filed written opposition, arguing that Allen had not demonstrated that the potential for prejudice outweighed the well-recognized benefits of joinder to the state. (CT 487-492.) The prosecutor argued that the case involved a single incident; appellants were equally culpable -- Allen as the actual killer, and Johnson as the instigator, planner, and provider of the weapon; and if an admission by Johnson implicated Allen, the rules of *Aranda/Bruton*[65] would apply, and the issue would be whether the prosecution could effectively redact the statement. (CT 489, 491.)

At the hearing on the severance motion, the trial court noted that it had read the motion and the prosecutor's response, and asked Allen's counsel if there was anything he wanted to add. (RT 589.) Allen's counsel responded:

> Not much. We are basically submitting it. I would just like to add a little bit if I could. . . .
>
> . . . [A]fter [appellants] are arrested, . . . Mr. Johnson starts making telephone calls from . . . the phone in the jail, in essence trying to kill witnesses in this case. [¶] . . . [T]hese statements by Mr. Johnson are not pursuant to any conspiracy . . . .
>
> So what I am concerned about is that during the . . . guilt phase of the trial, the prosecution is going to seek to offer these statements made by Mr. Johnson . . ., and that in connection with the other evidence is going to . . . create serious *Aranda* problems. . . .
>
> The other . . . argument . . . supporting severance is in the penalty phase . . ., the prosecution is going to start showing that Mr. Johnson started killing people March 14, 19[8]8. . . .
>
> . . . I can't imagine a worse nightmare than being tried jointly with [Johnson]. [¶] I mean his street name is Big Evil, and he's the evilest

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65. *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

man I've ever encountered . . . . [¶] So I know it is discretionary with the court, based on prejudicial association, but this is the most prejudicial association I have ever seen.

(RT 589-592.)

The prosecutor countered that the statements described by Allen's counsel did not raise *Aranda/Bruton* issues, because such statements did not incriminate Allen. (RT 592.) As for prejudicial association, the prosecutor pointed out that Allen was "a convicted murderer himself," which "puts him in a somewhat different position than if he came to court with absolutely no prior record." (RT 592-593.) The prosecutor also noted that, if any issue arose, the court could give a curative instruction. (RT 593.)

The trial court denied the severance motion. The court indicated that any *Aranda/Bruton* issues could be litigated at a later time, before Johnson's statements were admitted. The court also indicated that, at the penalty phase, the court and counsel could "focus the jury [on the aggravating evidence] that applies to each defendant." (RT 593.)[66]

B. Applicable Law

As explained by this Court in *People v. Coffman* (2004) 34 Cal.4th 1, a two-defendant capital case:

Section 1098 expresses a legislative preference for joint trials. The statute provides in pertinent part: "When two or more defendants are jointly charged with any public offense, . . . they must be tried jointly, unless the court order[s] separate trials." [Citation.] Joint trials are

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66. Allen claims to have made three additional motions to sever during the trial. (See AAOB 587-588.) He is incorrect. While references to the original severance motion were made and, at one point, Allen's counsel expressed a desire to renew it, the motion was never, in fact, renewed. (See RT 3601-3602, 4038, 4222-4230, 4395-4396, 4632, 4678-4679.)

favored because they "promote economy and efficiency" and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" [Citation.] When defendants are charged with having committed "common crimes involving common events and victims," . . . the court is presented with a "classic case" for a joint trial. [Citation.]

The court's discretion in ruling on a severance motion is guided by the nonexclusive factors enumerated in *People v. Massie* (1967) 66 Cal.2d 899, 917 . . ., such that severance may be appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." Another helpful mode of analysis of severance claims appears in *Zafiro v. United States*[] [1993] 506 U.S. 534 . . . . There, the high court, ruling on a claim of improper denial of severance under rule 14 of the Federal Rules of Criminal Procedure, observed that severance may be called for when "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, supra,* at p. 539 . . . .) The high court noted that less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice. (*Zafiro, supra,* at p. 539.)

A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling. [Citation.] Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. [Citation.]

(*People v. Coffman, supra,* 34 Cal.4th at pp. 40-41.)

An abuse of discretion will be found only if the trial court's denial of the severance motion "fell outside the bounds of reason." (*People v. Ochoa, supra,* 26 Cal.4th at p. 423; internal quotation marks omitted.)

However, "[e]ven if [a pretrial severance] ruling was correct when made, [the appellate court] must reverse if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*People v. Arias* (1996) 13 Cal.4th 92, 127; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 726 [accord].)

C. There Was No Abuse Of Discretion

Allen claims that the trial court abused its discretion by ruling on his severance motion in "a cavalier fashion." (AAOB 595-598.) The claim is meritless.

At the hearing, the court stated that it had read Allen's motion and the prosecutor's response. (RT 589.) The court also allowed the parties to present oral argument. (RT 589-593.) Nevertheless, Allen criticizes the court's handling of the hearing as "cavalier," because the court did not ask if the prosecutor planned to introduce any of Johnson's other crimes in the guilt phase, and the court "said nothing about any potential prejudice concerns at the guilt phase." (AAOB 597-598.) Respondent disagrees.

Allen's counsel mainly expressed concern about Johnson's extrajudicial statements being introduced in the guilt phase, and Johnson's numerous other crimes in the penalty phase. (See CT 473 [defense counsel informed and believed prosecution would offer evidence of Johnson's uncharged criminal conduct in penalty phase, and "possibly" guilt phase as well]; CT 474 [defense counsel informed and believed prosecution would offer evidence of Johnson's conversations in guilt phase]; CT 476 ["If defendants are convicted of murder, and the jury finds a special circumstance true, the prosecution is expected to

offer evidence in its penalty-phase case in chief" of numerous other crimes committed by Johnson]; CT 479 [accord]; RT 590 ["So what I am concerned about is that during the . . . guilt phase . . ., the prosecution is going to seek to offer these statements made by Mr. Johnson"]; RT 591 ["The other . . . argument . . . supporting severance is in the penalty phase . . ., the prosecution is going to start showing that Mr. Johnson started killing people March 14, 19[8]8"].) Not surprisingly, therefore, the court did not devote discussion to the possible introduction of Johnson's other crimes in the guilt phase.

Allen is also mistaken when he states that the court "said nothing about any potential prejudice concerns at the guilt phase." (AAOB 597.) When denying the severance motion, the court indicated that any *Aranda/Bruton* issues could be litigated before Johnson's statements were introduced. (RT 593.) Thus, the court was mindful of the possible prejudice to Allen, and the need to protect his confrontation rights. (Cf. *People v. Cleveland, supra,* 32 Cal.4th at p. 726 ["The court was very aware of the need to protect [the] codefendants. It stated its intent to exclude any statements that were inadmissible against a codefendant and that could not be adequately redacted"].)

Moreover, "[u]nder . . . section 1098, a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.'" (*People v. Alvarez* (1996) 14 Cal.4th 155, 190; emphasis in original.) Appellants here were charged with the same crimes, against the same victims, arising from the same incident. Both were active participants. In short, this was a "classic case" for a joint trial. (See *People v. Coffman, supra,* 34 Cal.4th at pp. 40, 44.)

Accordingly, there was nothing "cavalier" about the court's denial of Allen's severance motion, and no abuse of discretion.

D. There Is No Reason To Believe That The Jury Could Not Follow The Court's Limiting Instructions

Next, Allen maintains that it was "difficult, if not impossible," for the jury to follow the court's limiting instructions that Johnson's post-offense statements were admissible only against Johnson. (AAOB 600-615.) Respondent disagrees.

Before the jury heard evidence of statements made by Johnson during an interview at Ironwood State Prison,[67] the court instructed the jury:

> Ladies and gentlemen, . . . evidence of statements that you are about to hear are admissible as to Mr. Johnson only on this occasion and not Mr. Allen. [¶] Statements that you will hear as to Mr. Johnson are only admissible as to Mr. Johnson and not Mr. Allen.

(RT 4177.)[68]

Following the introduction of Johnson's statements to Donnie Adams,[69] the jury was instructed:

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67. During this interview, Johnson told detectives that Albert Sutton should not have brought Crips into the neighborhood, and that Sutton had to be "disciplined." (RT 4177-4178.) Contrary to Allen's suggestion, the jury did not hear evidence that Sutton was killed. (AAOB 602-603.)

68. Earlier, the jury was similarly instructed regarding Allen's statements to Marcellus James:

> . . . Ladies and gentlemen, the testimony you're hearing now and the testimony you just heard may be considered as to Mr. Allen only but is not admissible as to Mr. Johnson, all right? [¶] Don't speculate as to the legal reason for that, but it is admissible as to Mr. Allen only at this point in time.

(RT 4042.)

69. After the shooting, Adams spoke to Johnson in the front yard of Johnson's house. Johnson told Adams that the shooting involved a "mission," and he had provided the shooter with a gun. At Johnson's direction, the shooter also wore a ski mask. Johnson remarked: "That's two crabs gone." (RT 4413-4416, 4427, 4432-4433, 4438-4439.)

Ladies and gentlemen, before the witness is excused, one admonition. [¶] The testimony from this gentleman having to do with statements attributed to Mr. Johnson are admissible as to Mr. Johnson only. [¶] They are not as to Mr. Allen. Everybody clear on that? [The jurors answered in the affirmative.]

THE COURT: The testimony of this witness is admissible as to each defendant except for those portions of his testimony that dealt with . . . things that he said Mr. Johnson told him. [¶] All of those things, that is related to Johnson only and cannot be considered at all as to Mr. Allen. [¶] All right? [The jurors answered in the affirmative.]

THE COURT: Everybody clear? [The jurors answered in the affirmative.]

(RT 4440-4441.)

Before Johnson's testimony in *People v. Glass, et al.,* was read to the jury,[70] the court gave the following instruction:

Ladies and gentlemen, the next piece of evidence that you are going to hear will not come from a witness. [¶] We have a transcript here of portions of some testimony that was given in another proceeding. . . . [¶] The . . . evidence you are about to hear now, does not deal with Mr. Allen and will not be considered as to Mr. Allen. [¶] It will be considered only as to Mr. Johnson.

(RT 4445-4446.) After Johnson's testimony was read, the court reminded the jury that "that evidence . . . is admissible, again, as to Mr. Johnson and not as

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70. Johnson testified in the *Glass* case that he was a member of the Family Swan Bloods (RT 4446-4448); his nickname was Big Evil (RT 4449); Johnson "[didn't] have to answer to [any]body" (RT 4455-4456); Johnson hated Crips (RT 4450); and Blood gangs and Crip gangs were "natural enemies" (RT 4448-4449, 4452).

to Mr. Allen." The court asked if the jurors were "[c]lear on that," and they answered in the affirmative. (RT 4456.)

Before the tape recordings of Johnson's intercepted telephone calls were played,[71] the jury was instructed:

> Ladies and gentlemen, you are going to hear some tape recordings which are a portion of some conversations that were gleaned through what counsel have . . . stipulated . . . was a legal wiretap that was in effect on some phones, one of which was at the L.A. County Jail. And so you'll be hearing [Johnson] during some portions of some phone calls . . . that were intercepted from that jail phone.
>
> . . . [T]he evidence of the telephone calls you are about to hear are admitted for a limited purpose. First of all, you may not consider this evidence at all as to Mr. Allen, all right? These tapes, these phone calls pertain only to Mr. Johnson, cannot be considered as evidence at all against Mr. Allen.
>
> Further, you may only consider this evidence as it may bear upon, if at all, . . . Johnson's membership and status within the 89 Family Bloods. You may not consider this evidence for any other purpose other than this limited purpose for which it is admitted.

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71. The jury heard portions of four recorded telephone conversations that occurred while Johnson was in custody. In the first, Johnson directed Bill Connor (Carl Connor's brother) to "school" Carl Connor, and to give him a "crash course." (RT 4774-4775, 4778; Supp. IV CT 388-389, 393.) In the second, Johnson told an unidentified female that he had to contact Bill Connor regarding Carl Connor's statement. (RT 4775-4776, 4780-4781; Supp. IV CT 397-399.) In the third, Johnson spoke to Bill Connor, inquiring about Carl Connor's statement. (RT 4776, 4873; Supp. IV CT 402-403.) And in the fourth, Johnson asked an unidentified male whether he had "r[u]n into" Carl Connor, and Johnson expressed frustration that Connor could not be found. (RT 4785-4786.)

At the end of the case the court will give additional instructions which may also bear upon this point. But at this point in time and until further order of the court this evidence may only be considered for . . . those limited purposes.

Is everybody clear on that? [The jurors answered in the affirmative.]

(RT 4772-4773.)

After being read a portion of a handwritten note that had been seized from Johnson in the county jail,[72] the jury was instructed:

. . . Ladies and gentlemen, once again, that evidence you just heard . . . pertains to Mr. Johnson only. It cannot be considered as evidence at all against Mr. Allen. And further, you may only consider that note as it may bear upon, if at all, . . . Johnson's membership and status within the 89 Family Bloods. You may not consider it for any other purpose unless the court later instructs you otherwise.

(RT 4805.)

At the end of the case, the court instructed the jury:

Evidence has been admitted against one of the defendants, and not admitted against the other. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant. [¶] Do not consider this evidence against the other defendant.

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72. The portion of the note read:

> Tell him that you handle most of my calls and contacts and you know for a fact that if I wanted him dead that it could have been done. [¶] You have personally heard people from all types of other sets swear to me that they will handle him, his family and anybody else that I needed handled, because I've done favors for them and they know I'll do it for them. But I told them don't sweat it, don't even trip on him.

(RT 4804.) It was stipulated that this note did not refer to the victims or witnesses in this case. (RT 4803-4804.)

(CALJIC No. 2.07; CT 861; RT 5068-5069.)

The jury was also instructed:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(CALJIC No. 2.09; CT 862; RT 5069.)

And the jury was instructed that it "must decide separately whether each of the defendants is guilty or not guilty." (CALJIC No. 17.00; CT 900; RT 5089; see also RT 5473 [instructing jurors that "[e]ach defendant is entitled to your individual assessment and opinion," and reminding them that "we are really doing [two] separate trials here at the same time"].)

In *People v. Yeoman* (2003) 31 Cal.4th 93, this Court stated:

> Jurors are routinely instructed to make . . . fine distinctions concerning the purposes for which evidence may be considered, and we ordinarily presume they are able to understand and follow such instructions. [Citation.] Indeed, we and others have described the presumption that jurors understand and follow instructions as "[t]he crucial assumption underlying our constitutional system of trial by jury." [Citations.] We see no reason to abandon the presumption . . . where the relevant instructional language seems clear and easy to understand.

(*Id.* at p. 139; see also *Zafiro v. United States, supra,* 506 U.S. at p. 539 ["less drastic measures[] [than separate trials,] such as limiting instructions, often will suffice to cure any risk of prejudice"]; *Richardson v. Marsh* (1987) 481 U.S. 200, 206 [it is "the almost invariable assumption of the law that jurors follow their instructions"]; *People v. Coffman, supra,* 34 Cal.4th at p. 41 [citing *Zafiro*]; *People v. Waidla* (2000) 22 Cal.4th 690, 725 ["there is no basis to

judge [the limiting instructions] ineffectual. The presumption is that limiting instructions are followed by the jury"]; *People v. Zack* (1986) 184 Cal.App.3d 409, 416 ["'In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control'"].)

There is no reason to believe that appellants' jury would have been unable to limit its consideration of Johnson's post-offense statements to Johnson. The court's limiting instructions were clear, and the jurors expressly indicated that they understood them. (Cf. *People v. Ervin* (2000) 22 Cal.4th 48, 69 ["The record . . . fails to show that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant or were confused by the limiting instructions"].)

Allen's argument that Alternate Juror No. 2's note constitutes "[p]roof that the court's limiting instructions were ineffective" (AAOB 614-615), is without basis. This note, which was submitted to the court during a recess in the penalty phase, stated: "Your Honor[,] [¶] "I feel very uncomfortable being pointed at by Defendant All[e]n and his lawyer. Could you please address this issue." (CT 977; RT 6553-6555, 6571.)

Allen's counsel told the court, "I don't know who Mr. Allen was pointing at. I don't think either of us had any alternates in mind." Asked by the court, "Were you pointing at somebody?" Allen's counsel replied, "Not really. We are trying to do some guessing things." (RT 6554.) Allen's counsel acknowledged that a gesture had been made in the jurors' direction, but maintained that neither he nor Allen had Alternate No. 2 in mind. (RT 6572-6573.) The court admonished all counsel to try to refrain from gesturing at the jurors. (RT 6554, 6573.)

The court then addressed the jury,[73] stating:

> . . . Alternate Number 2, ma'am, first of all, thank you for bringing this matter to the court's attention. . . . Any time a juror feels uncomfortable I feel uncomfortable, and we need to deal with it.
>
> I've spoken to counsel and, ma'am, I can assure you, I believe, based on my knowledge of what goes on in the courtroom, and my knowledge of the parties involved and counsel involved, that . . . there was no intent to single you out or to actually point at you, okay? There was something going on between the defendant and his counsel which really did not relate to you at all, or any other juror.
>
> So that's all I can tell you at this point. [¶] Is that going to satisfy you?

(RT 6575-6576.)

Alternate No. 2 responded, "Yes." (RT 6576.) The court then asked the jury if there was "anybody who for any reason feels unable or uncomfortable about going forward and doing their duty in this penalty phase . . . ?" The jurors answered in the negative. (RT 6576-6577.)

The above occurrence had nothing to do with, much less called into question, the jury's ability to follow the court's limiting instructions.

E. A Joint Trial Did Not Prevent Allen From Adequately Cross-Examining Prosecution Witnesses

Incorporating by reference Arguments IV, and VI through X, of his Opening Brief, Allen contends that a joint trial prevented him from adequately cross-examining Freddie Jelks, Marcellus James, and Detectives McCartin and

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73. Alternate No. 2 had shared the contents of her note with the other jurors. (RT 6571-6572.)

Sanchez. (AAOB 615-616.) Such contentions are without merit,[74] and respondent has addressed them in detail in connection with appellants' freestanding Confrontation Clause claims. (See pp. 178-200, 207-215, *infra*.)

F. A Joint Trial Did Not Otherwise Result In "Gross Unfairness"

Nor did a joint trial otherwise result in "gross unfairness" to Allen. (*See People v. Arias, supra,* 13 Cal.4th at p. 127.)

There was substantial independent evidence of Allen's guilt. It was undisputed that Allen, aka "Fat Rat," was a member of the 89 Family. (RT 3363, 3530-3531, 4041-4043, 4045, 4299-4300, 4319-4320, 4418, 4791.)

Jelks testified that when Johnson had asked the group who wanted to "serve" Beroit, Allen volunteered. (RT 3542-3543, 3550.) Johnson retrieved an Uzi, and handed it to Allen. (RT 3543-3546, 3555, 3558-3559, 3653-3654, 3704.) Allen got into a car, which drove north through the alley as Johnson had instructed. (RT 3555-3558, 3562-3565, 3623-3624, 3657-3658.) Allen had short hair, glasses, and was wearing a black windbreaker. (RT 3558, 3569.) About one or two minutes later, Jelks heard gunshots. (RT 3566-3567.) Allen subsequently returned to Johnson's house, sweating and breathing heavily. (RT 3568-3570, 3575, 3658.) He removed his jacket and baseball cap, and handed Johnson the gun. (RT 3569-3570, 3575.) Allen, appearing nervous, said that he had "served them." (RT 3572, 3574.)

On or about the next day, Allen described to Jelks how he had committed the shooting. (RT 3579-3580, 3623.) Allen said that he walked up to the victims, "stooped over," and started firing at them. The victims never saw him coming. (RT 3580-3581, 3623.) Allen shot the passenger first and

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74. Indeed, in contradictory fashion, Allen states elsewhere in his Opening Brief that "the credibility of . . . Jelks was undermined so extensively" (AAOB 372), and that James was "impeached significantly" (AAOB 314).

then the driver.[75] (RT 3581, 3622-3623.) As he was shooting, Allen could see the passenger's flesh "popping off." (RT 3580, 3622-3623.) He also mentioned that he did not hit the car.[76] (RT 3581-3582.) When interviewed by the police in 1994, Jelks identified Allen as the shooter in the carwash case. (RT 3740.)

Allen argues that Johnson's extrajudicial admissions served to corroborate Jelks's testimony, which resulted in Jelks's credibility being improperly bolstered when the jury deliberated Allen's guilt. (See AAOB 603, 607-608.) Respondent disagrees. As discussed above, the court's limiting instructions adequately protected Allen. Further, Jelks's testimony as to Allen's involvement was amply corroborated by other witnesses, to wit, Carl Connor, Willie Clark, Eulas Wright, and Marcellus James.

Connor testified that he was at the auto repair shop next to the carwash, when he saw Allen, who he recognized from the neighborhood as "Fat Rat," walk up to the victims' car, and start shooting into the car with an Uzi or Mack 10. (RT 3338-3341, 3344-3346, 3349-3351, 3354, 3377-3378, 3422, 3441, 3450.) Connor described Allen as "chubby," with short hair and glasses. (RT 3346, 3431.) After the shooting stopped, Connor saw Allen walking west on 88th Street, toward the alley. (RT 3349, 3357-3360, 3424-3427.) When interviewed by the police, Connor positively identified Allen's photograph as the shooter. (RT 3373-3376, 3986; Supp. IV CT 371, 383-384, 386-387.)

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75. The shell casings recovered at the scene were predominately located on the front passenger side of the victims' car. (RT 3778-3780, 3782-3783.)

76. Detective Tiampo testified that there was an exit bullet hole on the driver's side of the car. (RT 3774-3775.) He did not recall finding any other damage to the car's exterior. (RT 3803-3804.) The passenger and driver's side windows were down. (RT 3774.) There was no broken glass around the car. (RT 3774-3775.)

Clark, who worked at the carwash, testified that when the shooting stopped, he saw a short, heavyset Black male, with short hair, wearing a black windbreaker with a hood, standing by the victims' car. (RT 3258-3259, 3265-3267, 3274-3275, 3279, 3283, 3303-3304.) The man ran north on Central, then turned left on 87th Place. (RT 3275, 3277, 3303-3304.) Approximately three months later, Clark selected Allen's photograph from a six-pack photo display as looking like the shooter. (RT 3270, 3280-3283, 3318-3322.)

Wright, the carwash's owner, testified that after the shooting stopped, he saw a short guy with a "chunky" build, wearing a black "Raiders" jacket with the hood over his head, running north up the street. (RT 3868, 3873-3875, 3888, 3890-3893.)

Finally, James, a former 89 Family associate, testified that he had heard rumors that Allen committed the carwash shooting. (RT 4041, 4072, 4321-4322, 4082-4084.) In 1992, James saw Allen down the street from James's house, and asked Allen if he had done it. Allen said, "Yeah." He told James that he had walked up to the victims and shot them. Allen stated that the victims were from the "wrong neighborhood." (RT 4041-4044, 4073, 4075-4078, 4081, 4083-4085, 4088, 4159, 4162-4163, 4240.) Allen added that when he shot the victims, the eyes of one of them "popped out of his head."[77] (RT 4084.)

Thus, as the prosecutor argued in closing argument, Allen had been "identified from a number of different sources." (RT 5117.)

In *People v. Coffman, supra,* this Court concluded:

> In sum, given the prosecution's independent evidence of defendants' guilt and the trial court's carefully tailored limiting instructions, which we presume the jury followed [citation], even under the heightened

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77. Officer Salcido testified that the eyeball of one of the victims had been "hanging out." (RT 3908.)

> scrutiny applicable in capital cases [citation], we find no abuse of discretion in the denial of severance. For the same reasons, defendants' claims that the joint trial deprived them of their federal constitutional rights to due process, a fair trial and a reliable penalty determination likewise must fail.

(34 Cal.4th at p. 44.)

The above language applies with equal force here. Allen's claim that his conviction should be reversed due to the denial of a severance is without merit.

III.

THE GANG EVIDENCE WAS PROPERLY ADMITTED

Appellants raise numerous claims regarding the allegedly improper admission of gang evidence. (AAOB 378-556; JAOB 114-170, 177-183.) As discussed below, such claims lack merit.

A. General Principles

"Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged -- and thus should be carefully scrutinized by trial courts -- such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect." (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

As stated by this Court in *People v. Hernandez* (2004) 33 Cal.4th 1040:

> [E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, . . . or other issues pertinent to guilt of the charged crime.

(*Id.* at p. 1049; see also Evid. Code, § 1101, subd. (b) [evidence of other acts admissible "when relevant to prove some fact (such as motive, opportunity, intent . . .) other than [defendant's] disposition to commit such an act"]; *People v. Martin* (1994) 23 Cal.App.4th 76, 81 ["where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial"]; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497 [while "California courts have long recognized the potentially prejudicial effect of gang membership evidence[,] [t]hey have admitted such evidence when the

very reason for the crime, usually murder, is gang related"]; *People v. Perez* (1974) 42 Cal.App.3d 760, 767 ["Motive is always relevant in a criminal prosecution"]; compare *People v. Cox* (1991) 53 Cal.3d 618, 660 ["we have condemned the introduction of evidence of gang membership if only tangentially relevant"].)

In addition,

> [e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court. [Citations.] . . . [¶] . . . [I]t is not necessary to show the witness's fear of retaliation is "directly linked" to the defendant for the threat to be admissible. [Citation.] It is not necessarily the source of the threat -- but its existence -- that is relevant to the witness's credibility.

(*People v. Burgener, supra,* 29 Cal.4th at p. 869.)

As stated in *People v. Olguin* (1994) 31 Cal.App.4th 1355, a gang case:

> A witness who testifies despite fear of recrimination . . . is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. . . . [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony knowing it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear.

(*Id.* at pp. 1368-1369; italics omitted.)

It is also well settled that the culture, habits, and psychology of gangs is a proper subject for expert testimony. (See *People v. Williams* (1997) 16 Cal.4th 153, 196; *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657; *People v. Valdez* (1997) 58 Cal. App.4th 494, 506.)

A trial court's ruling on the admission of evidence, including gang evidence, is reviewed for abuse of discretion. (*People v. Carter, supra,* 30 Cal.4th at p. 1194; *People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Champion* (1995) 9 Cal.4th 879, 922.) The trial court's exercise of that discretion "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

The erroneous admission of gang evidence does not compel reversal unless there is a reasonable probability that the error in permitting such evidence affected the verdict. (See *People v. Champion, supra,* 9 Cal.4th at p. 923; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. The Trial Court Properly Allowed The Challenged Gang Evidence To Show Connor, Jelks, And James's Fears Of Retaliation

While acknowledging that gang evidence is admissible to show a witness's fear of retaliation, Allen claims that the trial court abused its discretion by allowing the prosecutor to introduce "extensive, inflammatory and highly prejudicial gang evidence for [that] ostensible purpose." (AAOB 378-427.) Johnson similarly argues that the court erroneously permitted "graphic evidence of gang violence" regarding the murder of Nece Jones. (JAOB 147-153.) Respondent disagrees.

1. Connor

Connor first talked to the police about the carwash shooting three years later. (RT 3372-3373, 3376, 3973-3974.) Detective Sanchez made contact with him while investigating an unrelated murder in the neighborhood. Detective Sanchez was in an unmarked car, and dropped her business card on the ground near Connor because he did not want to be seen talking to the police. (RT 3971-3972.) The next day, Connor called Detective Sanchez, and they scheduled a formal interview. (RT 3972-3973.)

On August 15, 1994, Connor came to the police station. (RT 3973, 3991.) According to Detective Sanchez, Connor "didn't seem excited or happy" to be there, "but he was there willing to talk to us." (RT 3973.) The interview was secretly tape-recorded. (RT 3374, 3974, 3978.)

Connor stated that he was scared for his family, and that he did not want to testify. He asked if his name could be changed. (RT 3974.) Connor selected Allen's photograph as the person who had committed the carwash shooting. (RT 3373-3376, 3986; Supp. IV CT 371, 383-384, 386-387.) Connor also said that he had seen Allen walk back to Johnson's house to get the gun, and return to Johnson's house after the shooting. (Supp. IV CT 372, 374, 376, 378-382.)

Before coming into court, Connor told Detective Sanchez that he would testify against Allen, but not against Johnson because Johnson had "too many followers." (RT 3987-3988.)

Connor testified that he did not want to be in court. (RT 3334-3335, 3381-3382.) He had seen "paperwork" with his name on it in the neighborhood, and did not want his name "circulating around the neighborhood as being a snitch." (RT 3380, 3382.) In his neighborhood, snitches were viewed as "outcast[s]," and could "get killed." (RT 3361-3362.) Connor knew that Nece Jones had been killed for testifying against someone. (RT 3382-3383.) When people asked him about appellants' case, Connor would say that

he did not see anything. (RT 3362-3363.) Connor acknowledged that, by testifying, he was making himself a snitch. (RT 3361.)

Connor expressed fears regarding the 89 Family to detectives. Detective Barling considered those fears to be legitimate ones. (RT 4324.) Connor testified that he was not afraid for himself, but for his family. (RT 3384-3385.)

Connor testified in the case involving Nece Jones's death. (RT 3385-3386, 3389.) He received a $25,000 reward for his testimony from the City of Los Angeles. (RT 3389, 3449.) Connor had not been offered anything in exchange for his testimony in the instant case. (RT 3389-3390.)

At appellants' trial, Connor testified that he did not recall having seen Allen go to Johnson's house after the shooting. (RT 3359, 3364-3366.) Connor denied that he had said anything to the police about Johnson. (RT 3379-3380.)

Allen complains that when the prosecutor asked Connor about "[w]hat happens to snitches in [Connor's] neighborhood," the prosecutor did not limit her questions to Connor's state of mind. (AAOB 385-386.) Initially, these questions were not objected to at trial (see RT 3361-3362), thus any alleged error has been waived. (Evid. Code, § 353; *People v. Poggi* (1988) 45 Cal.3d 306, 331 ["It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'"].)

Moreover, the prosecutor's questions appropriately established Connor's fear of retaliation, which provided a reasonable explanation as to why he had not contacted the police earlier, and why he refused to implicate Johnson at trial. (See *People v. Burgener, supra,* 29 Cal.4th at p. 869 [evidence that a witness fears retaliation for testifying is relevant and admissible to credibility].) The court also instructed the jury that Connor's testimony about not wanting to

be in court was "being offered on the witness' credibility and attitude towards the proceedings." (RT 3334-3335.) It is presumed that the jury followed that instruction. (See *People v. Olguin, supra,* 31 Cal.App.4th at pp. 1373-1374 [applying to use of gang evidence general rule that "jurors are presumed to adhere to the court's instructions absent evidence to the contrary"].)[78/]

Next, Allen argues that the court erroneously overruled his relevance objections to Connor's testimony that he knew that Nece Jones had been killed for testifying against someone.[79/] (AAOB 387-389; RT 3382-3384.) Johnson also claims such testimony was irrelevant. (JAOB 147.) Respondent disagrees. Connor's knowledge of a person who had been murdered for testifying was obviously relevant to Connor's fear. (See *People v. Olguin, supra,* 31 Cal.App.4th at p. 1369 [jury entitled to know not just that witness was afraid, but also facts which would enable them to evaluate witness's fear].) As the trial court explained in its accompanying limiting instruction:

> Ladies and gentlemen, the reason the court is allowing this in over the objection of relevance is it is not so the jury will have any particular knowledge of what happened to Nece, or anybody else, but how it may bear upon this witness' testimony and why he has made certain statements, his demeanor or reluctance. [¶] Does everybody understand the limited purpose that you are allowed to consider this evidence?

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78. To the extent Allen contends that a further limiting instruction should have been given (see AAOB 386, fn. 220), such an instruction was not requested, and the court had no sua-sponte duty to give one. (See Evid. Code, § 355; *People v. Hernandez, supra,* 33 Cal.4th at pp. 1051-1052 [trial court ordinarily has no sua-sponte duty to give limiting instruction regarding gang evidence].)

79. The record does not reflect an answer to the prosecutor's question, "Did she testify against somebody who was part of the 89 Family?" (RT 3383-3384.)

(RT 3383-3384.) The jurors answered in the affirmative. (RT 3384.) Appellants fail to offer any convincing reason to believe that the jury did not follow this instruction. (See AAOB 388-389.)

Contrary to Allen's assertion, there ultimately was no objection to evidence that Connor had testified in the Nece Jones case. (See AAOB 390; RT 3388-3389.) Any complaint regarding such evidence has thus been waived. In any event, Connor's receipt of a reward for his testimony in that case was relevant to both sides. From a defense perspective, it arguably showed that Connor had a financial motive to help the prosecution obtain convictions. (See RT 5199 [Allen's closing argument characterizing Connor as a "mercenary" who "has interests in cases"].) On the other hand, the prosecutor desired to show that while Connor had received a reward in connection with the Jones case, he was not expecting to receive any financial benefit in the present case. (See RT 3385-3390.) Thus, testifying in this case was a no-win proposition for Connor.

Johnson further claims that the evidence of Jones's murder was "cumulative, highly inflammatory and far more prejudicial than probative," and that "[i]ts admission violated [Johnson's] Fifth, Sixth, Eighth, and Fourteenth Amendment rights." (JAOB 147.) Because there was no objection on these grounds at trial, such claims have been waived. They are also without merit. The guilt-phase evidence regarding Jones's murder was brief (RT 3382-3383, 3385-3386, 3389, 3449), was accompanied by a limiting instruction (RT 3383-3384), no details, much less "graphic evidence" (JAOB 147), of that crime were presented, and no evidence was introduced regarding Johnson's involvement in such crime.

Nor, as Johnson asserts, was there a "strong implication" that he had ordered Jones's murder. (JAOB 150-151.) No evidence was adduced that the

89 Family, let alone Johnson, had been responsible for that murder.[80] Further, the jury heard evidence that the 89 Family had approximately 50 to 60 members (RT 4361-4362), and that Johnson was "a" shot-caller in the gang, not the only one (RT 3625, 4326).

Allen characterizes the prosecutor's questioning of Connor regarding what he feared would happen to his family if he testified, to which Connor eventually responded that he was afraid somebody from his family may get shot and killed, as being "of such an incendiary nature that the potential undue prejudice . . . was inescapable." (AAOB 393; RT 3384-3385.) Respondent disagrees. The prosecutor was appropriately asking Connor to define the nature of his fear. As the trial court later explained: "Certainly [the People] are entitled to more than 'I'm afraid.' . . . [O]ne might be afraid for various reasons and to various degrees." (RT 3637.) (Cf. *People v. Olguin, supra,* 31 Cal.App.4th at p. 1369 ["A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle . . . would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house"].)[81]

Allen also takes issue with the prosecutor's eliciting from Detective Sanchez that Connor had stated during their August 1994 interview that "[h]e was scared for his family in the neighborhood," and he did not want to testify. (AAOB 411; RT 3974.) There was no objection to this questioning, thus waiving any alleged error. Such testimony also was entirely proper, as it went directly to Connor's credibility.

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80. Contrary to Johnson's assertion (at JAOB 151), neither Connor nor Detective Sanchez testified that Jones had been killed by the 89 Family.

81. When the prosecutor proceeded to ask "[w]hy" somebody from Connor's family may get shot and killed, the trial court exercised its discretion to curtail such questioning, stating: "I think the point is made, People. [¶] Next question." (RT 3385.)

Next, Allen contends that the court should have sustained his asked-and-answered objection to the prosecutor's question to Detective Sanchez: "How would you describe Mr. Conn[o]r's attitude about testifying in this case?" to which Detective Sanchez replied, "He didn't want to." (AAOB 411-413, & fn. 239; RT 3987.) Respondent disagrees. A "trial court has wide discretion under Evidence Code section 352 [in determining] whether evidence should be excluded as cumulative." (*People v. Morgan* (1987) 191 Cal.App.3d 29, 39.) Here, the court properly overruled Allen's asked-and-answered objection, as the prosecutor was now seeking to elicit Detective Sanchez's opinion (as opposed to Connor's statements) regarding Connor's attitude toward testifying, based on her contact with Connor during the pendency of this case. (RT 3987.) And because the question pertained to "the pendency of this case" (*ibid.*), the time period after Connor's August 1994 interview was now being considered.

It was also proper for the prosecutor to elicit from Detective Sanchez that before Connor entered the courtroom, he stated that he would testify against Allen, but not against Johnson because Johnson had too many followers. (AAOB 412-413; RT 3987-3988.) This explained Connor's failure to recall at trial that he had seen Allen go to Johnson's house after the shooting. (RT 3359, 3364-3366; Supp. IV CT 374, 378-379.) As for the court's failure to instruct that Connor's statement was limited to his state of mind (AAOB 413), there was no sua-sponte duty to do so.

Finally, Allen suggests that Detective Barling's testimony that Connor had expressed fears to him and other detectives regarding the 89 Family, and that in Detective Barling's view, those fears were legitimate ones, was cumulative. (AAOB 416; RT 4324.) Such a claim has been waived due to Allen's failure to object to this testimony at trial. The claim also lacks merit. That Connor had expressed fears of the 89 Family to multiple detectives evidenced the extent of his fear. And that, according to a gang expert, such

fears were legitimate, showed that Connor was testifying despite an actual risk of harm, which was obviously relevant to Connor's credibility.

2. Jelks

On December 6, 1994, Jelks talked to the police for the first time about this case. (RT 3628, 3630, 3646, 3684, 3729, 3738, 4165-4166, 4168.) Detective McCartin transported him to the police station for questioning. (RT 3628-3629, 3659-3660, 3684-3685, 4165-4166.) Jelks appeared "[v]ery scared and reluctant" to accompany the detective. (RT 4165-4166.)

The interview was secretly videotaped. (RT 3630-3631, 4178.) Jelks was not forthcoming at the beginning of the interview. (RT 4166.) He was afraid of being labeled a snitch, and "end[ing] up dead." (RT 3629, 3631, 3729-3733, 3736-3739, 4165-4166, 4169, 4233-4234.) Jelks also was concerned for the safety of his relatives who still lived in 89 Family territory. (RT 4166, 4234.) In the opinions of Detectives McCartin and Barling, Jelks's fears were legitimate ones. (RT 4171, 4324-4325.)

Detective McCartin had to pressure Jelks to cooperate. (RT 4166-4167, 4188.) Eventually, Jelks agreed to do so. (RT 3746-3747, 4179.) Jelks identified Allen as the shooter in the carwash case, and stated that Johnson had given Allen the gun. (RT 3740-3742.)

After Jelks spoke to the police, someone known as "Face" told Jelks that Johnson had sent him to find out if Jelks was "talking." Jelks told Face, "[N]o, I didn't say nothing." (RT 3631-3632.) Face also stated that there was "a hit" out for Jelks. (RT 3633.) Another person, known as "Bat Mike," told Jelks that Johnson wanted Jelks to be shot. (RT 3631, 3633.) A female named Belinda told Jelks the same thing. (RT 3633-3634.) Jelks's niece and sister were also threatened. (RT 3634-3635, 3638.)

Jelks was nervous about testifying because he feared he may be killed. (RT 3747; see also RT 3629, 3631, 3729-3733, 3736-3739, 4324-4325.) He

was being protected while in custody.[82] (RT 3638.) Jelks was also concerned about retribution against members of his family. (RT 4325.)

Allen first asserts that the following portion of Jelks's testimony was prejudicial, because "[e]ven though the prosecutor's question referred expressly to Jelks' state of mind, Jelks' response did not" (AAOB 398):

> Q. When you said you were scared, what were you scared of?
>
> [ALLEN'S COUNSEL]: Been asked and answered.
>
> THE COURT: Overruled. . . . Anything else other than what you've already mentioned?
>
> [JELKS]: Just the fact that, you know, in a situation like this you talk to the police, . . . it gets back and . . . you are a dead man. You know, if you talk to them about something as major as this, the greater odds are against you to survive through it.

(RT 3631.)

Allen's claim on appeal regarding the above testimony has been waived, because there was no objection on that ground at trial. The claim is also without merit, for as Allen himself states, "The prosecutor's question made it clear that Jelks['s] answer was in reference to his state of mind." (AAOB 398.)

Allen next argues that Jelks's testimony about having been approached by Face, Bat Mike, and Belinda "carried the strongest possible potential danger that the jury would consider it for a . . . highly prejudicial[] purpose." (AAOB 398-400.) Johnson also argues that this evidence was "irrelevant, cumulative, unreliable, and inflammatory." (JAOB 170-177.) However, other than alleged lack of relevance, appellants' claims have been waived, as the only objections

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82. Jelks had been charged with a "serious offense," and was in custody at the time of appellants' trial. (RT 3512, 3514, 3627-3628, 3641, 3682-3683, 3749.)

to such testimony at trial were on hearsay and relevancy grounds. (RT 3632-3634.)

Johnson contends that Jelks's fear of retaliation was irrelevant because "there was no indication during direct examination that Jelks's testimony was in any way impacted by fear of retaliation." (JAOB 173-174.) Respondent disagrees. As the prosecutor argued during closing argument:

> Freddie Jelks came into court in handcuffs, fearful for his safety, concerned and nervous. [¶] You saw his body language. You saw how he sat and you heard his voice. The hesitancy with which he spoke, spoke reams about the concerns that he had.

(RT 5123.)

A witness, such as Jelks, "who testifies despite fear of recrimination . . . is more credible because of his or her personal stake in the testimony." (*People v. Olguin, supra,* 31 Cal.App.4th at p. 1368.) Jelks's fears of retribution were legitimate ones. (RT 4171, 4324-4325.) In the words of the prosecutor in closing argument, Jelks "put his life on the line" by testifying. (RT 5125.)

The court also gave appropriate limiting instructions regarding Jelks's testimony about his encounter with Face. After Jelks testified that Face had "said that Evil sent him to find out if I was talking or not," the court instructed the jury:

> Ladies and gentlemen, that statement will not be received for its truth, but only as it may bear upon this witness' credibility in testifying. [¶] Is everybody clear on that? You can't use it for any other purpose.

(RT 3632.)

In response to defense objections to a subsequent question, the court stated:

I don't believe it's offered for the truth, it's just offered on the credibility of the witness, to perhaps explain his demeanor and manner in testifying

. . . .

(RT 3632.)

In addition, following an objection to Jelks's testimony that Face had told him there was "a hit" out for Jelks, the court instructed the jury: "Ladies and gentlemen, it goes to this witness' state of mind, his demeanor, and nothing else. [¶] Everybody clear on that?" (RT 3633.) There is no reason to believe that the jury did not follow these instructions. (Cf. *People v. Olguin, supra,* 31 Cal.App.4th at p. 1368 ["The trial court correctly limited the evidence to 'the witness' state of mind . . .,' and we presume the jury adhered to the trial court's limitations on this testimony"].)

Allen next complains that the prosecutor was allowed to ask Jelks, "[I]s it true that relatives of yours have been threatened?" to which Jelks answered, "Yes" (RT 3638), when that question did not refer to Jelks's state of mind, and was not accompanied by a limiting instruction. (AAOB 400-402.) Allen's complaint is both waived and without merit. There was no objection to that question, nor was a limiting instruction requested.[83/] It was also evident, in light

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83. Defense counsel did not object to the following testimony:

Q. To the best of your knowledge have any of your family members been threatened?

A. Yes.

Q. Who?

A. My niece and my sister.

(RT 3634-3635.)

The defense objected to the follow-up question, "And with respect to your niece, when did that happen?" on Evidence Code section 352 and discovery grounds. (RT 3635-3636.) As a result, the court allowed the prosecutor to ask the single leading question quoted in the text above (RT 3636, 3638), of which Allen now complains on appeal.

of the court's numerous limiting instructions regarding similar testimony, that that question concerned Jelks's state of mind.

Allen further complains that the prosecutor continued to ask Jelks questions on redirect examination about the repercussions of being a snitch, which allegedly served to "remind the jury of their 'reason to hate[]'" the 89 Family. (AAOB 402-407; RT 3729-3730, 3732-3733, 3737-3739, 3747, 3755.) With the possible exception of one question to which an asked-and-answered objection was interposed,[84] Allen's claim has been waived. In any event, the prosecutor's redirect examination was proper, given defense counsels' attempts to establish on cross-examination that Jelks had lied to the police in order to obtain favorable treatment on his pending case. (See RT 3646, 3659-3660, 3682-3685, 3715-3718, 3720-3722, 3727, 3729, 3749, 3753-3754.) The prosecutor's questions were not designed to provide a so-called "reason to hate" appellants or the 89 Family, but to show that Jelks stood more to lose, i.e., his life, than to gain by testifying against the gang. Such questions went to the heart of Jelks's credibility.

Also, contrary to Allen's assertion, Jelks's testimony that he had known an 89 Family member to have a Tech 9 or Uzi (RT 3741) was not elicited to show the gang's "ability to intimidate victims and witnesses" (AAOB 406), but rather the gang's access to the type of weapon used in the carwash shooting.

Lastly, Allen takes issue with the testimony of Detectives McCartin and Barling regarding Jelks's fears of retaliation, essentially as being cumulative. (AAOB 414-417; RT 4165-4166, 4169, 4171, 4233-4234, 4324-4325.) Because there was no objection to this testimony at trial, any alleged error has

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84. Near the end of her initial redirect examination of Jelks, the prosecutor asked him why he had felt nervous when he came into court the previous day. Defense counsel objected to the question as having been asked and answered. The objection was overruled. (RT 3747.)

been waived. In any event, the detectives' testimony was not cumulative, but served to corroborate the existence and legitimacy of Jelks's fears.

3. James

James first talked to the police about this case on September 21, 1994, while in custody on a probation violation. (RT 4044, 4049, 4054-4056, 4156-4158.) The interview was secretly tape-recorded. (RT 4159, 4238-4239.) Detective McCartin described James's demeanor at the start of the interview as "[v]ery scared and reluctant." (RT 4159.)

Because he feared retaliation from the 89 Family, James did not immediately tell the police everything he knew. (RT 4044-4045, 4080, 4159-4160, 4233-4234, 4325.) He thought that if he held back information, he would not have to testify. (RT 4080.) Consequently, James initially lied to the police that he "didn't actually hear it from [Allen]" that Allen had committed the carwash shooting, but just heard it from somebody in the neighborhood. (RT 4069-4072, 4080-4081.) Later in the interview, James truthfully stated that Allen himself had told James of his commission of the shooting. (RT 4085.)

James still feared retaliation, despite having moved out of the neighborhood. (RT 4045-4047.) He felt that he had made himself a snitch by testifying. (RT 4047.) Detective Barling considered James's fears for his safety to be legitimate fears. (RT 4325.)

The defense did not object to any of the prosecutor's questions concerning James's fear of retaliation. Allen's claims on appeal with respect thereto (AAOB 407-411, 413-414, 417) have thus been waived. The prosecutor's questioning on the subject of James's fear was also clearly proper. Not only did the existence of such fear evidence James's credibility as a witness, it explained why he initially lied to the police about the source of his information that Allen had committed the shooting.

In sum, the credibility of Connor, Jelks, and James was a central issue in this case. The court thus properly allowed the challenged gang evidence to show the nature, extent, and legitimacy of these witnesses' fears of retaliation.

C. Detective Barling's Expert Testimony Was Proper

Allen contends that the trial court abused its discretion when it ruled Detective Barling was qualified to testify as an expert regarding the 89 Family and appellants, and when it allowed Detective Barling to testify that the charged murders sent a message to the East Coast Crips. Appellants both further contend that the court erroneously allowed Detective Barling to testify that the 89 Family kept weapons in the pigeon coop in Johnson's backyard, and that the fears expressed by prosecution witnesses were legitimate. (AAOB 427-494; JAOB 133-146.)[85] Respondent disagrees.

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85. While not listed as one of his four "Claim[s] of Error," Allen also asserts that the prosecution presented "minimal credible evidence" that the motive for the murders was gang related. (AAOB 433-437.) Respondent disagrees. Initially, at the hearing on the prosecutor's motion to admit gang evidence, there was no objection to the prosecutor stating in opening statement that this was a gang homicide. (RT 3204-3206.) The trial court also found that gang evidence was "highly relevant" in this case. (RT 3206.) Even elsewhere in his Opening Brief, Allen characterizes this as a "trial involving the execution-style murders of two victims for which the motive was gang related." (AAOB 454, 466.)

At trial, in addition to the expert testimony of Detective Barling, the prosecutor presented Jelks's firsthand account of the circumstances immediately preceding the shooting. Jelks testified, inter alia, that Johnson had stated that the car at the carwash belonged to "Baba," who was an 89 East Coast Crip. (RT 3537-3538, 3655-3657, 3698.) Then somebody else said that the car belonged to a guy named Payton. (RT 3540-3541.) Payton was also associated with the East Coast Crips. He was known for having money, and for helping that gang. (RT 3540-3542, 3552.)

The 89 Family and 89 East Coast Crips were enemies. (RT 3538.) Central Avenue was the dividing line between them. The 89 Family's territory was located on the west side of Central, and that of the East Coast Crips on the east side. (RT 3553.) The carwash was on the west side of Central. (RT 3526-

1. Relevant Proceedings Below

Before Detective Barling testified, the prosecutor explained to the court that this detective was "not a gang expert in the generic sense," but had

> worked for [the] LAPD from at least 1989 until the present and focused on 89 Family and the neighboring Swan gangs. . . .
>
> He was a CRASH officer . . . . Now he's a homicide investigator. He had daily contacts with the people involved in the street. He was intimately familiar with who lived where and what the relationship between the people in this particular set of gangs were. . . .
>
> He is somebody who had contact with virtually everybody whose names have come up in the context of this particular case.

(RT 4266.)[86]

3527.)

Johnson and the rest of his group were upset that a Crip might have brought his car onto Central. (RT 3542.) Johnson asked the group who wanted to "serve," i.e., shoot, Payton. (RT 3542, 3550.) Shooting Payton would send "a message" to the East Coast Crips. (RT 3552.) Allen volunteered. (RT 3542-3543, 3550.)

Donnie Adams testified that, following the shooting, Johnson told him that the shooting had involved a "mission," and remarked, "That's two crabs gone." (RT 4414-4415.) According to Adams, who was a member of the 89 Family, it would have been disrespectful to the 89 Family for a Crip to go to that carwash in the middle of the day. (RT 4408, 4412, 4416-4417.)

And James testified that Allen had told him that the victims were from the "wrong neighborhood." (RT 4043-4044.) Thus, there was more than ample evidence that these murders were gang related.

86. Allen characterizes the prosecutor's comment that Detective Barling was "not a gang expert in a generic sense" (RT 4266) as being "rather startling," an "admission," and indicating the prosecutor's belief that Detective Barling "did not have the qualifications to testify as an expert on African-American gangs generally in the Los Angeles area." (AAOB 437, 440, & fn. 249; italics omitted.) To the contrary, the prosecutor was simply pointing out that Detective Barling was not only a gang expert in the general sense, but he had had firsthand experience with the people involved in this case.

The court responded, "So, [Detective Barling is] an expert on this little subset." (RT 4266.) The court then elicited from the prosecutor the nature of Detective Barling's expected testimony. (RT 4266-4268.)

Johnson's counsel objected to Detective Barling rendering an opinion that this shooting was a "mission," on the ground that such was an "ultimate conclusion" for the jury. (RT 4269.) He also objected to Detective Barling testifying that guns were known to be kept in the Johnsons' pigeon coop as being "either hearsay or a conclusion," absent personal knowledge of that fact on the detective's part. (RT 4269-4270.) In addition, Johnson's counsel objected to Detective Barling testifying that the witnesses' fears of retribution were real, on the ground that that was a conclusion. (RT 4270.) Allen's counsel added that an opinion by Detective Barling that Johnson was a shot-caller, and "sends other ones out on missions, to wit Allen, because Allen just got back in the neighborhood, is a far stretch by a non-percipient witness." (RT 4271.)

The court ruled as follows:

> . . . [The prosecutor] must lay the foundation that [Detective Barling] has some particular expertise, vis-a-vis this gang, and the players involved in this subset known as 89 Family.
>
> [Detective Barling] may . . . testify to his knowledge of the defendants in this case, and . . . assuming there's proper foundation he may render an opinion re Mr. Johnson's position in that group. [¶] He may render opinions . . . whether Johnson is a respected member by other gang members. [¶] Whether [Johnson] has a reputation for being the type of person wherein others will do things for him at his behest. . . . [¶] Further, . . . [the prosecutor] will be allowed to elicit from [Detective Barling] . . . that Mr. Johnson is feared . . . .

[The prosecutor] may not seek from [Detective Barling] an opinion that in this case what happened was Mr. Allen was sent out by Mr. Johnson to do a killing as part of some sort of mission. . . . But . . . [¶] [the detective] can give . . . a description of what that term means, a mission, because we've heard . . . some reference to it earlier in the case. . . .

[The prosecutor] may elicit from [Detective Barling] . . . an opinion that sometimes when folks are absent and then return they are expected to, or choose to do things for the gang to sort of get back in their good standing, without reference to his opinion that that's what Mr. Allen did here. [¶] [The prosecutor] may elicit from [Detective Barling], if he knows it, that Mr. Allen was absent in fact for some period of time from that neighborhood, without saying that Allen was in the Youth Authority at the time[87/]. . . .

In terms of the . . . pigeon coop, . . . [¶] . . . [the prosecutor has] got to lay some foundation before [Detective Barling] just gets up there and is able to testify that he knows they keep guns in the pigeon coop. . . .

In terms of [the prosecutor's] offer that the defendant Johnson's home is a meeting place, . . . that is a proper subject for [Detective Barling's] testimony.

. . . [Detective Barling] may testify to this gang rivalry that exists and delineate it.

He can talk about the significance of the fact and the boldness of a killing in the middle of the day on a thoroughfare that apparently is the dividing line between various gangs.

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87. Allen was paroled from the California Youth Authority on June 29, 1991, approximately six weeks before the carwash shooting. (CT 1240; RT 4268, 6658-6660, 6676.)

> [Detective Barling] . . . may testify that fears of retribution are not hollow fears. . . . [T]here has been testimony from these witnesses that they are afraid. There have also be[en] very effective suggestions by defense counsel that they really are afraid of the police, and they are a bunch of liars. So, I think perhaps the jury might need a little testimony about that.
>
> It's easy to claim fear and . . . I don't know how the jury assesses the reality or unreality of those claims without knowing a little bit about what really does go on, and the fact that people really are blown out of their socks every day for testifying and giving information . . . . [A]nd I think that hearing it from gang members is one thing. You point out they are not always the most credible of witnesses. And hearing it from somebody else is an all together different matter.
>
> I can't say this is cumulative in any sense, certainly, when the defense position is that you are dealing with quote, unquote, "bought witnesses," none of whom are to be believed. So, I think that this testimony is appropriate at this time.

(RT 4273-4276.) The court also ruled that Detective Barling could testify as to where the people involved in the case lived at the time of the shooting. (RT 4277.)

Outside the jury's presence, Detective Barling testified that he was familiar with the pigeon coop in the rear yard of Johnson's house. (RT 4279-4281.) Between 1989 and 1991, he had spoken to approximately six people, including members of the 89 Family and other citizens in the area, who stated that guns were stored in that pigeon coop. Detective Barling had also recovered a rifle in an abandoned vehicle next to the pigeon coop. He was not aware of any guns that had been recovered from the pigeon coop itself. (RT 4280-4281.)

Johnson's counsel argued that Detective Barling's knowledge about guns being kept in the pigeon coop was based on hearsay, and was not a proper subject for expert testimony. (RT 4282.) He further argued that Johnson had been in custody for a substantial portion of the time between 1988 and 1991, "so the fact that [Detective Barling] was told that guns were kept there would not be attributable to Mr. Johnson for that period of time . . . ." (RT 4283.) Allen's counsel added that hearsay relied upon by an expert must be "reliable hearsay." (RT 4282.)

The court ruled that Detective Barling could render an opinion as to where the guns were stored. (RT 4283-4284.) The court indicated that it was not important to whom the guns were "attributable," but that they were "available on the property in that location for use of the gang." (RT 4283.) The court further explained:

> It's kind of a strange thing . . . to keep a gun out in a pigeon coop, at least for most folks it is. Apparently not for the Johnsons, however, as not only gang members have indicated that to [Detective Barling], [a rifle] was recovered . . . next to the pigeon coop in a truck, . . . and the neighbors are also giving that information. That's the type of thing that I'm convinced -- at least the type of information over that period of time and from that many different sources is the type of thing that an expert is certainly . . . entitled to take into account when forming an opinion as to whether the gang stores weapons in the coop over at Johnson's house.
>
> So, yes, it is a fact in a sense, as most opinions have to do with factual matters. It's a factual matter that the boundary line, for example, . . . is on a certain street. It's a factual matter that guns are kept out in the coop for use by the gangs. The fact that it can be characterized as a fact rather than an opinion doesn't mean it's not an appropriate subject for this testimony.

(RT 4283-4284.)

2. Detective Barling Was Amply Qualified To Testify Regarding The 89 Family And Appellants

While acknowledging that Detective Barling was "a respected and experienced detective who was qualified as an expert on gangs" (AAOB 467), Allen claims that the trial court abused its discretion when it allowed the detective to render testimony that "pertained specifically to [Allen], co-defendant Johnson, and/or other members of the 89 Family Bloods gang" -- as opposed to gangs in general. For example, Allen argues that Detective Barling was unqualified to testify regarding appellants' levels of respect within the 89 Family (RT 4302-4304, 4307), Johnson's position as a shot-caller (RT 4325-4326), that Johnson was feared (RT 4306, 4326), that Allen had "just recently rejoined the gang" after a period of absence from the neighborhood (RT 4302-4303), and that a consequence of a gang member's absence from the neighborhood "usually means that [he has] to . . . do something to reshow that [he is] . . . still down for the [']hood and . . . willing to do stuff for that gang," which would include doing a "mission" (RT 4303). (AAOB 439-453, 455-456.)

Initially, Allen did not object at trial that Detective Barling lacked sufficient qualifications to give the above testimony, thus waiving the claim on appeal. (See *People v. Panah* (2005) 35 Cal.4th 395, 478 [failure to challenge expert's qualifications in trial court forfeits claim]; *People v. Price* (1991) 1 Cal.4th 324, 430 [finding waiver of lack-of-foundation claim because no objection at trial on that ground].) Allen's claim is also without merit.

Permissible expert testimony on the culture and habits of criminal street gangs includes "the primary activities of a specific gang." (*People v. Killebrew, supra,* 103 Cal.App.4th at p. 657.) "[A] particular expert is sufficiently qualified if 'the witness has sufficient . . . experience in the field so that his [or

her] testimony would be likely to assist the jury in the search for the truth.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.) "The determination of whether a person qualifies as an expert is governed by the deferential abuse of discretion standard and will not be disturbed absent a showing of manifest abuse. Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness *clearly lacks* qualification as an expert." (*People v. Panah, supra,* 35 Cal.4th at p. 478; internal quotation marks and citations omitted; italics in original.)

Detective Barling testified that he had been a police officer for 10 years, and was currently a detective assigned to South Bureau Homicide. (RT 4288.) From 1989 to 1993, he was assigned to Southeast (previously South Bureau) CRASH, the department's gang unit. (RT 4288-4289.) In 1993, Detective Barling transferred to South Bureau Homicide, where he worked gang cases as well as other cases. (RT 4289.)

Detective Barling's job as a CRASH officer entailed, among other things, identifying gang members, compiling information about gangs, handling radio calls that involved gang members, and dealing with the community regarding gang activity in the area. (RT 4290-4293.) Detective Barling obtained information from talking to citizens, gang members, and other law enforcement officers. (RT 4291-4293.) On an average day, Detective Barling would speak to approximately 20 gang members. (RT 4291.)

One of Detective Barling's assigned areas was the area of 88th and Central. (RT 4292.) He worked this area from 1988 to 1993, both as a uniform officer and a CRASH officer. Detective Barling still worked that area as a homicide detective. (RT 4333, 4798.)

Detective Barling had "years of experience" with the 89 Family. (RT 4314.) He was familiar with the 89 Family and appellants themselves. (RT 4289, 4299-4301, 4313, 4359, 4361-4362, 4366-4367, 5039-5040.) Detective

Barling had had contact with Allen, and had seen him in the neighborhood. (RT 4299-4300.) Detective Barling based his opinion that Allen was a member of the 89 Family on "contacts and gang identification cards." (RT 4300.)

Detective Barling knew that Johnson was an 89 Family member, as the two had spoken on more than approximately 20 occasions. (RT 4301, 4359.) Detective Barling also had knowledge of police records concerning Johnson's gang membership. (RT 4366-4367.) Johnson had told Detective Barling about his (Johnson's) reputation in the gang. (RT 4304.) Detective Barling's opinion regarding Johnson's high level of respect was based on "what [Johnson had] said, other sources, and how everybody acted with him around and with him not around." (RT 4303-4304.) Detective Barling explained:

> An example is if I came down the street and Mr. Johnson was there with [six] other members of [the] 89 Family Bloods and I was with my partner in uniform in a car, they would not necessarily approach. . . . [¶] At a point Mr. Johnson may walk in front of everyone and have a verbal conversation with us and then everybody else would relax and talk to us. [¶] If Mr. Johnson was not around, nobody would want anything to do with us.
>
> So based on those small types of suggestions that once I talk, it is okay to talk, it showed his status within the gang . . . .

(RT 4304-4305.)

Detective Barling thus was amply qualified -- based on his years of experience with the 89 Family and direct contact with appellants themselves -- to testify regarding the 89 Family and appellants, rather than simply gangs in general. There was no abuse of discretion in allowing such testimony.[88/]

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88. In support of his argument, Allen cites the following language from *People v. Killebrew, supra*:

> [Officer] Darbee also testified that Killebrew was the "shot caller" for the East Side Crips that day, i.e., he ordered the

Allen's claims that Detective Barling's testimony violated the trial court's ruling are also without merit. Allen first asserts that Detective Barling impermissibly testified that Allen had "just recently rejoined the gang" after a period of absence. (AAOB 446, fn. 253; RT 4302-4303.)[89] Defense counsel did not object that this testimony lacked foundation, much less violated the court's ruling. Accordingly, such claims have been waived. In any event, as a local gang officer at the time, Detective Barling was in a position to know that Allen had been committed to the Youth Authority, and thus absent from the neighborhood.

Allen argues that the prosecutor further violated the court's ruling when she elicited from Detective Barling that a consequence of a gang member's absence from the neighborhood "usually means that [he has] to . . . do something to reshow that [he is] . . . still down for the [']hood and . . . willing to do stuff for that gang," which would include doing a mission, and that Johnson was "somebody who another member would respond to with respect in completing a mission." (AAOB 447, fn. 254, 449-450; RT 4303, 4325-4326.)[90] Again, such a claim has been waived due to the failure to object at

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> drive-by shooting at Casa Loma Park. This rank speculation should never have been submitted by the prosecution and undoubtedly increased the prejudice of the Casa Loma Park testimony.

(103 Cal.App.4th at p. 651, fn. 6; AAOB 452-453.) Such reliance on *Killebrew* is obviously misplaced, as Detective Barling never opined that Johnson had ordered the shooting in this case.

89. The court ruled that the prosecutor "may elicit from [Detective Barling], if he knows it, that Mr. Allen was absent . . . for some period of time from that neighborhood, without saying that Allen was in the Youth Authority at the time." (RT 4274.)

90. The court ruled that the prosecutor "may elicit from [Detective Barling] . . . an opinion that sometimes when folks are absent and then return they are expected to, or choose to do things for the gang to sort of get back in

trial. In any event, contrary to Allen's suggestion, Detective Barling did not opine that Allen had performed a mission for Johnson. Rather, Detective Barling indicated that a gang member who had been absent from the neighborhood "usually" would be required to do something to show that he was still loyal to the gang, and that Johnson had the status in the gang to direct a mission. (RT 4303, 4325-4326.)

3. Detective Barling's Testimony Was Not Inadmissible Character Evidence

Allen contends that Detective Barling's testimony about appellants' "respect level[s]," or "reputation[s] for violence," within the 89 Family was inadmissible character evidence. (AAOB 453-454, 523-526.) Respondent disagrees.

It is well established that "evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act." (*People v. Williams, supra,* 16 Cal.4th at p. 193; see also *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449 ["Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense"].) Contrary to Allen's claim, evidence regarding appellants' levels of respect within the 89 Family was not admitted to show their propensity for violence. (See AAOB 523.) Rather, such evidence was properly admitted to show that Johnson had the status in the gang to direct a mission, and to explain why Allen, who was not as respected as Johnson, would have volunteered to perform it.

Allen's related claim based on Evidence Code section 352 (AAOB 454) must similarly fail. "Evidence Code section 352 permits a trial court, in its

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their good standing, without reference to his opinion that that's what Mr. Allen did here." (RT 4274.)

discretion, to exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create the substantial danger of undue prejudice . . . ." (*People v. Coffman, supra,* 34 Cal.4th at p. 76.) "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against [the] defendant as an individual and which has very little effect on the issues." (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) A trial court's "exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse, i.e., unless the prejudicial effect of the evidence clearly outweighs its probative value." (*People v. Karis* (1988) 46 Cal.3d 612, 637.) As indicated above, evidence of appellants' levels of respect within the 89 Family was highly relevant to the issues in this case. The court thus did not abuse its discretion in allowing such evidence.

Allen also lists various other portions of Detective Barling's testimony which he contends constituted inadmissible character evidence. (AAOB 455-456.) Again, none of such testimony was objected to at trial, thus waiving Allen's claims. The claims also lack merit.

First, Allen takes issue with Detective Barling's testimony that gang members usually did not appear to be afraid of the police, and "a lot of times they would want to talk to [the police] to find out what we know and tell us what they know because it may be a fact of protecting the neighborhood from the rival gangs . . . ." (AAOB 455; RT 4291-4292.) This was not character evidence, nor was it irrelevant and inflammatory as Allen asserts in a related claim (see AAOB 506-507). Rather, such evidence was offered to explain how Detective Barling was able to obtain information from gang members regarding gang activity. (See RT 4290-4291.) Detective Barling's testimony that gang members usually did not appear to be afraid of the police was also relevant given the court's finding that there had been "very effective suggestions by

defense counsel that [the prosecution witnesses] really are afraid of the police, and they are a bunch of liars."[91] (RT 4276.)

Next, Allen complains about Detective Barling's testimony that gang members increased their gang's level of respect, as well as their own respect levels within the gang, by committing "[h]omicides, drive-by shootings, [and] walk-up shootings," that the 89 Family were "known for committing homicides, for doing shootings," and that performing a "mission" was a show of loyalty and respect. (RT 4296-4299; AAOB 455-456; see also AAOB 507-508, 513-514 [Allen's related claims that such testimony was unduly prejudicial].)

This was proper expert testimony on gang culture, and relevant to motive. The issue of motive was significant in this case. As the court observed, "[W]hen total strangers are killed in a case, people that are just known by reputation, the issue of motive does become quite important. [¶] Why would that happen?" (RT 4729-4730.) With regard to Allen's motive, performing this mission (as Allen indicates) "was an opportunity for [him] to demonstrate his loyalty and respect for the gang." (AAOB 516;[92] cf. *People v. Barnett, supra,* 17 Cal.4th at p. 1119 [because testimony was offered as proof of motive, trial court correctly determined its admission would not violate statutory restriction on propensity evidence]).

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91. For example, Allen's counsel asked Detective McCartin on cross-examination, "Is it your experience that all these gang members are also afraid of the police?" Detective McCartin answered, "Yes." (RT 4247.)

92. Johnson's counsel thusly described the alleged motives in this case:

> The motive is that Mr. Johnson felt that his neighborhood had been disrespected by Crips coming into Blood territory and bringing a flashy automobile over there. [¶] Mr. Allen . . . had just returned from being out of town and in order to maintain whatever status he had in the gang, he was sent out on a mission.

(RT 4730.)

Testimony regarding the 89 Family's violent nature was also directly relevant to the prosecution witnesses' fears of retaliation, and thus to such witnesses' credibility. That this testimony may have been damaging to Allen, i.e., by accurately describing the nature of the gang to which he belonged, did not render the evidence inadmissible. (See *People v. Bolin, supra,* 18 Cal.4th at p. 320 ["In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'"].)

Allen next challenges Detective Barling's testimony regarding the concept of "disciplining" in a gang. (AAOB 455, 515-516.) Detective Barling testified that Johnson had the reputation for being a disciplinarian within the 89 Family, and a failure to show loyalty to the gang could result in discipline, including "physically beating that member, or maybe even shooting that member or pushing that member aside as a black sheep of [the] gang." (RT 4305-4306.) Such testimony was relevant and admissible to help explain why Johnson's directive to "serve" the victims in this case was carried out.

Next, Allen complains about Detective Barling's testimony regarding the 89 Family's disdain for people who cooperated with the police, and that the gang would threaten, and retaliate against, witnesses or their family members. (AAOB 456, 516-522; RT 4311-4314, 4316-4317.) Again, such testimony was directly relevant to the prosecution witnesses' credibility, and properly admitted.

Lastly, Allen argues that Detective Barling's testimony that there were hand signs, tattoos, and graffiti associated with the 89 Family was irrelevant and unduly prejudicial. (AAOB 456, 503-506; RT 4319.) The argument is without merit. These behaviors evidenced the 89 Family's nature as a criminal street gang.[93/] Further, Allen had a tattoo of the letters "NHF," which stood for

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93. Contrary to Allen's suggestion (at AAOB 497, 526, fn. 277), the gang evidence in this case was not rendered less relevant merely because a section 186.22, subd. (b), gang enhancement had not been alleged. (See *People v. Hernandez, supra,* 33 Cal.4th at p. 1049 ["In cases *not* involving the gang

Neighborhood Family, on the side of his face. (RT 4319-4320, 4791.) Having this tattoo not only evidenced Allen's membership in the 89 Family, but was a manifestation of his loyalty to the gang. (See RT 4319-4320.) As the trial court stated in another context, "[I]t would tend to show that [Allen was] not just a hanger on but rather deeply entrenched [in the gang lifestyle] and proud of it." (RT 4142.)

4. Detective Barling Properly Opined That The Shooting Would Have "Sen[t] A Message"

Allen contends that the trial court abused its discretion when it allowed Detective Barling to give the following testimony:

> Q[.] What would be the significance of committing a murder or double murder at 3:00, 4:00 in the afternoon on Central by one gang against rival members?
>
> A[.] Let the other gang know:
>
> Do not come into our territory. This is ours. This is our turf. How dare you either cross it or how dare you even come close to us.
>
> Q[.] What would that do to somebody's level of respect?
>
> A[.] It would enhance the respect of whatever gang did the killing or shooting to let that other gang back off -- excuse my French -- [¶] We are bad asses and you do not want to come over here.

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enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted *if* its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense" (latter italics added)].) As Allen himself states, "[gang] evidence was highly relevant to the prosecution's theory of how and why[] the victims were killed." (AAOB 499.)

Q[.] Would that scenario send a message to non-gang members of the community?

A[.] Sure.

Q[.] What would that be?

A[.] Look, we are bold enough to do a killing during the daylight and none of you have the guts to tell [the police] about it . . . because you will be next.

(RT 4316-4317; AAOB 459-460.)

Initially, contrary to Allen's suggestion, there was no objection to this testimony. (AAOB 459.) His complaints with respect thereto (AAOB 459-467) have thus been waived. Moreover, for reasons previously discussed, Detective Barling was well-qualified to give such expert testimony, which was obviously relevant to motive and the witnesses' fears of retaliation. (See *People v. Killebrew, supra,* 103 Cal.App.4th at p. 657 [permissible gang expert testimony includes "motivation for a particular crime, generally retaliation or intimidation"].)

5. The Trial Court Did Not Abuse Its Discretion In Allowing Detective Barling To Opine That The 89 Family Stored Guns In The Pigeon Coop

Appellants argue that the trial court abused its discretion when it allowed Detective Barling to opine that the 89 Family kept guns in the pigeon coop in Johnson's backyard. (AAOB 468-473; JAOB 142-144; RT 4314-4315.) Respondent disagrees.

As indicated above, Detective Barling testified outside the jury's presence that he was familiar with the pigeon coop in Johnson's backyard; between 1989 and 1991, he had spoken to approximately six people, including members of the 89 Family and other citizens in the area, who stated that guns were stored in that pigeon coop; he had recovered a rifle in an abandoned

vehicle next to the pigeon coop; but he was not aware of any guns that had been recovered from the pigeon coop itself. (RT 4279-4281.) In ruling that Detective Barling could render an opinion that the 89 Family stored weapons in that location, the court explained that "[i]t's kind of a strange thing . . . to keep a gun out in a pigeon coop, at least for most folks it is," and the "the type of information [relied upon by Detective Barling] over that period of time and from that many different sources is the type of thing that an expert is certainly . . . entitled to take into account." (RT 4283-4284.)

That the 89 Family would store guns in the pigeon coop thus was "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) As Detective Barling explained, a gang would keep guns in a location where they could be readily accessed in the event "a rival gang is coming by," or the gang "need[s] to do a mission." (RT 4314.)

There also was an adequate foundation for the challenged opinion. Under Evidence Code section 801, subd. (b), expert testimony may be "[b]ased on matter . . . perceived by or personally known to the witness or made known to him . . ., whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (*Ibid.*) Detective Barling had personally observed the pigeon coop in Johnson's backyard (RT 4279-4281, 4315, 4328-4329, 4336-4337, 4359-4360, 4366), and recovered a rifle in an abandoned vehicle next to the pigeon coop (RT 4280, 4359). In addition, he had been informed by members of the 89 Family that guns were stored in that location. (RT 4280-4281.) (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463 ["a gang expert may rely upon conversations with gang members"]; cf. also *People v. Gardeley, supra,* 14 Cal.4th at p. 620 [detective's conversations with gang

members formed part of basis from which jury could find that gang met requirements of criminal street gang].)

The court therefore did not abuse its discretion in allowing Detective Barling to opine that the 89 Family stored guns in the Johnsons' pigeon coop.

But even assuming, arguendo, that the court erred in allowing such an opinion, the error was plainly harmless. Appellants do not challenge Detective Barling's testimony that a gang would keep guns in a location where they could be readily accessed (RT 4314), there was a pigeon coop in Johnson's backyard (RT 4315, 4336-4337, 4359-4360), and Detective Barling had found a gun in that backyard (RT 4359-4360). Thus, even without Detective Barling's complained-of opinion, Jelks's testimony that the 89 Family stored guns in a pigeon coop behind Johnson's house (RT 3544, 3568, 3654) would have been amply corroborated.

Detective Barling also admitted on cross-examination that, despite having gone into the Johnsons' pigeon coop approximately five or six times, he never found a gun inside of it. (RT 4359-4360.) Defense counsel noted that fact in closing argument. (RT 5205.) Nor did Detective Barling reveal the basis for his opinion that the 89 Family stored guns in that location. The jurors were instructed that "[a]n opinion is only as good as the facts and reasons on which it is based," and that they were not bound by an expert witness's opinion. (CALJIC No. 2.80; CT 880.)

Accordingly, there is no reasonable likelihood appellants would have obtained a more favorable result had Detective Barling's challenged opinion not been admitted.

6. Detective Barling Properly Opined That The Fears Of Retaliation Expressed By Connor, Jelks, And James Were "Legitimate" Fears

Appellants argue that Detective Barling impermissibly opined that Connor, Jelks, and James's fears of retaliation by the 89 Family were "legitimate."[94] (AAOB 473-492, JAOB 138-142.) Respondent disagrees.

When asked, "In your experience as a gang investigator, is retaliation a legitimate concern for potential witnesses?" Detective Barling responded: "Yes. It can be depending upon the situation and the totality of what is being investigated and being said and who we are dealing with." (RT 4312.) Based on his conversations with, and listening to recordings of, 89 Family members, Detective Barling opined that the 89 Family "disdain[ed]" witnesses who cooperated with the police, and would rather "see [snitches] dead" than have them testify against the gang. (RT 4313, 4317.) In Detective Barling's experience, the 89 Family had engaged in attempts to prevent people from talking to the police. (RT 4313.)

Based on his years of experience with the 89 Family, Detective Barling opined that a witness's fear of retribution by that gang was a legitimate fear. (RT 4313-4314.) Detective Barling further testified that Connor, Jelks, and James had expressed fears of retribution by the 89 Family, and that in his view, those were legitimate fears. (RT 4324-4325.)

This was proper expert testimony, for it assisted the jury in evaluating the reality of the fears expressed by Connor, Jelks, and James.[95] Contrary to

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94. Earlier, Detective McCartin similarly testified, without objection, that in his view as a homicide investigator, Jelks's concerns of retaliation were legitimate. (RT 4166, 4169, 4171.)

95. Indeed, Johnson's gang expert, Deputy Probation Officer Galipeau, also testified that a snitch would have reason to fear for his life. (RT 4889, 4893.)

Allen's suggestion, it was highly relevant to these witnesses' credibility that, due to their cooperation with the police, they had exposed themselves and their family to "actual danger," as opposed to some "perceived, but nonexistent" one. (AAOB 480.) As the trial court found, the jury was entitled to hear expert testimony that fears of gang retaliation were not "hollow fears." (RT 4276; see also *ibid.* ["I don't know how the jury assesses the reality or unreality of those claims without knowing a little bit about what really does go on"]; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1369 [the jury "would be entitled to know not just that the witness was afraid, but also . . . those facts which would enable them to evaluate the witness's fear"].)

Appellants' reliance on *People v. Killebrew, supra* (AAOB 478-479, JAOB 139-141), is again misplaced. Detective Barling did not opine that Connor, Jelks, or James had "specific knowledge or possessed a specific intent." (See *Killebrew,* 103 Cal.App.4th at p. 658.) Nor did he purport to vouch for these witnesses' credibility. (See AAOB 481-491; JAOB 141-142; *People v. Coffman, supra,* 34 Cal.4th at p. 82 ["The general rule is that an expert may not give an opinion whether a witness is telling the truth"].) Rather, Detective Barling properly testified, based on his experience as a gang officer, that the fears of retaliation expressed by Connor, Jelks, and James were legitimate fears -- i.e., ones that realistically could materialize.

Allen's citation to *People v. Gutierrez* (1994) 23 Cal.App.4th 1576 (AAOB 480-481), is also unavailing. In *Gutierrez*, the Court of Appeal stated: "The investigator's opinion of the threats could shed no light on whether the witnesses believed the threats credible and whether the witnesses' testimony was affected because of that belief." (*Id.* at p. 1589, fn. 8.) Unlike the instant case, defense counsel in *Gutierrez* sought to cross-examine the People's investigator as to why he did not conduct a particular line of investigation (i.e., to determine whether Gutierrez's brother had actually threatened witnesses).

(*Ibid.*) Nor, in that case, was the investigator testifying as a gang expert on the subject of gang retaliation. The issue presented in *Gutierrez* was therefore markedly different from that presented here.

Allen is also incorrect when he asserts that Detective Barling's opinion regarding the legitimacy of the prosecution witnesses' fears was inadmissible character evidence. (AAOB 479.) This testimony was offered on the issue of witness credibility, not to prove appellants had a violent disposition and therefore likely committed the charged murders. (See Evid. Code, § 1101, subd. (c) ["Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness"].)

Accordingly, the trial court did not abuse its discretion in allowing the complained-of expert opinion.[96]

7. Detective Barling Properly Testified Regarding The Relationships Between The 89 Family, Swan, And Crip Gangs

Allen characterizes Detective Barling's testimony regarding the relationships between the 89 Family, Swan, and Crip gangs as being irrelevant and inflammatory, in that it "simply informed the jury of the extent of the gang problem in Los Angeles." (AAOB 502-503; RT 4294-4295.) Allen's complaints about this testimony are both waived for lack of an objection at trial, and without merit.

Detective Barling was not testifying regarding the gang problem in Los Angeles, but the relationships between the gangs at issue in this case. (RT

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96. Further, if it is true, as Allen asserts, that "of all the counties in the United States, Los Angeles County would be one of the *last* counties where an understanding of 'gang retaliation against snitches' in a gang-related prosecution would be 'beyond [the] common experience of the jurors" (AAOB 477; italics in original), then Detective Barling's testimony, which the jury purportedly already knew, could not possibly have prejudiced appellants.

4294-4295.) Appellants were members of the 89 Family, which was a Blood gang (RT 4293, 4300-4301); victim Beroit was associated with a Crip gang (RT 3540-3542, 3552); and a Swan gang member transported Allen to the location of the shooting (RT 3561-3565, 3657-3658). The complained-of testimony thus was obviously relevant.

8. Detective Barling's Testimony Was Not Cumulative To That Of Jelks

Allen is also incorrect in asserting that Detective Barling's testimony was cumulative to that of Jelks. (AAOB 514, fn. 273.) As the trial court observed, "[H]earing [testimony] from gang members is one thing. . . . [T]hey are not always the most credible of witnesses. And hearing it from somebody else is an all together different matter." (RT 4276.)

D. Jelks Properly Testified Regarding The Potential Consequences To A Rival Gang Member Who Entered 89 Family Territory

Jelks testified that the 89 Family was protective of its neighborhood, and that the 89 Family's "respect" would be violated if a rival gang member entered the neighborhood. (RT 3538-3540.) When the prosecutor asked Jelks, "What happens if somebody that's not 89 Family is in the neighborhood?" Allen's counsel objected to the question as calling for speculation. The objection was overruled. (RT 3538.) Jelks answered, "There's a lot of discipline going on," explaining that "if you get caught . . . in the neighborhood you probably [will] get hurt, beat up or . . . shot." (RT 3538-3539.)

Allen contends that the court erroneously overruled the defense objection. (AAOB 500-501, 508-509.) Respondent disagrees. It did not require speculation for Jelks -- an 89 Family member -- to testify regarding the potential consequences to a rival gang member who entered 89 Family territory. Such testimony was clearly admissible as to appellants' motive to commit this otherwise inexplicable crime. (See *People v. Hernandez, supra,* 33 Cal.4th at

p. 1049 ("evidence of the gang's territory, . . . beliefs and practices . . . can help prove . . . motive"].)

E. Jelks Properly Testified As To How 89 Family Members Distinguished Themselves Within The Gang

Allen cites as another example of the alleged erroneous admission of gang evidence Jelks's testimony that all 89 Family members were not equal, but distinguished themselves from one another by their "performance" -- e.g., by "[b]ring[ing] money to the neighborhood," "[e]liminat[ing] [the gang's] enemies," or "keep[ing] [the gang's] enemies from [the] neighborhood." (AAOB 522-523; RT 3550-3551.) Again, such testimony was obviously relevant and admissible on the issue of motive.

F. Detective Tiampo Properly Testified Regarding The "Atmosphere Of Fear" That Existed At The Murder Scene

Allen argues that the trial court erroneously allowed irrelevant opinion testimony by Detective Tiampo that numerous potential eyewitnesses at the scene had refused to talk to the police due to their fear of retaliation by the 89 Family. (AAOB 529-537.) Respondent disagrees.

Detective Tiampo, the initial investigating officer, attempted to interview people at the murder scene. When the prosecutor asked the detective, "How would you describe the level of cooperation that you received?" Allen's counsel objected on the ground of relevance. (RT 3763, 3772-3773.) The objection was overruled. Detective Tiampo responded, "Very noncooperative, an atmosphere of fear." He indicated that of the approximately 25 or 30 people that "we" had attempted to talk to that day, none had agreed to talk to the police. (RT 3773.)

The court properly overruled Allen's relevance objection, as Detective Tiampo's testimony further evidenced the validity of the fears expressed by prosecution witnesses. The claim on appeal that such testimony constituted an

improper opinion has been waived, as there was no objection on that ground at trial. In any event, Detective Tiampo, who would have had an opportunity to observe the demeanor of the people to whom he attempted to speak, could properly opine as to their apparent fear. (See Evid. Code, § 800 [lay witness may testify to opinion if rationally based on his perception and helpful to clear understanding of his testimony]; *Holland v. Zollner* (1894) 102 Cal. 633, 637-639 [exception to general rule precluding lay opinions "applies to questions . . . concerning various mental . . . aspects . . ., such as . . . fear"; such "mental . . . operations[] find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving what to him is the ultimate fact"]; *People v. Hurlic* (1971) 14 Cal.App.3d 122, 127 ["when the details observed . . . are 'too complex or too subtle' for concrete description by the witness, he may state his general impression"]; cf. also *People v. Deacon* (1953) 117 Cal.App.2d 206, 210 [witness's testimony that "spirit or tenor of voices" denoted "anger" properly allowed under exception to opinion rule].) There was no abuse of discretion. (See *People v. Mixon* (1982) 129 Cal.App.3d 118, 127 ["Admission of lay opinion testimony is within the discretion of the trial court and will not be disturbed 'unless a clear abuse of discretion appears.'"].)

Nor was it a "natural and reasonable inference" from Detective Tiampo's testimony that "[t]here could have been as many as 25 or 30 additional eyewitnesses to these murders," but for their fear of retaliation. (AAOB 534-535; italics omitted.) There was no indication that these people were "eyewitnesses." Detective Tiampo did not arrive at the scene until at least an hour after the shooting. (RT 3764-3765.) Moreover, the prosecutor never suggested that additional, undisclosed witnesses existed who identified Allen as the shooter.

G. The Trial Court Did Not Abuse Its Discretion In Allowing The Photographs Of 89 Family Members

Appellants claim that the trial court abused its discretion when it allowed the prosecutor to introduce "graphic and frightening" photographs of 89 Family members, which were outside the scope of proper rebuttal. (AAOB 537-556; JAOB 177-183.) Respondent disagrees.

1. Relevant Proceedings Below

Jelks testified that Allen was wearing a black windbreaker on the date of the shooting. (RT 3558, 3708-3709.) Clark testified that when the shooting stopped, he saw a short, heavyset Black male, wearing a black windbreaker with a hood, flee north on Central. (RT 3266-3267, 3274-3275, 3277, 3303-3304.) Wright testified that when the shooting stopped, he saw a short, "chunky" guy, wearing a black "Raiders" jacket with the hood over his head, running north up the street. According to Wright, the jacket had the word "Raiders" on it. (RT 3873-3875, 3888.)

During the defense case, Deputy Probation Officer James Galipeau testified that a black Oakland Raiders' jacket was an item of clothing associated with Crip gangs. (RT 4869, 4944-4946, 4955-4956.) Galipeau had known Blood gang members to wear black windbreakers, but not black Raiders' jackets. (RT 4953-4954.)

Before commencing her rebuttal case, the prosecutor informed the court:

> I have photographs which appear to depict individuals in Raider-style jackets. One of them includes the defendant [Johnson]. . . . [I]t's a booking photograph . . . . [¶] In addition, there are [two] other photographs which depict 89 Family members. One of them is wearing a black windbreaker-style jacket similar to a Raiders' jacket, and the other one is a black jacket also similar to a Raiders' jacket.

(RT 5019.)

Johnson's counsel objected to these photographs on the ground they did not rebut Galipeau's testimony. (RT 5019.) Johnson's counsel argued:

> Mr. Galipeau said that Bloods don't wear Raiders' jackets. He said that anybody could wear a black windbreaker. And there is no photograph of somebody in a Raiders' jacket.

(*Ibid.*)

The court overruled the objection, finding that Galipeau's testimony had been "quite expansive. I believe that was his final answer . . . . However, some of his early answers didn't make that very clear . . . ." (RT 5019-5020.)

Johnson's counsel next objected that "people [were] posing with firearms in [one of] the pictures." The court replied, "That's what gang members do." Allen's counsel added an objection under Evidence Code section 352 that the prejudicial effect of the guns outweighed their probative value. The court overruled that objection, and queried of defense counsel:

> Are you suggesting that the jury is not aware at this point in time that gang members often possess guns? My Lord, they've heard enough testimony. . . . [¶] I don't find anything particularly prejudicial, frankly, about a picture of a gang member holding a gun[.]

(RT 5020-5021.)

Johnson's counsel then suggested that the two people holding guns, neither of whom was wearing a black jacket, be redacted from the photograph. The court declined to do so, finding "[i]t does tend to suggest . . . that the fella in the black jacket might be a gang member, as he is flanked by [two] of them brandishing their weapons." (RT 5022.) The court also disagreed with Allen's counsel's contention that the graffiti behind the person wearing the black jacket adequately showed that he was a gang member. (RT 5023.)

Detective Barling subsequently testified in rebuttal that when the Oakland Raiders moved to Los Angeles in the early 1980's, both Crips and

Bloods began wearing Raiders' jackets, as black was "kind of a neutral color." (RT 5033-5034, 5043.) The prosecutor also introduced the following three photographs:

People's Exhibit 47, a photograph of Johnson wearing a black jacket. The jacket was similar in style to a Raiders' jacket, without the Raiders' logo on it (RT 5035-5036, 5042);

People's Exhibit 48, a photograph of a group of individuals making hand signs. One was wearing a black long-sleeve shirt with "89 Family" written on the back (RT 5035, 5038-5039, 5042); and

People's Exhibit 49, a photograph of four 89 Family members standing in front of 89 Family gang graffiti. One of them was wearing a Raiders'-style jacket. Two others were holding guns -- a shotgun, and what appeared to be an SKS rifle. (RT 5020-5021, 5035, 5039-5041, 5043.)

2. There Was No Abuse Of Discretion

The court did not abuse its discretion in allowing the prosecutor to introduce these photographs in rebuttal. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1193 ["'The admission of photographs . . . lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory.'"]; *People v. Carrera* (1989) 49 Cal.3d 291, 323 ["The admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of 'palpable abuse.'"].)

"[P]roper rebuttal evidence . . . is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*People v. Daniels* (1991) 52 Cal.3d 815, 859.) In his defense case-in-chief, Johnson introduced new evidence which called into question not only whether a Blood gang member could be expected to wear a black Raiders' jacket, but any black jacket.

Galipeau testified that Bloods normally associated themselves with the color red. (See RT 4944-4945.) Whereas Crips wore black Raiders' jackets, "red football jackets . . . were worn by Blood groups." (RT 4945.)

Although Galipeau testified that a black windbreaker could be worn by either a Crip or Blood gang member (RT 4953-4954), he implied that a Crip was more likely to do so than a Blood. When asked, "So the black Raiders' jacket signifies . . . allegiance to the Crips?" Galipeau responded: "Yeah, it would be if you are going to make a fast stab at somebody running down the street wearing a *black jacket* you might be concerned he's a Crip." (RT 4945; italics added.) When asked, "What about if the shooter is wearing a black jacket, does that conclusively mean that that person is a Crip?" Galipeau began his reply, "It's not conclusive but . . . ." (RT 4955.) In addition, Galipeau testified that one "could *possibly* wear a black windbreaker to a shooting, and . . . not [be] identifying [him]self as anybody but somebody who has a black windbreaker." (RT 4956; italics added.)

In light of this testimony, photographs of 89 Family members donning black jackets which were similar in style to a Raiders' jacket, or wearing a black long-sleeve shirt, had probative value, for such photographs eliminated any ambiguity as to whether an 89 Family member would wear the color of clothing that the shooter was identified as having worn.

The court also reasonably found the photographs not to be unduly prejudicial. Exhibit 47 was simply a mug shot of Johnson. There were no weapons shown in Exhibit 48. And while Exhibit 49 did show two 89 Family members with guns, the jury already properly was aware that the 89 Family was a violent street gang with ready access to guns. In addition, the photographs arguably favored the defense, as none showed an 89 Family member actually wearing a jacket with the Raiders' logo on it. For the same reasons, any error in allowing these photographs must be considered harmless. (See *People v.*

Scheid (1997) 16 Cal.4th 1, 21 ["Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded"].)

H. Johnson's Statements Were Properly Admitted

Johnson claims that the trial court erroneously allowed the admission of his statements in the *Glass* case, during a prison interview, and in a note from jail, because such evidence did nothing but highlight his bad character and criminal propensity. (JAOB 114-132.) Respondent disagrees.

1. Relevant Proceedings Below

a. Johnson's Testimony In *People v. Glass*

The prosecutor filed a motion to admit various statements by Johnson as admissions under Evidence Code section 1220. (CT 670-725.) At the hearing on the motion, the court first considered Johnson's May 1992 testimony in *People v. Glass, et al.* (See CT 676.) The court found Johnson's testimony that his nickname was "Big Evil" (CT 690), and he hated Crips (*ibid.*; see also CT 680-682, 703-704), to be "quite admissible on the issue of motive, intent and so forth." The court explained that Johnson's hatred of Crips was not character evidence, but "a highly relevant admission of [Johnson] of his state of mind," which "would give him a motive to commit the crime and speaks towards his intent . . . ." (RT 4132.)[97]

The court found Johnson's testimony that he was an "O.G." or original gangster (CT 695, 707-708, 712), he had "paid [his] dues" (CT 712), he "[did

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97. The court subsequently indicated that it had considered Evidence Code section 352 in connection with each of its rulings on Johnson's statements. (RT 4140-4141.)

not] have to answer to [any]body" (*ibid.*), rather other people answered to him (CT 713), to be

> a pretty clear statement of [Johnson's] position in his gang and his loyalty thereto, the centrality of his gang beliefs to his life and, therefore, . . . absolutely relevant as to motive and intent.

(RT 4135-4136.)

Portions of Johnson's testimony in *Glass* were later read to appellants' jury.[98] In that case, Johnson testified that he was a member of the Family Swan Bloods. (RT 4447-4448.) His nickname was "Big Evil." (RT 4449.) Johnson was an "O.G.," i.e., an original gangster, and had "paid [his] dues." (RT 4451, 4454, 4456.) Johnson "[did not] have to answer to [any]body"; rather, other people answered to him. (RT 4455-4456.)

Johnson hated Crips. (RT 4450.) Blood gangs and Crip gangs did not get along, and "never will." They were "natural enemies." (RT 4448-4449, 4452.) To Johnson, "beating up a Crip [was] nothing." (RT 4453.) Johnson did not believe in a truce between the Bloods and Crips. (RT 4450.) He told Glass that there would not be a truce "due to the fact that [Glass's] homeboys shot one of [Johnson's] homeboys in the head in the riot."[99] (RT 4452-4453.)

b. Johnson's Prison Interview

The court allowed a portion of Johnson's June 1994 prison interview, in which Johnson told detectives that Albert Sutton had to be "disciplined" because he had brought Crips into the neighborhood, even though one of those Crips was Sutton's brother. (CT 721.) The court explained:

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98. The jury was instructed that this evidence was admissible only as to Johnson. (RT 4445-4446, 4456.)

99. Johnson erroneously asserts that this testimony was not revealed to appellants' jury. (JAOB 127.)

. . . [T]hat seems to be a rather relevant statement by [Johnson]. [¶] It tends to adopt . . . the testimony that we have heard earlier from the prosecution witnesses that when folks come in from other gangs, they have to be disciplined. [¶] That is what we heard another witness use in the case.[100] [¶] It would tend to bolster the credibility of that witness and tend to show us something about Mr. Johnson's thinking about gangs and gang life with his Crip and Blood rivalry and how serious it is to him.

Once again, it may be hard for an average juror here to believe that a gang member could conceivably be killed for driving his car to the wrong carwash. [¶] Certainly, when you hear Mr. Johnson make statements like the ones made in here, it makes the whole thing understandable to . . . the average juror who has very little experience with gang activity and gang motivation, and what folks do to one another in the neighborhood and their gang. [¶] So that is obviously quite relevant and it will be admitted. [¶] What he is discussing here is a homicide that occurred and his attitude on it.

(RT 4138-4139.)

Detective McCartin subsequently testified that in June 1994, he, along with Detectives Tapia and Mathew, spoke to Johnson at Ironwood State Prison. (RT 4173, 6040-6041, 6061.) They asked Johnson about a matter involving Albert Sutton, which Detective McCartin was investigating. (RT 4173-4174, 4176-4177.) Johnson stated that Sutton should not have brought Crips into the neighborhood. The detectives asked Johnson whether he knew that one of those Crips was Sutton's brother. (RT 4177.) Johnson responded: "It doesn't

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100. Jelks testified that if a rival gang member got "caught" in the 89 Family's neighborhood, that person would be subject to "discipline," i.e., getting beaten up or shot. (RT 3538-3539.)

matter. You don't bring Crips into the 'hood." Johnson said that Sutton had to be "disciplined." (RT 4178.) When Johnson made these comments, he was "[n]onchalant," as if "[t]hat is just the way business is." (RT 4173, 4178.)[101/]

c. Johnson's Jail Note

In October 1995, while in custody at the county jail, Johnson displayed a note to his wife in the visitor's booth. The note was seized from Johnson. (CT 723-725, 730; RT 4803.)

The trial court ruled that it would

> allow that potion of the note . . . wherein [Johnson] states that he is of such a position in this gang that folks from other sets of this gang swear to him they will handle a witness, his family and anybody else that [Johnson] needs handled because he has done favors for them and they know that he will reciprocate.[[102/]]

(RT 4142.)

The court explained:

> This speaks rather loudly to [Johnson's] attitude not only toward potential witnesses . . . but, once again, shows you the level to which [Johnson] feels that he is entrenched in this gang life style and milieu

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101. The jury was instructed that this evidence was admissible only as to Johnson. (RT 4177.)

102. That portion of the note read:

> Tell him that you handle most of my calls and contacts and you know for a fact that if I wanted him dead that it could have been done. [¶] You have personally heard people from all types of other sets swear to me that they will handle him, his family and anybody else that I needed handled, because I've done favors for them and they know I'll do it for them. But I told them don't sweat it, don't even trip on him.

(RT 4804; Peo. Exh. 44.)

where he brags in his writings . . . that he has acquaintances, associates and loyal followers up and down in various jails and so forth.

Certainly his position in this gang I think is important. His attitude toward gangs and gang members is likewise important as to the issue of motive and intent . . . . [¶] . . . [I]t would tend to show that [Johnson] is not just a hanger on but rather deeply entrenched and proud of it. [¶] And I think it is quite relevant.

(RT 4142.)

The court later reversed its ruling when it learned that Keith Williams, to whom the note pertained, was not a potential witness in this case. The court reasoned that the note did not show a consciousness of guilt vis-a-vis this case; the "theory that [Johnson knew] that his orders would be carried out . . . [was not] at this point sufficiently relevant to overcome the inherent prejudicial effect of the [note]"; nor did the note "add anything" regarding Johnson's gang affiliation, of which there was ample evidence. (RT 4258-4264.)

The admissibility of the note was reconsidered in connection with the prosecutor's motion to admit evidence under Evidence Code section 1101, subdivision (b). (CT 726-735; RT 4718.) The prosecutor explained that the note was

not offered with respect to Keith Williams as a witness. [¶] What it is really offered for is to show that [Johnson] has a state of mind that if he wants to get something done on the street, he can. [¶] It happens that the person that it is directed at is a witness in the other murder, in the Mosley murder. [¶] But my offer is not with respect to him specifically threatening Keith Williams. . . . [¶] It is offered for [Johnson's] state of mind and for his role, his authority, while he is . . . in custody, still being able to maintain control about what is going on out in the street.

(RT 4719-4720.)

The trial court ultimately decided to allow the note. (RT 4752.) The court observed that the People

> want[ed] to prove that [Johnson] had a certain position in this gang, that he has the where with all to get people to do what he wants them to do and that he is not a mere underling . . . .

(RT 4721.)

The court also observed that the note was "in [Johnson's] own words," and thus was

> not some leap that you have to make[.] [I]n [Johnson's] own words he says: [¶] I can get people killed if I want to. . . . And had I wanted to, I could have done it.

(RT 4751.)

The court found that Johnson's ability to control others in the gang was "a fact of importance in the case," and the note was "compelling evidence" and "highly relevant." (RT 4750-4752.)

The jury was subsequently read the portion of the note quoted in footnote 102, above. (RT 4804; p. 134, fn. 102, *ante*.) It was stipulated that this note did not refer to the victims or witnesses in this case. (RT 4803-4804.) The jury was also instructed that such evidence was admissible only as to Johnson, and "may only [be] consider[ed] . . . as it may bear upon, if at all, . . . Johnson's membership and status within the 89 Family Bloods." (RT 4805.)

2. Evidence Code Sections 352 And 1101 Did Not Compel The Exclusion Of Johnson's Statements

Johnson argues that his statements should have been excluded under Evidence Code sections 352 and 1101. (JAOB 125.) Respondent disagrees. Such evidence was not admitted to show that Johnson "was a bad person with a propensity to murder his enemies" (*ibid.*), but to demonstrate his high status in the 89 Family, his ability to direct other gang members to do his bidding,

including the commission of murder, his deep-seated hatred of Crips, his belief that "discipline" had to be meted out if a Crip encroached on 89 Family territory, and thus his motive and ability to have directed the killings in this case. (See Evid. Code, § 1101, subd. (b) [evidence of other acts admissible "when relevant to prove some fact (such as motive, opportunity, intent . . .) other than [defendant's] disposition to commit such an act"]; *People v. Bolin, supra,* 18 Cal.4th at p. 320 ["In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'"].)

That Johnson may not have intended to dispute his gang status or hatred of Crips (see JAOB 125) did not warrant, much less compel, the exclusion of his statements. Even if Johnson had offered to stipulate to those facts, which he did not, the prosecutor would not have been required to eliminate from her case such powerful evidence as "statements out of [Johnson's] own mouth" (see JAOB 127). (Cf. *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007 ["The general rule is that the prosecution . . . cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness"].) Nor did the fact that other witnesses testified regarding the rivalry between Crips and Bloods, and Johnson's status in the 89 Family (see JAOB 125), render Johnson's own statements on these subjects inadmissible. (See *People v. Thornton* (2000) 85 Cal.App.4th 44, 48 ["it is the rare occasion when one of two different types of circumstantial evidence is correctly ruled cumulative"].)

The trial court thus acted well within its discretion in allowing Johnson's statements. (See *People v. Barnett, supra,* 17 Cal.4th at p. 1118 ["When a trial court overrules a defendant's objections that evidence is . . . unduly prejudicial and inadmissible character evidence, we review the rulings for abuse of discretion"]; *People v. Champion, supra,* 9 Cal.4th at p. 913 ["Evidence Code

section 352 gives the trial court broad discretion when weighing the probative value and prejudicial effect of proffered evidence"].)

I. The Trial Court Properly Allowed References To Appellants' Gang Monikers

Johnson contends that the trial court abused its discretion in finding appellants' gang monikers -- "Big Evil" and "Fat Rat" -- to be more probative than prejudicial, and in permitting repeated references to them. Johnson further argues that the prosecutor committed misconduct by violating the court's order to minimize use of the monikers. (JAOB 153-170.) Respondent disagrees.[103/]

1. Alleged Abuse Of Discretion

Johnson filed a motion in limine to preclude reference to appellants by their monikers. (CT 637-640.) The prosecutor opposed this motion, arguing that the monikers were "highly relevant to the issues of identity."[104/] (CT 668.) The prosecutor explained:

> Witnesses used [appellants'] monikers when they identified [appellants] as perpetrators of these murders, referred to "Evil and "Fat Rat" when describing [appellants'] conduct and identifying [appellants] in photographic line ups.

(CT 666.)

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103. The portion of Johnson's claim concerning reference to his moniker in the penalty phase (JAOB 162-163, 168-170) is addressed in section XVIII, *infra*.

104. Johnson erroneously asserts that the prosecutor "admitted the lack of any probative value with regard to the monikers." (JAOB 153, 164.) Also, contrary to Johnson's contention (at JAOB 164-165), identity was the key disputed issue in this trial -- both Allen's identity as the shooter and Johnson's as an aider and abettor.

> . . . [T]he identification of [appellants] by their monikers will undoubtedly be introduced by the witnesses who know . . . Johnson and . . . Allen by their respective monikers. To attempt to force the witnesses to refer to [appellants] by names or attributions never before associated by the witnesses to either [appellant] may well impose an unfair burden upon the witnesses. Such a demand may negatively impact their ability to present the truth as they know it. In a case where credibility is an issue, a juror may view a witness with distrust if the witness does not appear to be able to name and identify the perpetrators with ease.

(CT 668-669.)

At the hearing on the motion, Johnson's counsel argued that Johnson's moniker had "no probative value on the issues in this case," and "only serve[d] to present an inflammatory name to the jury and to prejudice [Johnson]." (RT 3208.) Johnson's counsel maintained that "all the witnesses [were] quite capable of referring to [Johnson] by his proper name" (RT 3211), and cited Jelks's grand jury testimony, in which Jelks did so (RT 3208-3210). Allen's counsel similarly argued that Allen's moniker should be excluded under Evidence Code section 352. (See RT 3211-3212.)

The prosecutor countered that

> [a]ll the witnesses' prior statements, not including the grand jury testimony, in every single one of those prior statements witnesses referred to [appellants] by their monikers, not by their given names.
>
> I don't dispute the [grand jury] transcript that [Johnson's counsel] points out, but I point to every one of the previous statements wherein

the witnesses . . . used monikers in identifying who was involved and what they did respectively. . . .[105/]

. . . These are simply the names by which these people know [appellants]. . . . [¶] [Appellants] use these names . . . . [¶] To saddle the witnesses with the responsibility to try to remember what [appellants'] given names are . . . is an undue burden and an attempt to cloud the truth and impose on [the witnesses'] credibility.

(RT 3212-3213.)

The trial court ruled as follows:

It is clear to the court that the names have some relevance. . . . [¶] It is not unexpected and, in fact, is almost 100 percent the case that gang members utilize monikers. [¶] It is also the court's experience time and time again that witnesses come into court and testify under oath that they do not really know folks' real names, even folks that they have known for 10 or 20 years. . . .

In other words, if you know somebody as Big Evil, that is his name. That is what he goes by. [¶] It is not a big deal. It is just a fact of life. It is an identifier and has no connotation other than that. . . .

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105. For example, during Connor's police interview, the following dialogue occurred:

CARL CONN[O]R: Yeah, and . . . a guy named Donovan and Payton got killed. It was down the street from Evil's house. . . .

DETECTIVE SANCHEZ: Oh, the double. Right there across from . . . the auto store.

CARL CONN[O]R: Did you all solve that one?

DETECTIVE SANCHEZ: No.

CARL CONN[O]R: That -- that's Fat Rat.

DETECTIVE SANCHEZ: Fat Rat did that, right?

CARL CONN[O]R: Yeah.

(Supp. IV CT 371.)

> Now the only problem here . . . is the nature of the name. [¶] It is Big Evil. This is a name that [Johnson] has adopted, or over the years has come to be known by, since 1983. About 14 years.
>
> He has seen fit when addressing the world to be addressed as Big Evil and to make himself known as Big Evil. [¶] To come into court now and ask to be addressed by witnesses who know him . . . as Big Evil and have known him and associate with him as Big Evil imposes artificial error on this trial[,] and now he is known as Mr. Johnson makes witnesses testify out of their milieu. . . .
>
> I think it is also inescapable that the name likely would come in at some point in this trial on the issue of I.D. and gang membership because certainly a moniker like that is circumstantial evidence of gang membership.
>
> And . . . to go through the process of editing various documents, if it is like the typical case, we will have photo I.D.'s and things will have written down this is Big Evil, and this is Fat Rat . . ., and we will not go through and edit a lot of exhibits and take the time to do that.
>
> The jury will not be shocked by the fact that gangs use gang names. I doubt that they will. . . . [¶] I am convinced that while [Big Evil] is not the most flattering name, it is not the type of situation that is going to overly prejudice this jury. [¶] The relevance outweighs the prejudicial effect, if any.

(RT 3214-3217.)

The court indicated that it would give a limiting instruction that the jury may not consider appellants' monikers for any purpose other than as an identifier. (RT 3217, 3219.) The court also instructed the prosecutor that she would

be allowed to elicit where necessary testimony that witnesses know [appellants] by these various monikers. But . . . once the person identifies the person as "Big Evil" or "Fat Rat" . . ., there is then no need to endlessly repeat during questions . . . the name over and over . . . .

The witnesses at some point should be instructed once the evidence is in and once we know who is who, you can do it by pointing at the defendants or referring to Mr. Johnson as Mr. Johnson. . . . [¶] At that point any lack of clarity in the mind of the witness should go away.

(RT 3217-3218.) The court told the prosecutor, "I want your evidentiary effect to be there because that is fair," but admonished her not to use appellants' monikers "where it simply is gratuitous and there is no need." (RT 3218.)

The court later instructed the jury:

Ladies and gentlemen, throughout the trial you may hear various gang monikers or neighboring [*sic*] names referred to by various witnesses. You've heard a couple here, one identified . . . as having the nickname of Big Evil and the other as Fat Rat.

You are instructed that you are not to draw any inference from those names. They are simply used as identifiers in the case, and you can certainly consider that testimony on issues relating to identity, who is who, and the relationship to the parties, but you can't draw any inference because somebody's name is Big Evil, Fat Rat, or any other gang names you hear, okay?

Everybody clear on that? [¶] Any question? [¶] All right. . . .

(RT 3533.) No juror indicated that he or she did not understand this instruction. (*Ibid.*)

In *People v. Brown, supra,* 31 Cal.4th 518, this Court found no abuse of discretion in the trial court's allowing reference to the defendant's nickname ("Bam" or "Bam Bam"), where

> [t]he court carefully weighed defendant's concern over the potentially prejudicial effect of the nickname with the prosecutor's assertion that many of the witnesses knew defendant only by that name. The court then reasonably concluded that it would be impossible to sanitize the entire trial of any references to the nickname, but instructed the prosecution to minimize its use in order to reduce any prejudice. . . . [¶] . . . Because defendant's identity was at issue, the trial court did not err in cautioning the prosecutor not to emphasize the nickname, but acquiescing in the inevitability that it would come out before the jury.

(31 Cal.4th at pp. 550-551.)

Assuming, arguendo, error occurred, the *Brown* court applied the *Watson* standard of prejudice, concluding that the defendant "would not have achieved a more favorable result in the absence of the error." (*People v. Brown, supra,* 31 Cal.4th at p. 551; see also *id.* at fn. 12 ["Because this issue concerns the mere admission of evidence that was not particularly inflammatory, we reject defendant's contention that admission of his nickname requires we test the error under *Chapman v. California* (1967) 386 U.S. 18, 24 . . ."]; *People v. Champion, supra,* 9 Cal.4th at p. 923 [finding no reasonable probability that testimony defendants' monikers were "Treacherous" and "Evil" affected the verdict].)

Here, as in *Brown*, evidence of appellants' monikers was relevant, and properly admitted. Witnesses Connor and James knew appellants only by their monikers. (See RT 3346-3347, 3367, 4041-4043, 4045-4046.) Witnesses also used appellants' monikers when referring to appellants in their pretrial statements. (See CT 666; Supp. IV CT 371; RT 3212-3213.) Prohibiting reference to the monikers thus not only would have been impracticable, but would have risked unfairly hampering the prosecutor's ability to present these witnesses' testimony. As stated by the trial court:

> [Johnson] has seen fit when addressing the world to be addressed as Big Evil and to make himself known as Big Evil. [¶] To come into court now and ask to be addressed by witnesses who know him . . . as Big Evil and have known him and associate with him as Big Evil imposes artificial error on this trial[,] and now he is known as Mr. Johnson makes witnesses testify out of their milieu.

(RT 3215; see also CT 669 [prosecutor's concern that "a juror may view a witness with distrust if the witness does not appear to be able to name and identify the perpetrators with ease"].)

As the court further indicated, appellants' monikers provided circumstantial evidence of gang membership (RT 3216), which was directly relevant to motive.

The court also reasonably found that the probative value of appellants' monikers was not substantially outweighed by a danger of undue prejudice. (See RT 3216-3217; Evid. Code, § 352.)[106] The jury properly became aware that appellants were hardcore members of a violent street gang. Thus, it cannot be said that the revelation, or intermittent use, of their monikers would have had a significant effect on the jury's perception of appellants as individuals. By contrast, in *Brown, supra,* where the motive for the crime was not gang-related,[107] reference to the defendant's nickname carried a greater potential for prejudice. Appellants' jury also was instructed that it could not "draw any inference because somebody's [nick]name is Big Evil, Fat Rat, or any other gang names you hear." (RT 3533.) There is no reason to believe that the jury did not follow this instruction.

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106. Indeed, Allen's moniker was rather innocuous. While the nickname "Fat Rat" was not flattering, it carried no violent connotations.

107. The motive in *Brown* was robbery. (See 31 Cal.4th at pp. 524-527.)

No abuse of discretion occurred.

2. Alleged Prosecutorial Misconduct

Johnson's claim that the prosecutor committed misconduct by violating the court's order to minimize use of the monikers (JAOB 166-167) must also fail.

> The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.]

(*People v. Ochoa* (1999) 19 Cal.4th 353, 427; internal quotation marks omitted.)

> Reversal of [a] judgment is designed not so much to punish prosecutors as to protect the fair trial rights of defendants. Hence, in the absence of prejudice to the fairness of a trial, prosecutor misconduct will not trigger reversal.

(*People v. Bolton* (1979) 23 Cal.3d 208, 214; see also *Smith v. Phillips* (1982) 455 U.S. 209, 219 ["the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"].)

> Under traditional application of this state's harmless error rule, the test of prejudice is whether it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the [activity] attacked by the defendant. . . . However, if federal constitutional error is involved, then the burden shifts to the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

(*People v. Bolton, supra,* 23 Cal.3d at p. 214.)

Johnson first complains that, after Connor testified he recognized the shooter as "[a] guy we call Fat Rat" (RT 3346), the prosecutor did not steer Connor toward the use of Allen's true name, but instead asked:

> Q[.] What was the name that you knew that person by?
>
> A[.] Fat Rat.
>
> Q[.] Do you remember what Fat Rat had on?
>
> A[.] No. . . .

(RT 3347; JAOB 157-158.)

At this point, Allen's counsel asked to approach the bench. He noted the court's prior ruling about the persistent use of street names. (RT 3347-3348.) The court instructed the prosecutor to ask Connor to make an identification, and "explain that the defendant's name is Allen. Then, if you can, refer to him as Allen. [¶] If you need to clarify the person you are speaking about, that is fine." (RT 3348.) The prosecutor complied. (RT 3349.) The prosecutor's misstep in asking what "Fat Rat" had on thus was quickly corrected, and could not have prejudiced appellants.

Johnson next cites the prosecutor's use of appellants' monikers when impeaching Connor with his grand jury testimony and tape-recorded police interview. (JAOB 158; RT 3364-3367, 3377-3379.) The defense did not object to this questioning, thus waiving appellants' complaint with respect

thereto. In any event, such references to appellants' monikers were not gratuitous, as confronting Connor with something other than the actual words of the transcripts could have caused confusion. Indeed, Johnson's counsel himself used Allen's moniker when cross-examining Connor with his grand jury testimony. (RT 3429; see also RT 3697, 3700, 3713-3714, 3718-3719, 3724-3726, 4181 [Johnson's counsel's use of appellants' monikers when cross-examining Jelks and Detective McCartin]; RT 3650-3653, 3656, 3751-3752, 4070, 4195-4197 [Allen's counsel's use of appellants' monikers when cross-examining Jelks, James, and Detective McCartin]; cf. *People v. Brown, supra,* 31 Cal.4th at p. 551 [noting that nickname came out in defense counsel's cross-examinations as well].)

Next, Johnson complains that after Jelks referred to appellants by their real names, the prosecutor, "for no legitimate purpose," asked Jelks if he knew appellants by any other names. Jelks then testified regarding appellants' monikers, including how long he had known appellants by those names, and that he had heard appellants and other people refer to appellants by those names. (JAOB 158; RT 3515-3516, 3520-3521, 3529-3531.) Allen's counsel asked to approach the bench, and objected that the prosecutor was "way over doing this gang name stuff." The court noted that it had "only heard [four] or [five] questions." (RT 3532.) At Johnson's counsel's request, the court then gave the limiting instruction quoted above. (RT 3532-3533; see p. 142, *ante*.)

There was no misconduct. Contrary to Johnson's assertion, a legitimate purpose existed for the prosecutor to ask Jelks, a former 89 Family member, about appellants' monikers. Jelks's testimony that appellants used those monikers corroborated the other witnesses' identifications of appellants by those names. The court also did not view this line of questioning to be in violation of its order. In any event, as Johnson observes, after the court's

limiting instruction, the prosecutor "returned to using appellants' true names for the remainder of Jelks's testimony." (JAOB 159.)

Next, Johnson complains that, after Wright denied knowing Johnson by name, the prosecutor asked Wright, "Did you tell the police that day that you knew Big Evil from the neighborhood?" (RT 3883; JAOB 159.) Allen's counsel's objection was overruled. (RT 3883-3884.) Wright denied having used that name, claiming he "[didn't] really know anybody in that neighborhood." (RT 3884.) Apparently, the prosecutor was attempting to challenge Wright's testimony that he did not know Johnson. Such reference to Johnson's moniker thus does not appear to have been gratuitous, and the court did not view it as a violation of its order. It also could not have prejudiced appellants.

Johnson next complains that, after the prosecutor asked James if he "kn[e]w anybody by the nickname of Fat Rat," to which James answered, "Yes," the prosecutor continued to refer to Allen by that name in the following questions:

Q. Did you ever talk to Fat Rat about that murder?

A. Yes, I did.

Q. Did Fat Rat ever tell you what happened -- did Fat Rat ever describe[] what he did in that murder?

A. Well, as I recall he walked up to them and he just shot them.

Q. Who told you that?

A. Fat Rat.

Allen's counsel's objection was overruled. (JAOB 159-160; 4041-4042.)

The court did not view this questioning to be in violation of its order. The above repetition of Allen's moniker also was clearly harmless. Some preliminary use of that moniker was necessary because James did not know

Allen's real name. (RT 4042.)[108] The same is true for the prosecutor's question, "And where is Evil sitting?" when asking James to identify Johnson. (JAOB 160; RT 4046.) James did not know Johnson's true name either. (RT 4046.)

Later, the prosecutor asked Detective McCartin about what James had said during his interview. (RT 4162.) The detective responded:

> He said that he heard about the [two] boys that were killed over by the carwash and that he had asked Mr. Allen . . . did he know . . . who did it[,] and that Mr. Allen admitted that he was the one who did it.

(RT 4163.)

The prosecutor then asked Detective McCartin:

> Q[.] Did Mr. James use the name "Mr. Allen"?
>
> A[.] No, he did not.
>
> Q[.] What name did he use?
>
> A[.] Fat Rat.

(RT 4163; see also RT 4240 ["Did Mr. James tell you specifically that Fat Rat told him . . . that he did the shooting?"]; JAOB 160.) These questions were properly designed to avoid confusion, as James had testified that he did not know Allen's real name. (RT 4042.) The defense also made no objection, waiving any claim of error.

Johnson next contends that in the following questions, the prosecutor, "for no proper purpose, steered [Detective] Barling towards using the gang monikers" (JAOB 160-161):

> Q[.] When you talk to members of the 89 Family on the street, do they usually talk to you with people's given names or monikers?
>
> A[.] More likely monikers . . . .

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108. When asked, "[D]o you know who Michael Allen is?" James answered, "No." (RT 4042.)

Q[.] In this particular case, are you familiar with either of the defendants who are on trial?

A[.] Yes, I am.

Q[.] Drawing your attention to the individual at the far left side of the courtroom. [¶] Who is that person?

A[.] It is Michael Demone Allen. Fat Rat.

(RT 4299.)

Q[.] Do you recognize the individual seated here, also to my left, in the striped shirt?

A[.] Yes, I do.

Q[.] Who is that?

A[.] That is Cleamon Demon[e] Johnson. . . .

Q[.] Did Mr. Johnson tell you what nickname he went by?

A[.] Yes.

Q[.] What name is that?

A[.] Evil.

Q[.] Did he go by simply Evil or by another name?

A[.] Evil or Big Evil.

(RT 4300-4301.)

Detective Barling's expert testimony properly corroborated that Fat Rat and Big Evil were, in fact, appellants Allen and Johnson. Johnson's complaint regarding this testimony has also been waived because there was no objection thereto.

Next, Johnson complains that the prosecutor asked Adams, a current 89 Family member, who had been a member since around 1980 or 1981 (RT 4408, 4412):

Q. While you were a member of 89 did you know an individual who went by the name of Evil?

A. Yes.

Q. Do you know his real name?

A. Yes.

Q. What's his real name?

A. Cleamon Johnson.

Q. Is he here in court?

A. Yes.

(RT 4408-4409; JAOB 161.) Adams then proceeded to identify Johnson. (RT 4409.)

Similarly, the prosecutor asked Adams with respect to Allen:

Q. Back in 1991 did you know somebody by the name of Fat Rat?

A. Yes.

Q. Is Fat Rat in court?

A. Yes.

(RT 4418; see JAOB 161.) Adams then identified Allen. (RT 4418.)

Again, the above questions were relevant to corroborate appellants' monikers, and there was no objection thereto. Nor was there any objection to the prosecutor's subsequent, intermittent reference to Johnson's moniker after Adams had referred to Johnson by his real name. (JAOB 161; RT 4413-4415.) Accordingly, Johnson's complaint regarding such questioning has been waived.

Lastly, Johnson complains that during the defense case, the prosecutor, over objection, was allowed to ask Johnson's mother whether she had heard her son referred to by the nickname "Evil." Mrs. Johnson responded, "Yes." (JAOB 162; RT 4974.) Again, such testimony was relevant, and not considered by the court to have been in violation of its order.

In any event, even if one or a few references to appellants' monikers were deemed to be excessive, there is no reasonable probability of a different result given the other, clearly appropriate references thereto.

Appellants' prosecutorial misconduct claim must therefore fail.

J. Assuming, Arguendo, That The Trial Court Erred In Allowing Some Gang Evidence, Any Such Error Was Harmless

Even assuming, arguendo, that some gang evidence was erroneously admitted, any such error was harmless. There is no dispute that gang evidence was relevant in this case. The prospective jurors were voir dired extensively regarding such evidence. (See Supp. III CT 20-21 [juror questionnaire];[109] RT 1978-1981, 2045-2049, 2161-2162, 2165-2167, 2193-2194, 2196-2197, 2202-2205, 2233-2234, 2249-2250, 2277-2278, 2293-2298, 2321-2323, 2327, 2435, 2480, 2534, 2544-2546, 2558-2559, 2564-2565, 2619, 2631-2632, 2691, 2717-2719, 2720-2722, 2730-2731, 2734-2737, 2779-2780, 2788-2791, 2900, 2922, 2959-2960, 2976-2980, 2990-2992, 3081-3082, 3117-3118.)

At the hearing on the prosecutor's motion to admit gang evidence, there was no objection to the prosecutor's stating in opening statement that this was a gang-related homicide. (RT 3204-3206.)

On appeal, Allen describes the trial as "involving the execution-style murders of two victims for which the motive was gang related." (AAOB 454, 466.) Allen also

> acknowledges that based on the prosecution's theory, some understanding of gangs was relevant in this case and, as a result, certain gang evidence was admissible. Without an appropriate gang context to explain the murders in the present case, the killings would appear inexplicable, a reasonable inference being that someone other than a Bloods gang member committed the murders for some other reason. According to the facts, the victims did nothing to provoke the shootings.

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109. For example, question number 64 of the questionnaire asked: "Do you think that if a person belongs to a gang, because of that fact alone he is guilty of a crime charged against him?" (Supp. III CT 21.)

> They were unarmed and merely seated in a car on Central Avenue in front of a car wash waiting for Beroit's car to be cleaned. There was no evidence the victims knew [Allen] or that [Allen] knew the victims. Although [Allen's] "gang membership and [his] gang activities were prejudicial to a certain degree, the evidence was highly relevant to the prosecution's theory of how and why" the victims were killed. [Citations.]

(AAOB 499.)

Johnson also concedes that "[t]here was unquestionably some evidence of appellant's gang affiliation that was relevant to this case." (JAOB 114.) Thus, this is not a case in which, but for the alleged errors, the jury would not have learned about appellants' gang membership.

During trial, the court gave limiting instructions that Johnson's intercepted telephone calls, and handwritten note, could only be considered as to Johnson's "membership and status within the 89 Family Bloods" (RT 4772-4773, 4804-4805); Connor's testimony about the murder of Nece Jones could only be considered as to Connor's "demeanor or reluctance" (RT 3383-3384); Face's statements to Jelks were not received for their truth, but only as to Jelks's state of mind, demeanor, and "credibility in testifying" (RT 3632-3633); and appellants' monikers were simply used as identifiers, and no inference could be drawn from those names (RT 3533). Not only are jurors ordinarily presumed to understand and follow limiting instructions (see, e.g., *People v. Yeoman, supra,* 31 Cal.4th at p. 139), the court here expressly asked the jurors if they understood the above instructions, and the jurors indicated that they did so (RT 3384, 3533, 3632-3633, 4773).

In its concluding instructions, the court instructed the jury that "[c]ertain evidence was admitted for a limited purpose," and "not [to] consider this evidence for any purpose except the limited purpose for which it was admitted."

(CALJIC No. 2.09; CT 862; RT 5069.) The jury also was instructed, at both the beginning and end of the case, that it "must not be influenced by . . . passion, prejudice, public opinion or public feeling." (CALJIC No. 1.00; CT 848-849; RT 3233, 5062.) In addition, the jury was instructed that if it found "an effort to procure false . . . evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort." (CALJIC No. 3.05; CT 859; RT 5068.)[110]

In closing argument, the prosecutor told the jury that "[t]here has been a lot of evidence received in this case about being in gangs, and being a gang member is not a crime." (RT 5119.) The prosecutor never suggested that the jury should convict appellants merely because of their gang involvement.

Similarly, Johnson's counsel explained in his closing argument that Johnson was "not on trial for being a gang member[,] . . . for his status in the gang . . .[,] [or] for . . . hating Crips." (RT 5146.) Johnson's counsel further stated:

> . . . [W]hen we started this case, I made a brief opening statement. I told you that Mr. Johnson was a gang member. And you know that he has status in the gang and it's real clear he's not a Boy Scout. And you may not like him. And you may want to convict him because he's a Blood gang member. But he's entitled to the same protection of the law and the same rules . . . in evaluating this evidence and in reaching a proper verdict that anybody else is.
>
> . . . He's acknowledged that he's a gang member, that he has status, that he has respect, that he can tell people what to do. And he's

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110. Both sides agreed that, given the court's limiting instructions, no additional instructions regarding gang evidence were necessary. (RT 4995-4997.)

> acknowledged that he hates Crips. But that doesn't make him responsible for this crime. . . . And you shouldn't convict him . . . of a crime he's not responsible for.

(RT 5186.) The prosecutor said nothing in her rebuttal argument that contradicted the above.

Accordingly, assuming for the sake of argument that the trial court erred in allowing some gang evidence, regardless of the standard of prejudice employed, any such error was harmless.

IV.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY PRESENTING CARL CONNOR'S TESTIMONY

Allen claims that the prosecutor committed misconduct by knowingly presenting false testimony by Carl Connor. (AAOB 64-137.) Essentially, Allen argues that, because other evidence contradicted Connor's testimony as to the directions that the shooter approached and fled, and the shooter's location in relation to the victims' car, and because there were discrepancies in Connor's statements, "the only reasonable inference is that Connor lied when he stated he was present when the murders occurred." (See AAOB 65-66, 101.) This claim is both waived and without merit.

A. Factual Background

1. Connor's Statement To Police

Connor was interviewed by the police on August 15, 1994. (RT 3372-3373, 3973.)[111] He told detectives that he was at the carwash when Fat Rat killed Donald and Payton. (Supp. IV CT 371-372, 386.) Connor saw Fat Rat walk by, heading southbound toward the motel. (Supp. IV CT 372, 374.) Fat Rat observed Baa-Baa in the victims' car. (Supp. IV CT 380.) Fat Rat then walked to Evil's house, returned with a gun, and started shooting at the car. (Supp. IV CT 372, 374, 376-378, 380-381.) He then walked back to Evil's house. (Supp. IV CT 374, 379.)

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111. The record does not support Allen's implication that Connor knew when he spoke to the police that "the Los Angeles City Council was being asked to authorize rewards for information on certain unsolved murders in the city." (AAOB 65, 491-492.) There was no evidence that Connor had such knowledge, much less the clairvoyance to know that a reward would be approved.

2. Connor's Grand Jury Testimony

In December 1994, Connor testified before the grand jury that Fat Rat had "walked down 88th Street all the way down to like where the [victims'] car is." (Supp. IV CT 35, 42, 47-48; RT 3355.) Fat Rat walked past the car, then walked back to Evil's house, which was about two houses from the motel. (Supp. IV CT 48-49.) Approximately two minutes later, Connor saw Fat Rat walk on the sidewalk toward the victims' car, and start shooting. When he started shooting, Fat Rat was by a van, about 12 feet from the victims' car. (Supp. IV CT 50-52.) After the shooting, Fat Rat ran to the backyard of Evil's house. (Supp. IV CT 54-55, 55A.)

3. Connor's Trial Testimony

Connor testified at trial in August 1997. (RT 3203, 3333.) On direct examination, he testified that he had seen Allen walking east on the sidewalk on 88th Street, by the motel, toward Central. (RT 3203, 3333, 3344-3346, 3349.) Allen then turned around near the motel driveway. (RT 3344-3345.)

A few minutes later, Connor saw Allen run up and start shooting at the victims' car. (RT 3344, 3346.) Allen was standing in the street, near the back of a van, about 10 feet from the victims' car. (RT 3346-3347, 3349-3350, 3378.) His gun was pointed at the driver's side of the car. (RT 3350.) When the gunshots started, Connor ran, so he "just [saw] the car get hit once." (RT 3351.)

After the shooting stopped, Connor saw Allen walking west on the sidewalk on 88th Street, by the motel. (RT 3357-3360.) When asked, "Whose house did [Allen] go to . . .?" Connor responded, "I don't know what street he went to." Asked, "Did you see [Allen] go down anybody's yard?" Connor answered, "I don't remember that, no." (RT 3359.) Connor denied testifying

before the grand jury, or telling the police, that he had seen Allen go to Johnson's house. (RT 3364-3366, 3376-3377, 3379-3380.)[112/]

On cross-examination, Connor testified that when he first saw Allen, Allen was by the motel on 88th Street, walking east toward Central. (RT 3407, 3409-3410, 3447.) When Allen reached the corner of Central, he turned around and walked back west on 88th Street. (RT 3410-3411, 3448-3449.)

About five or ten minutes later, Connor saw Allen a second time, walking by the motel. (RT 3414-3419.) Allen then went by a van that was in front of the victims' car, stood in the street "off like at an angle" from the car, and started shooting. (RT 3419-3422, 3443.) Asked, "[W]as he directing these shots into the passenger side or the driver's side of the car?" Connor responded, "I really -- it could have been the driver's side, but I didn't stick around and see exactly where he was shooting." (RT 3421.) However, it seemed to Connor that Allen was "[c]loser to the driver's side, like he was shooting at the driver." (RT 3422.)

After the shooting, Allen ran. (RT 3425.) Connor then saw Allen walking west on 88th street, between Central and the alley. (RT 3424-3427.)

On redirect examination, Connor indicated that when Allen started shooting, he was standing near the gutter by the back of the van. (RT 3468-3470.) Allen was moving toward the victims' car. Connor ran, and did not continue to watch Allen as Allen approached the car. (RT 3469.)

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112. Allen acknowledges that Connor's "trial testimony omitted any reference to . . . Johnson, probably because Johnson had been successful in persuading Bill Connor to speak to . . . Carl Connor and 'warn' him of the danger of testifying against Johnson." (AAOB 98-99.) Indeed, Detective Sanchez testified that, before coming into court, Connor stated he would testify against Allen, but not against Johnson because Johnson had "too many followers." (RT 3987-3988.)

On recross-examination, Connor testified that when he saw Allen discharging the gun, Allen was standing off to an angle in front of the victims' car. (RT 3472-3473.)

4. Other Witnesses' Testimony

Freddie Jelks testified that Allen had approached Johnson's house northbound through the alley that was next to the motel, and joined the group. (RT 3529-3530, 3533-3534.) After Allen volunteered to "serve" Payton, one member of the group suggested that Allen go straight up 88th Street to Central to commit the shooting. (RT 3542-3543, 3546-3547, 3550, 3692.) Johnson instead instructed Allen to "go through the alley and come up on 87th," and then "[g]o down to where they were in the car." (RT 3555-3558, 3623-3624.) Johnson handed Allen the Uzi, and Allen left in a car traveling north through the alley. (RT 3555, 3558-3559, 3562, 3564-3565, 3653-3654, 3657-3658, 3704.) About two minutes after the shooting, Allen reappeared, walking quickly southbound out of the alley. (RT 3566-3570, 3575, 3658; Supp. IV CT 109-110.[113])

Allen subsequently described how he had committed the shooting. (RT 3579-3580, 3623; Supp. IV CT 111, 114, 116.) He said that he "came off of 87th and he walked south on Central on the sidewalk." (Supp. IV CT 111-112.) The victims never saw him coming. (RT 3581; Supp. IV CT 111.) Allen shot the passenger first and then the driver. (RT 3581, 3622-3623; Supp. IV CT 112.)

Willie Clark testified that when the shooting stopped, he saw a short, heavyset Black male, wearing a black windbreaker with a hood, standing on the passenger side of the victims' car. (RT 3266-3267, 3274-3275, 3303-3304.)

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113. The citations to the Supplemental Clerk's Transcript are to Jelks's grand jury testimony.

The man ran north on Central, then turned left on 87th Place. (RT 3275, 3277, 3303-3304.) Clark later identified Allen's photograph from a six-pack photo display as looking like the shooter. (RT 3270, 3280-3283, 3318-3322.)

Eulas Wright testified that after the shooting, he saw a short, "chunky" guy, wearing a black "Raiders" jacket with the hood over his head, running north up the street. (RT 3873-3875, 3888, 3890-3893.)

Detective Tiampo testified that the expended shell casings recovered at the scene were predominately located on the front passenger side of the victims' car. (RT 3782-3783.) Specifically, one casing was found three inches east of the curb, in the gutter; another was 1.9 feet east of the curb; three were at the curb; another was four feet east of the curb, in the street; another was almost two feet east of the curb; another was one inch east of the curb; and one more was one foot east of the curb. (RT 3778-3780.)

Firearms examiner Starr Sachs opined that, based on where the casings were found, the shooter could have been standing on the passenger side of the car, but could not have been in the street. (RT 3830-3831, 3860-3861.) There also was a bullet hole, which was most consistent with an exit hole, on the driver's side of the car. (RT 3579, 3774-3775, 3803, 3846-3847.) Detective Tiampo did not recall finding any other damage to the car's exterior. (RT 3803-3804.)

Autopsies revealed that Beroit had suffered three gunshot wounds, one to his right ear, one to his right cheek, and one to the right side of his back. (RT 4094-4096, 4099.) Loggins also suffered three gunshot wounds, two behind his right ear, and one to his right shoulder. (RT 4100-4101, 4103.) According to Deputy Medical Coroner Christopher Rogers, the victims' wounds were consistent with the shooter having been positioned adjacent to the car, parallel to the passenger door. (RT 4092, 4114.)

5. Closing Arguments

During closing argument, the prosecutor indicated that the victims' car had been parked southbound on Central. (RT 5103.) The shooter walked down Central, approaching the car from behind. (RT 5103-5104, 5106.) Based on the physical evidence, the shooter stood on the sidewalk, and shot into the passenger side of the car. (RT 5102, 5104-5106, 5116.) The shooter then fled north on Central. (RT 5103, 5122.)

The prosecutor acknowledged that Connor had "baggage," as he had admitted falsifying timecards. (RT 5115, 5135.) However, the prosecutor argued that Allen had been identified as the shooter from a number of different sources:

> Mr. Allen was identified by Willie Clark as looking like the shooter. [¶] He was identified by Carl Conn[o]r as the shooter who had an Uzi.
>
> He was identified by Freddie Jelks as a person who agreed to serve, received an Uzi, got directions, took a ride up the alley with the Uzi in hand, was absent while the gunfire from Central was heard . . ., and then returned to the Johnson home sweaty and jittery saying, [¶] I served them.
>
> Mr. Allen also admitted having committed this crime both to Mr. Jelks and to Marcellus James. . . .

(RT 5117-5118.)

In his closing argument, Johnson's counsel argued:

> What kind of person is [Connor]? Is he a trustworthy individual? . . .
>
> I think that initially there is a question about just where Mr. Conn[o]r was on August the 5th, 1991. If you believe the . . . custodian of records from Don Kott Ford's timecards, they show that . . . [¶] . . . from a little

after 2:00 until 5:00 he was at Don Kott Ford . . . . If he was at Don Kott Ford then he wasn't up there at the repair shop like he told you.

So, one thing immediately becomes clear about Mr. Conn[o]r, and that is that he's a liar about where he was on August 5th . . . . [¶] . . . He either lied to you or he lied to Don Kott Ford, but to somebody he's lied. [¶] So, immediately you know that he's a liar.

(RT 5149-5151.)

If you want to take a chance on [Connor] and say, well, . . . I think he was lying to Don Kott Ford; he may have lied to us a little bit, but I don't think he lied about [the shooting], let's look to see if the evidence corroborates what he told you about being up there. . . .

He said [Allen] stood behind the van and then opened up some type of Tech 9 . . ., and shot the people in the car, shot the driver first. . . .

The physical evidence is not that somebody stood back here behind this van . . . and fired these shots, because there's no bullets in the front of the car. . . . [A]ll the shells were found over here (indicating).

(RT 5152-5154.)

. . . Mr. Clark and Mr. Wright . . . say the shooter ran north on Central going up towards 87th Place . . . . [¶] Where does Mr. Conn[o]r say the shooter went after he got through standing over here behind the van . . ., shooting at the driver's side? He says he went back down 88th Street.

So, first of all, [Connor's] not corroborated by the physical evidence as to what he says happened. And then he's not corroborated by the independent eyewitnesses.

(RT 5155-5156.)

Allen's counsel added in his closing argument that Connor "couldn't identify the clothes that Michael Allen was wearing. He didn't know the time

or day that this happened." (RT 5198-5199.) Allen's counsel also characterized Connor as a "mercenary" who "has interests in cases." (RT 5199.)

In her rebuttal argument, the prosecutor countered:

> . . . [W]hen you go and look at Carl Conn[o]r's testimony, and there are discrepancies,[114] ask yourself, does it really matter? Is that really important? [¶] Ask yourself, is there a reasonable explanation for why this discrepancy might exist? [¶] The mere fact that there were differences doesn't mean you toss it out.
>
> As I said in my opening argument, if this stuff was carbon copied you'd have a really good reason to be suspicious. . . . But the difference in this case is you have a number of different people from a number of different points of view telling you over and over the same things. The totality of their statements are inevitably consistent.

(RT 5209.)

> Why would [Connor] need to worry about what it was Mr. Allen had on if he knew the guy by face?

(RT 5212.)

> Was there any benefit to these people? [¶] Carl Conn[o]r was pressured by the defendant via his brother. He was fearful he'd end up like Nece, the person whose murder he testified in. Did he seem evasive? Absolutely. Did he have a reason to be evasive? Yes. So what can you do? Look at his prior testimony in conjunction with other testimony and see if what he says rings true. . . .

(RT 5221.)

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114. Allen incorrectly asserts that the prosecutor "never conceded that Connor may have been 'mistaken' at one point or another." (AAOB 172; italics omitted.)

. . . Mr. Conn[o]r talked about the shooter's location on a couple of occasions. And what he said . . . is that the shooter was moving. Where he first saw the shooter versus where he was when he heard the first shots, he drew an arrow in the direction that the shooter, Mr. Allen, moved on People's 17.

. . . And what Carl Conn[o]r does is he draws a C over here . . ., near the rear right side closest to the sidewalk of the van, with an arrow going down the street toward the car. [¶] He says that he didn't watch the guy shoot because he took cover. . . .

He doesn't say the guy was shooting from the opposite side of the street. He says that he was over near the van. [¶] And in any event, even if the shooter is 5 or 6 feet in either direction, . . . does that change the accuracy of his identification? He knows Mr. Allen. . . He's never identified anybody else. . . .

(RT 5226-5227.)

. . . Were this a case where any one of these people were the sole source of information perhaps you'd have some problem reaching a verdict. [¶] Michael Allen was identified by Freddie Jelks on [three] occasions, by Carl Conn[o]r on [three] occasions, by Willie Clark as being somebody who looked like the shooter . . . .

(RT 5230.)

B. General Principles

As explained by this Court in *People v. Marshall* (1996) 13 Cal.4th 799:

Due process is denied when a prosecutor knowingly uses perjured testimony to obtain a conviction. [Citations.] Originally, under the traditional rule, to obtain relief a defendant had to establish by a preponderance of the evidence that perjured testimony was adduced at his trial, that representatives of the state knew of its falsity, and that such

testimony may have affected the outcome of the trial. [Citations.] Under the current rule, a showing that the false testimony was perjurious, or that the prosecution knew of its falsity, is no longer necessary. [Citations.]

(*Id.* at pp. 829-830.)[115]

The prosecution also has a "basic duty . . . to correct any testimony of its own witnesses which it knew, or should have known, was false or misleading." (*In re Jackson* (1992) 3 Cal.4th 578, 595; italics omitted.) If the prosecution fails to do so, "reversal is required 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" (*Id.* at p. 597.) This standard has been equated with the *Chapman* harmless beyond a reasonable doubt standard. (*Id.* at pp. 597-598, & fn. 10.)

On the other hand, so long as the prosecutor has disclosed the material information bearing on credibility to the defense, she is not forbidden from calling a witness merely because that witness's credibility is open to some doubt. For example, in *People v. Riel* (2000) 22 Cal.4th 1153, this Court stated:

Defendant . . . argues the record supplies many reasons for the jury to question Edwards's testimony. Edwards's credibility was indeed suspect. Defense counsel cross-examined him effectively. Edwards made many prior inconsistent statements and had an obvious motive to

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115. In *People v. Morales* (2003) 112 Cal.App.4th 1176, however, the Court of Appeal observed:

> As a result of statutory changes, in a habeas corpus proceeding, the defendant no longer has to show that the prosecutor knew the testimony was false. (*In re Hall* (1981) 30 Cal.3d 408, 424 . . . .) It is not entirely clear whether this same new rule also applies on direct appeal. (Compare *Marshall*, at p. 829 . . . [dictum: defendant need not show falsity, citing habeas cases] with *People v. Musselwhite* [1998] 17 Cal.4th [1216,] 1253 . . . [rejecting claim because prosecutor did not know testimony was false].)

(*People v. Morales, supra,* 112 Cal.App.4th at pp. 1192-1193.)

blame defendant and minimize his own participation in the crime. . . . But these circumstances -- known to the jury -- do not provide a basis to exclude his testimony. . . . It was for the jury to evaluate the testimony of [Edwards and defendant] and the remaining evidence and determine where the truth lay.

Defendant also claims that Edwards was so incredible that the prosecution presented false testimony in using him as a witness. We disagree. The prosecution simply presented its evidence and allowed a fully informed jury to evaluate it. . . .

. . . [T]he prosecutor . . . was not present at the murder scene. He did not *know* whether or to what extent Edwards might be lying at trial. . . . Allowing both Edwards and defendant to testify subject to cross-examination and impeachment by available evidence, as was done here, afforded defendant a fair trial and comported with due process.

(*Id.* at pp. 1181-1182 [italics in original]; see also *People v. Harrison* (2005) 35 Cal.4th 208, 242 ["When . . . the prosecution has doubts as to the truth of a statement it intends to present at trial, it must disclose to the defense any material evidence suggesting that the statement in question is false. But, notwithstanding those doubts, the prosecutor may still present the statement to the jury"]; *People v. Seaton* (2001) 26 Cal.4th 598, 648 ["So long as the prosecutor's doubts are based solely on the evidence presented at trial, the jury is capable of deciding which of the competing [witnesses] is the more convincing, and the prosecutor's views have no bearing on that decision" (italics omitted)]; *People v. Morales, supra,* 112 Cal.App.4th at p. 1195 ["Defendant does not suggest any way in which the jury's ability to perform its functions -- to resolve credibility disputes and to find the facts -- was compromised so as to render the trial unfair"]; *People v. Farris* (1977) 66 Cal.App.3d 376, 385 ["The mere fact that the statement of a witness is later

contradicted by an opposing witness does not establish that the first witness' testimony was perjured, let alone that the prosecution was aware of its falsity, even if testimony of the latter witness may appear more reliable"].)

C. Allen's Claim Has Been Waived

Allen acknowledges that he did not object at trial to the presentation of Connor's testimony on the ground such testimony was false. (AAOB 108.) The claim on appeal has thus been waived. (See *People v. Musselwhite, supra,* 17 Cal.4th at p. 1253 [claim that prosecution knowingly presented perjured testimony waived by not raising issue in trial court]; *People v. Marshall, supra,* 13 Cal.4th at pp. 830-831 [same].) Allen's position that an objection or admonition would not have cured the alleged harm (AAOB 109) is without merit. An order striking Connor's testimony, had that been appropriate, surely would have been sufficient.

D. There Was No Misconduct

In any event, Allen's prosecutorial misconduct claim is meritless. There is no suggestion that the prosecutor withheld any material information regarding Connor's credibility. Allen is merely rehashing information that was known to the defense at trial.[116]

Nor was appellants' jury given a falsely favorable impression of Connor. Allen himself points out that Connor's credibility was "vigorously challenged" by the defense. (AAOB 490; see also AAOB 138 ["The nature, quality and quantity of the evidence introduced to impeach Connor was formidable"];

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116. This is not a case like *People v. Kasim* (1997) 56 Cal.App.4th 1360, cited by Allen (AAOB 96-97), where the defendant's trial counsel, through his own initiative, uncovered only "some of" the favorable information that the prosecution had failed to disclose. (*People v. Kasim, supra,* 56 Cal.App.4th at pp. 1383, 1386.) Here, in contrast, there was no failure to disclose.

AAOB 172 ["Connor's credibility was undermined so extensively"]; AAOB 227 ["Connor was dramatically impeached"]; AAOB 314 [Connor was "impeached significantly"].) Connor admitted that he had falsified timecards, thus cheating his employer (RT 3395-3396), which enabled defense counsel to argue in closing argument that Connor was a known liar (RT 5150-5151). His testimony regarding the directions that the shooter approached and fled, and the shooter's location in relation to the victims' car, was called into question by other evidence. The prosecutor also admitted in closing argument that Connor had "baggage," and that there were discrepancies in his testimony. (RT 5115, 5135, 5209.)

Moreover, simply because Connor's testimony may have differed in certain respects from that of other witnesses does not make his testimony false. (See *People v. Farris, supra,* 66 Cal.App.3d at p. 385.) Connor's account was not physically impossible. For example, one expended shell casing was found four feet from the curb, in the street. (RT 3779.) It is thus conceivable that the shooter had fired a shot while standing in the street, as Connor indicated.

By the same token, that Connor may have been wrong, or made inconsistent statements, when describing certain details, does not mean that he was lying about having witnessed Allen commit the shooting -- let alone that the prosecutor knew, or should have known, that was the case. Obviously, Connor's memory of the incident may have faded by the time he spoke to the police in August 1994, three years after the fact. Appellants' jury was fully instructed on assessing witness credibility.[117/] Whether Connor was simply

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117. The jury received CALJIC Nos. 2.13 (Prior Consistent or Inconsistent Statements as Evidence), 2.20 (Believability of Witness), 2.21.1 (Discrepancies in Testimony), 2.21.2 (Witness Willfully False), 2.22 (Weighing Conflicting Testimony), 2.23 (Believability of Witness -- Conviction of a Felony), 2.23.1 (Believability of a Witness -- Commission of Misdemeanor), and 2.27 (Sufficiency of Testimony of One Witness). (CT 864-872.)

mistaken as to various details, or lying about having witnessed the shooting, was an issue for the jury to decide.

Accordingly, the prosecutor did not commit misconduct by presenting Connor's testimony.[118]

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118. Allen argues that the prosecutor's presentation of Connor's testimony was "outrageous" misconduct that "shocks the conscience," such that the proper remedy is not only reversal, but dismissal with prejudice. (AAOB 122-137.) This argument is moot as there was no prosecutorial misconduct. However, respondent notes that "the normal and usually sufficient remedy for the vast majority of instances of [alleged] prejudicial prosecutorial misconduct that occur at trial is . . . a reversal of a defendant's conviction on appeal followed by retrial." (*People v. Batts* (2003) 30 Cal.4th 660, 666.)

V.

REVERSAL IS NOT WARRANTED DUE TO ALLEGED IMPROPER BOLSTERING OF CONNOR AND JELKS'S CREDIBILITY

Appellants argue that their convictions must be reversed because detectives were improperly allowed to bolster Connor and Jelks's credibility. (AAOB 137-174, 333-356; JAOB 199-206.) Respondent disagrees.

A. Connor

1. Connor's Information Being Corroborated By Other Sources

During her redirect examination of Detective Sanchez, the prosecutor asked: "With respect to the information that was provided to you by Mr. Connor, was that information corroborated through other sources?" (RT 3991-3992.) Defense counsel objected on the grounds that this question called for hearsay and a conclusion. The objections were overruled. Detective Sanchez then answered, "Yes." (RT 3992.)

It is well settled that "[l]ay opinion about the veracity of particular statements by another is inadmissible on that issue." (*People v. Melton* (1988) 44 Cal.3d 713, 744; see also *People v. Zambrano* (2004) 124 Cal.App.4th 228, 239-240 ["a lay witness's opinion about the veracity of another person's particular statements . . . invades the province of the jury as the ultimate fact finder"].)

Appellants' claim of improper bolstering initially has been waived for failure to object on that basis at trial. In any event, the prosecutor did not ask Detective Sanchez for her opinion on Connor's veracity, but simply a yes-or-no question as to whether information provided by Connor had been corroborated by other sources. Moreover, assuming arguendo that the trial court erred in overruling the defense objections, reversal is unwarranted because "there is no reasonable probability that [the] questionable testimony affected the verdict."

(See *People v. Melton, supra,* 44 Cal.3d at p. 745, citing *People v. Watson, supra,* 46 Cal.2d at pp. 836-837.)

Detective Sanchez's complained-of testimony consisted of but a single question and answer. (Cf. *People v. Melton, supra,* 44 Cal.3d at p. 745 [witness "answered only four questions" regarding other's credibility].) Detective Sanchez did not offer her personal opinion that Connor had witnessed the shooting. (RT 3991-3992.) The detective thus did not "place[] the prestige of the government behind [Connor] through personal assurances of the witness's veracity." (See *People v. Fierro* (1991) 1 Cal.4th 173, 211.)

Nor did the prosecutor "exploit" this testimony in closing argument. (See *People v. Melton, supra,* 44 Cal.3d at p. 745.) The prosecutor never suggested that the "other sources" referred to by Detective Sanchez had not been presented to the jury. (See *People v. Fierro, supra,* 1 Cal.4th at p. 211 ["Impermissible 'vouching' may occur where the prosecutor . . . suggests that information not presented to the jury supports the witness's testimony"].) Indeed, the prosecutor's only mention of Detective Sanchez in closing argument concerned Connor's statement that he would not testify against Johnson because Johnson had "too many followers." (RT 5134.)[119/]

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119. Johnson distorts the prosecutor's closing argument by quoting only the following italicized language:

> [A]sk yourself, did something happen between the time that [Connor's] statement was taken in August of 1994 and now that might cause Mr. Connor to change his mind about the defendant [Johnson]?
>
> Add to that the fact that *Mr. Connor was pretty honest with Detective Sanchez* and said Evil's got too many followers, Mr. Johnson has too many people left there. Is that *corroborated by other evidence from other sources* in other circumstances? Absolutely. . . .
>
> Carl Connor is not *the brightest man that ever walked the earth.* But he was *earnest and he tried.* You can hear it in his statement. . . .

Finally, the jurors were instructed that they were "the sole judges of the believability of a witness." (CALJIC No. 2.20; CT 865.) Detective Sanchez's brief testimony that the information provided by Connor had been "corroborated through other sources" was therefore plainly harmless.

2. Connor's Concern For His Safety Having Never Gone Away

On direct examination, Detective Sanchez testified that she had had contact with Connor during the pendency of this case, including on the day Connor was in court. The prosecutor asked Detective Sanchez, "How would you describe Mr. Connor's attitude about testifying in this case?" Allen's counsel objected that such question had been "asked and answered." The court overruled the objection, and Detective Sanchez answered, "He didn't want to." (RT 3987.) The prosecutor subsequently asked Detective Sanchez, without objection: "With respect to this particular case, has Mr. Connor's concern about his safety ever gone away to the best of your knowledge?" Detective Sanchez responded, "No." (RT 3988.)

Allen's claim that the last exchange constituted improper opinion testimony has been waived due to the failure to object at trial. The claim is also without merit. Fear is a proper subject for lay opinion testimony, and Detective Sanchez's personal contact with Connor provided an adequate foundation for her opinion. (See Evid. Code, § 800; *Holland v. Zollner, supra,* 102 Cal. at pp. 637-639.) Nor can it be said that, absent the challenged opinion, there is a reasonably probability that the jury would have come to a conclusion that

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(See JAOB 206; RT 5134-5135.)

Connor had not been afraid,[120] much less found a reasonable doubt as to appellants' guilt.

3. Connor's Reward Having Been Contingent On A Conviction

Over an irrelevance objection, Detective Sanchez was allowed to give the following testimony:

> Q[.] With respect to the issuance of the reward, was the granting of the reward to Mr. Conn[o]r contingent upon conviction or upon him testifying in court?
>
> [ALLEN'S COUNSEL]: Irrelevant.
>
> THE COURT: Overruled.
>
> [DETECTIVE SANCHEZ]: Conviction.
>
> BY [THE PROSECUTOR]:
>
> Q[.] Was that conviction achieved?
>
> A[.] Yes.
>
> Q[.] Did Mr. Conn[o]r testify in that case?
>
> A[.] Yes.

(RT 3992.)

Allen argues that this testimony

> improperly and prejudicially tie[d] Connor's receipt of the reward in the Reco Wilson case to his credibility in [appellants'] case. . . . The prejudice suffered by [Allen] because of the trial court's erroneous ruling involved the inferences that . . . a) the "Wilson jury" must have concluded Connor was a credible, truthful witness or the "Wilson jury" would not have convicted Wilson; and b) since Connor was a credible,

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120. Connor expressed fears regarding the 89 Family to multiple detectives, even going so far as to ask if his name could be changed. (RT 3974, 3987-3988, 4324.) Connor also testified that he was afraid for his family. (RT 3384-3385.)

truthful witness in the Reco Wilson murder case, the jury could be assured that Connor was a credible, truthful witness in [appellants'] case, also.

(AAOB 163; italics omitted.) Respondent disagrees.

A reasonable juror would not have drawn such inferences. By testifying that Connor's reward had been contingent on a conviction, Detective Sanchez did not vouch for Connor's credibility, but merely stated the terms of the reward. This testimony actually favored the defense, for it added fodder to the argument that Connor had a financial motive to help the prosecution win convictions.

Further, for all appellants' jury knew, the jury in the Reco Wilson case could have disbelieved Connor's testimony, and voted to convict based on other evidence. As Allen himself argues:

The prosecution . . . presented no evidence that the "Wilson jury" concluded Connor was a credible, truthful witness in that case. No evidence was presented to explain why the "Wilson jury" voted to convict Wilson. Hence, the inference that Connor testified truthfully in the Reco Wilson case because the "Wilson jury" convicted Wilson was simply speculative and improper.

(AAOB 163-164; italics omitted.)

In closing argument, the prosecutor never asked appellants' jury to draw the inferences that Allen raises on appeal. The jurors also were instructed, at both the beginning and end of the case, that they "must not be influenced by . . . conjecture . . . ." (CALJIC No. 1.00; CT 848-849; RT 3233, 5062.)

There is thus no reasonable probability that appellants would have obtained a more favorable result in the absence of the complained-of testimony.

B. Jelks [121]

1. Jelks's Information Being Corroborated By Other Sources

Allen complains (at AAOB 340-347) that the prosecutor elicited the following testimony from Detective McCartin regarding Jelks's information being corroborated:

> Q[.] And did [Jelks's] information corroborate information that you had from other sources regarding the investigations that you were conducting?
>
> A[.] Yes.

(RT 4168-4169.)

> Q. In the case of Mr. Jelks, did the use of that kind of ruse result in his giving you information that was completely different from other information that you had gotten?
>
> A. No.

(RT 4233.)

As discussed above regarding similar testimony by Detective Sanchez (see pp. 170-172, *ante*), appellants' claim of improper bolstering is both waived and without merit. There was no objection to Detective McCartin's complained-of testimony on the ground of improper bolstering or otherwise. Detective McCartin did not render his personal opinion that Jelks was telling the truth, but only that information Jelks provided was similar to other information the detective had obtained. Detective McCartin's testimony on this subject was also very brief. And the jurors were instructed that they were the sole judges of a witness's believability.

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121. Allen's argument that Detective McCartin improperly bolstered Jelks's credibility when he testified that Jelks's fears of retaliation were legitimate (AAOB 336-340), has been addressed at pages 121 to 123, *ante*.

Further, the prosecutor did not suggest that she had information supporting Jelks's credibility that had not been presented to the jury. To the contrary, in closing argument, the prosecutor argued based solely on the evidence adduced at trial:

> What are the chances of Mr. Jelks being able to tell the same story as Mr. Wright, as Mr. Clark, as Carl Conn[o]r, as that which was related after the fact by both the defendants?

(RT 5124.)

2. Detective McCartin's Opinions Regarding The "Ruse" Used In Jelks's Interrogation

Allen also argues that Detective McCartin improperly bolstered Jelks's credibility when he opined regarding the "ruse" used in Jelks's interrogation -- to wit, lying to Jelks that witnesses had identified him:

> Q [BY THE PROSECUTOR]. And in your experience does the pressure that that kind of ruse puts on a witness cause them to lie?
>
> A. No. . . .
>
> Q. And in your experience is it permissible as an investigator, legally, to use those kinds of ruses?
>
> A. Yes.
>
> [ALLEN'S COUNSEL]: Wait a minute, calls for a conclusion. . .
>
> THE COURT: You can answer the question.
>
> THE WITNESS: Yes, it is.

(RT 4232-4233; AAOB 340-341, 347-349.)

Allen's complaint about the initial question and answer has been waived due to the lack of a timely objection. In any event, there is no reasonable probability that such brief testimony affected the verdict. Detective McCartin did not opine that Jelks had been truthful, but merely that, in Detective

McCartin's experience, the type of interrogation tactic that was employed did not cause people to lie. And, as indicated above, the jurors were instructed that they were the sole judges of witness credibility.

As to the latter question and answer, it was certainly within Detective McCartin's realm of expertise -- and the jury was entitled to know -- that the interrogation technique used in Jelks's interview was legally permissible. (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 182 [deception regarding defendant's fingerprints unlikely to produce false confession]; *People v. Jones* (1998) 17 Cal.4th 279, 299 ["The detective implied at various times that he knew more than he did or could prove more than he could. Such deception regarding the evidence was permissible, for it was not of a type reasonably likely to procure an untrue statement" (internal quotation marks omitted)]; *People v. Thompson* (1990) 50 Cal.3d 134, 166-167 [defendant's statements properly admitted even though police falsely stated that incriminating evidence had been found].)

Appellants' claims of improper bolstering must therefore be rejected.

VI.

THE TRIAL COURT DID NOT UNDULY RESTRICT APPELLANTS' ABILITY TO IMPEACH PROSECUTION WITNESSES

Appellants contend that the trial court unduly restricted their ability to impeach Freddie Jelks, Donnie Adams, Marcellus James, and Detectives McCartin, Sanchez, and Tapia.[122/] (JAOB 183-199; AAOB 174-228, 248-333, 356-378.) Respondent disagrees.

A. Jelks

1. Relevant Proceedings Below

Prior to Jelks's testimony, the prosecutor informed the court that Jelks had been charged with appellant Johnson in another pending murder case, involving the September 1991 drive-by shooting of 97 East Coast Crip member Tyrone Mosley.[123/] Jelks was charged as the driver, and Johnson as a shooter. (RT 3496-3497, 3501.) The prosecutor sought a ruling as to the evidence the court would permit concerning Jelks's pending case. (RT 3496.) Johnson's counsel indicated that he intended to question Jelks regarding the subject matter of that case, "so that the jury is aware of the circumstances under which [Jelks] implicated Mr. Johnson in the [charged] murders." (RT 3499, 3502.)

The court asked whether any promises had been made to Jelks regarding his pending murder case. The prosecutor responded, "No, it's wide open." (RT 3500.) Allen's counsel disagreed, explaining:

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122. Allen's reference to Detective Tapia in this guilt-phase claim (AAOB 248) appears to be in error, as Detective Tapia did not testify in the guilt phase.

123. Evidence of the Mosley murder was introduced in the penalty phase. (See Statement of Facts at pp. 27-32, *ante*.)

During the interrogation . . .[,] the police hold the murder case . . . over [Jelks] and say, if you talk to us we'll let you go. And so Mr. Jelks talks to [them] . . . . [¶] . . . [T]hey let him walk out of the police station. I think that's a promise, and a pass for an alleged murder[.]

(RT 3500.) Allen's counsel added that the officers had used the murder case "as bait" to obtain Jelks's statement against appellants. (RT 3501.)

The prosecutor acknowledged that Jelks "clearly has a bias that [defense counsel] would want to bring out," but argued that the nature of Jelks's pending charges was irrelevant. (RT 3504.) The court stated:

[M]y tentative feeling is . . . that the fact the witness has a pending homicide case is a relevant factor . . ., insofar as that particular homicide was mentioned by the officers and was perhaps an inducement to get him to talk . . . . I don't think we should leave the jury in the dark. There's too much of a potential, frankly, that a witness looking at a murder case that's been filed might have some motivations other than altruism for testifying in a case. So, the court's . . . [¶] . . . intention is to allow inquiry as to certainly things that were said during the initial interview that might bear upon whether he'd be arrested on this murder. That would be appropriate.

(RT 3505-3506.)

However, the court added:

I'd be quite cautious, because I can see a twist and turn here to where it might come out before the jury, guess who [Jelks's] co-defendant is in that case.

(RT 3507.) Johnson's counsel asked the court to preclude such evidence as irrelevant. (RT 3507.)

The court replied:

In the abstract it's not particularly relevant but . . . if the issue is, [Jelks is] making up lies about Johnson to beat his own murder case, one might ask did he give information about Mr. Johnson during that interview about this other homicide, Mosley?

(RT 3507.) Counsel responded in the affirmative; during the interview, Jelks admitted being the driver, and implicated Johnson as a shooter. (RT 3507-3508.) The court indicated that it would review the interview transcript, and give the issue some additional thought. (RT 3509-3510.)

After reading the transcript (RT 3587), the court stated:

The bottom line is whether statements [Jelks is] making today, and whether some of the statements he made earlier are true or not. You [referring to Johnson's counsel] posit as a reason for untruthfulness a certain bias, the reason for the bias being threatened arrest. . . . [¶] You then want to go further . . . and put on that [Jelks has] got a pending murder case.

(RT 3592.)

. . . [T]here are a variety of crimes discussed in [the interview]. There's probably 10 different murders. . . .

And what's interesting is this: . . . Mr. Jelks, as to some professes no knowledge or just says, . . . there's hearsay, I can tell you what I heard. In others he professes personal knowledge of either actually seeing the crime, or the immediate precursors, or events immediately after the crimes. In some of those he implicates [Johnson], in others he does not. . . . [F]or example, . . . the fella shot in a phone booth, [the police] asked [Jelks] about that. . . . [T]he police[] suggest to Mr. Jelks, . . . that was

Evil that did that, we know that. . . . And Jelks says, no, he didn't do that. . . . It was another guy . . . .[124] So, [Jelks is] quite selective.

. . . [I]n terms of allowing the jury to determine what's going on here, certainly the best way to do it would be for the jury to hear . . . the tape [of the interview]. And I certainly don't have a problem with that. [¶] Mr. Lasting [Johnson's counsel], I assume you would have a great problem with that, because [Johnson's] name is mentioned in connection with lots of crimes.[125]

(RT 3593-3594.)

. . . But if the issue is that [the police telling Jelks, if you want to go home today, start talking] creates a bias in Mr. Jelks's mind sufficient to cause him to name [Johnson], is it not equally true the jury should hear how many times he implicated [Johnson] in murders, how many times he didn't, how many times he refused to implicate anybody, how many times he professed knowledge, how many times he professed no knowledge, how many times he expressed fear, and the reasons therefor[]? . . . [A]ll those things go into this credibility mix . . . [.]

(RT 3595-3596.)

The things you [referring to Johnson's counsel] point out are relevant, the things the People point out are relevant. But . . . what I cannot do is the following: allow you to simply elicit from [Jelks] a portion of his motivations and not the entire -- we've got [two] sides here. . . . [W]e can't simply select from the transcript, in fairness, . . . a line or two, to

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124. See also RT 3596-3597 (Jelks "refuses to name [Johnson] when given the perfect opportunity. The police are urging him in the strongest possible terms to tell them that [Johnson] shot a man in a phone booth, and he refuses to . . . take the bait").

125. Johnson's counsel responded in the affirmative. (RT 3594.)

the exclusion of other equally, if not more relevant factors in the case. And there are many statements made by Mr. Jelks in the transcript that could bear upon his credibility, his bias for or against [Johnson].

The fact that they've been apparently crime partners for some period of time cuts both ways. It may show some loyalty toward [Johnson], it may show the opposite. The jury would have to decide that. It certainly would tend to show he has some knowledge of [Johnson's] activity, in that Mr. Jelks . . . admits being involved in criminal activity himself on many occasions with [Johnson]. And those portions seem to be not what I would call self-serving at all. He admits a good deal of criminal liability on his own part, including driving the car in this one homicide that is trailing. Now, he also tries to minimize it, it seems to the court, his own involvement, his own state of mind . . . . But the bottom line is he does admit to slowing a car down to [five], [six], [seven] miles an hour with knowledge that there's guns in the car, driving to a rival gang territory to a party going on with some rival gang members, and lo and behold somebody gets killed . . . . To some degree he lays out [Johnson] on that, but he lays himself out as well. It just seems to me that if you seek to introduce portions of the transcript the likelihood is . . . larger portions will become highly relevant as well.

(RT 3599-3601.)

Allen's counsel indicated that he had previously made a severance motion, and that he did not want the jury to hear evidence of Johnson's other crimes. (RT 3601.) He maintained that the only relevant parts of Jelks's interview were the statements by the police -- "You've been identified on a murder case," "We can book you now," and, "It's Christmas. Don't you want to get home for Christmas?" -- and Jelks's statements, "I have a family and

[four] kids. . . . I want to cooperate with you so I can get out." (RT 3602-3603.) The court disagreed that those were the only relevant portions. (RT 3603.)

When the court asked Johnson's counsel if he wanted the jury to become aware that Jelks was facing the murder charge along with Johnson, Johnson's counsel responded:

> . . . I want to be able to present to the jury that [Jelks] is sitting here with a murder charge hanging over his head, and has a hope that by providing the testimony he's providing in this case that he will lessen, or perhaps avoid any criminal punishment for that murder case . . . . And the fact that Mr. Johnson is also charged in that case . . . is not relevant to that desire on the part of Mr. Jelks. Mr. Jelks would have that same desire were he charged alone, were he charged with Mr. Johnson, were he charged with some third party who is not a party to this case. [¶] The only reason to bring Mr. Johnson into it . . . is . . . to let the jury know that Mr. Johnson has another case, and perhaps draw adverse inferences as to his character from the fact of that pending case.

(RT 3603-3604; see also RT 3607.)

Johnson's counsel further stated:

> I think its fair argument, in terms of the jury's assessment of [Jelks's] credibility, that this is a guy who is . . . facing the possibility of receiving a life sentence . . . .

(RT 3606.)

The court ruled as follows:

> It seems to me, Mr. Lasting, that you are in a fairly unique situation, wherein the pending case of the witness is a case wherein he . . . gives . . . a confession, or the next best thing as to his being the driver of a car in a drive-by shooting wherein your client is allegedly the shooter . . . .
>
> I will allow you to elicit from [Jelks] the following:

That he is facing a case. That he has a pending case wherein he faces a potential life sentence. [¶] And you may ask him if he's been made offers, . . . or if he has expectations that his testimony here will assist him in that pending case.

If you want to get into the nature of the case I'll allow you to, but then we are going to get into the facts of the case as well, and I'll allow [Jelks] to testify . . . as to what the facts were, or at least I'll allow a tape to be played to the jury, assuming he'd want to invoke his right against self-incrimination. . . .[126]

The important thing . . . is as you have argued, [Jelks is] looking at a good deal of time on a pending case, and the charge in the case is one that I don't believe fairly should be given to the jury absent an opportunity of [Jelks] to explain what it is that went on, which is I drove the car while [Johnson] shot and killed somebody. [¶] So, fair is fair. . . . [I]f you want to get into that we'll have to get into the larger portion of the tape.

In terms of the statements made to [Jelks] by the officers early on, they are relevant, there's no question. I'll allow you to elicit from him the following:

That they informed him he was a suspect in a serious crime, and that they . . . told him that he could go home -- whatever they say in there, however they phrased it. You can get out of here tonight, we won't book you, we'll give this to the D.A. later, and they'll do what they are

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126. See also RT 3611 ("If anybody wants to elicit that it's a murder case, go ahead and do it, but then what we're going to do is . . . hear the murder case . . . [¶] and how [Jelks] found himself in the situation of facing that murder case. And the way he did was to confess his involvement as the driver of the car in which Mr. Johnson allegedly acted as a shooter and passenger").

going to do . . . . If you want to get out of here tonight, tell us what happened in these various matters. . . .

We will then see what, if anything additional, comes out as we progress with [Jelks's] examination. I don't know, but I suspect that there may be other things that come in as well. . . . [¶] As I say, he speaks about a good number of crimes, some of which he implicates [Johnson] in, but a great number of which he refuses to, notwithstanding your claim that he has some bias that caused him to lay [Johnson] out.

. . .

(RT 3608-3611.)

The court added:

. . . I've indicated what you can get into in cross-examining [Jelks] on the points you've raised so far. [¶] Obviously, you can cross-examine him on anything you want, but in terms of these specific points that's the way we'll handle it.

(RT 3612.)

Appellants' jury heard the following evidence impeaching Jelks's credibility:

Jelks was smoking marijuana during the events preceding the carwash shooting. (RT 3524, 3544-3545, 3655.)

At the time of appellants' trial in August 1997, Jelks was in custody. He had been charged with a "serious offense," for which he faced a possible life sentence in state prison.[127] (RT 3514, 3627-3628, 3641, 3682-3683, 3715-3716, 3749, 4185.) No promises had been made to Jelks regarding his case,

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127. Johnson is incorrect when he states that the jury was "merely told that [Jelks] had been threatened with a 'serious offense' for which he was ultimately arrested." (JAOB 195.)

although he hoped "something good" would happen to him as a result of his testimony.[128] (RT 3514, 3628, 3638, 3684.)

Detective Sanchez was prepared to say that Jelks had cooperated with the prosecution in this case. (RT 3990.) The detective allowed Jelks to smoke on the street unhandcuffed. (RT 3684, 3988-3989.)

Jelks had prior convictions as a juvenile for joyriding in 1980 or 1981, and robbery in 1983, and as an adult for possession of cocaine in 1985, misdemeanor receiving stolen property around 1990, and sale of marijuana in 1994. (RT 3640-3641, 3681-3682.) Jelks admitted that he had made money selling drugs. (RT 3626, 3644.)

Jelks used to be a member of the 89 Family. (RT 3518, 3643.) He admitted that he had "participated in some things." (RT 3627.)

Around 1992, Johnson assaulted Jelks over a dispute regarding Johnson's girlfriend. Jelks subsequently ceased his affiliation with the 89 Family, and moved out of the neighborhood. (RT 3518-3519, 3627, 3693-3697, 3718-3719, 3734-3736.) Jelks did not really get along with Johnson, and described him as a "back stabber." (RT 3718-3719.)

In December 1994, Detectives McCartin, Tapia, and Mathew interviewed Jelks about the carwash shooting and various other incidents, including the offense for which Jelks was currently in custody. (RT 3628, 3630, 3646, 3684, 3729, 3731, 3738, 4165-4166, 4168.) Jelks was told that if he did not cooperate, he would be arrested on his traffic warrants. (RT 4167, 4178-4179.) Detective McCartin asked Jelks about his children, reminded him that Christmas was approaching, and asked, "[Y]ou want to be home for Christmas, right?" (RT 3717, 3720-3721, 4181-4182.) Jelks was concerned

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128. Johnson asserts that, "during direct examination, Jelks maintained that he was not concerned about potential charges against him." (JAOB 192, citing RT 3627-3628.) The record does not support this assertion.

about being arrested, and not being able to be home for Christmas. (RT 3630, 3717, 3732-3733, 4167-4168, 4179.) Detective McCartin told Jelks, "We want to keep a nice flow of information coming." (RT 3721, 4182.) The detective was suggesting that if Jelks did not provide information, he would be arrested. (RT 4182.)

At some point in the beginning of the interview, Detective Tapia said: "Well, let's just send this in, Brian [i.e., Detective McCartin]. We'll do our thing and we'll just book [you]." (RT 4182-4183, 4190, 4235.) Jelks replied, "Wait a minute, man. Wait a minute," and told Detective McCartin not to "shut the doors on him." (RT 4182-4183.)

Detective McCartin told Jelks:

> You give me all the truth that you know on this stuff and I will know if you are lying. You will go home today. [¶] I'm going to show all this to the District Attorney and I'm going to tell them how you cooperated. [¶] I can't promise you that they won't file on you later on. . . . [¶] I can promise that you can go home today. [¶] I'll let you go if you give me truthful information and I will work with the D.A. and whoever else and keep you out of jail.

(RT 4184-4185.)

Detective McCartin was now referring to Jelks being arrested for a very serious offense, which carried a potential life sentence.[129] (RT 3715-3716, 4185-4186.) Detective McCartin lied to Jelks that "[w]e got witnesses that have come out . . . and identified you." (RT 4188-4191, 4232-4233.) To put added pressure on Jelks, Detective McCartin asked him: "How many strikes

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129. During his examination of Detective McCartin, Allen's counsel revealed that Jelks was facing a murder charge, asking the detective: "And when you meant 'book him,' you meant book him on the *murder* charge. [¶] Is that correct?" (RT 4190; italics added.)

you got on your rap[?] . . . You got a couple of strikes. How many felony convictions you have[?]" (RT 4189.)

After giving conflicting statements about his involvement, Jelks incriminated himself on his own case, although he did not provide enough information for Detective McCartin to arrest him at that time. (RT 4235-4236, 4238, 4247.) Jelks subsequently implicated appellants in the carwash case. (RT 3739-3742.) When the interview ended, Jelks was allowed to go home. (RT 3722, 4238.)

In closing argument, Johnson's counsel argued regarding Jelks's credibility:

> So, Freddie Jelks, what kind of guy is he? Is Mr. Jelks the kind of person who will do whatever it takes, whatever is necessary to help out Freddie Jelks? . . .
>
> Well, his numerous convictions attest to that. [¶] He's got juvenile convictions for joyriding and robbery. He's got adult convictions, receiving stolen property as a misdemeanor, possession of drugs, sale of marijuana.

(RT 5163-5164.)

> . . . [D]oes [Jelks] have a reason to lie about Mr. Johnson?
>
> One, he doesn't like him because he got beat up by him[;] and[]
>
> Two, he finds himself in the situation where he is confronted there at the police station . . . with a choice. And the choice is, you tell us information or it's incarceration for you. . . . [¶] . . . [I]t was a choice between being booked, locked up on a serious offense, an offense that carried a potential sentence of life in the state prison, . . . or you can go home and be with your family for Christmas.

(RT 5166; see also RT 5174.)

. . . [N]ow [Jelks is] here telling you . . . no deals have been cut here. Well, that may be true. Maybe the deal hadn't been cut yet. It's get up there, testify, we'll work this out later. But . . . his case hangs over his head. The potential sentence of life in the state prison hangs over his head.

(RT 5177.)

The jury instructions . . . include an instruction about the . . . believability of witnesses. . . . [¶] Look to see if there is the existence or non-existence of a bias, interest or other motive. Well, clearly Mr. Jelks has a bias, interest and other motive. [¶] Any offer of leniency given to or expected by the witness. Well, that fits right in there on Mr. Jelks and his believability.

(RT 5178.)

Johnson's counsel also referred to various inconsistent statements by Jelks. (RT 5165, 5181-5183.) For example, Jelks told the police that Allen had walked through the alley to get to Central. (RT 3705-3708, 5182.)

During his closing argument, Allen's counsel argued:

Who would assume they'd tell the truth now when they are outside on the street like Jelks, smoking pot, with [three] prior felony convictions, when he's supposed to be making some type of observation? Who would believe [Jelks's] observation with all his felonies of robbery, selling drugs, possessing drugs, now being involved in a serious life offense? Does that make him a credible witness?

(RT 5196.)

So you can see how much we have to believe in Mr. Jelks. He has prior convictions of felonies. He's made inconsistent statements. He has a bias, interest, and motive.

(RT 5197.)

On appeal, Allen acknowledges that Jelks was "significantly impeached." (AAOB 574; see also AAOB 372 ["the credibility of . . . Jelks was undermined so extensively"]; AAOB 556 [referring to "extensive impeachment evidence"].)

2. There Was No Abuse Of Discretion

As this Court explained in *People v. Frye* (1998) 18 Cal.4th 894:

> "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]

(*Id.* at p. 946.)

Allen claims that the trial court's ruling prevented the defense from "dramatically contradicting much of Jelks's testimony on direct examination," from "presenting significant evidence of Jelks['s] character trait for dishonesty and for moral turpitude," from "introducing strikingly probative evidence of Jelks' motive to ingratiate himself with the prosecution," and from "proving

that Jelks' testimony was false, involuntary, and the product of continuing police coercion." (AAOB 204 [italics omitted]; see also AAOB 248.) Johnson argues that the court "refused to allow Jelks to be cross-examined on the fact that he had been threatened by the police with murder charges if he did not cooperate, and that murder charges were pending against him at the time of his testimony." (JAOB 183.) The court did no such thing.

The court told counsel:

"If you want to get into the nature of [Jelks's] case I'll allow you to" (RT 3609);

"If anybody wants to elicit that it's a murder case, go ahead and do it" (RT 3611);

"[I]n terms of allowing the jury to determine what's going on here, certainly the best way to do it would be for the jury to hear . . . the tape. And I certainly don't have a problem with that" (RT 3594);

"In terms of the statements made to [Jelks] by the officers early on, they are relevant, there's no question. I'll allow you to elicit . . . [¶] [t]hat they informed him he was a suspect in a serious crime, and that they . . . told him that he could go home -- whatever they say in there, however they phrased it. You can get out of here tonight, we won't book you, we'll give this to the D.A. later, and they'll do what they are going to do . . . . If you want to get out of here tonight, tell us what happened in these various matters" (RT 3610);

"We will . . . see what, if anything additional, comes out as we progress with [Jelks's] examination. . . . I suspect that there may be other things that come in as well" (RT 3610); and,

"Obviously, you can cross-examine [Jelks] on anything you want" (RT 3612).

Allen is mistaken when he indicates that his counsel tried to delve into Jelks's case on cross-examination, but was not allowed to do so. (AAOB 189,

citing RT 3644-3645.) Allen's counsel asked Jelks, "Did you ever participate in[] seeking out enemies of the Bloods and destroying them?" Both the prosecutor and Johnson's counsel objected to this question. At sidebar, Allen's counsel stated, "I know what [Johnson's counsel is] talking about. Forget about it." The court asked, "You want to withdraw the question?" Allen's counsel replied, "Forget about it." (RT 3644-3645.) Thus, contrary to his suggestion, Allen was not precluded from inquiring into this area, but had abandoned the line of questioning.

Allen is also wrong when he asserts that the trial court "prevented him from being able to challenge the admissibility of Jelks's trial testimony on the basis that it was false, involuntary and the product of continuing police coercion." (AAOB 250.) Allen cites nothing in the record reflecting an attempt to exclude Jelks's testimony on these grounds. The claim on appeal that Jelks's testimony was involuntary and unreliable, violating Allen's right to due process (see AAOB 250-253, 281), thus should not be entertained. (See *People v. Champion, supra,* 9 Cal.4th at p. 918 ["[D]efendants never asserted at trial that admission of the evidence . . . violated . . . their right to due process . . . . We therefore will not consider these claims on appeal"].)[130/]

If the defense opted to elicit that Jelks's pending case was a murder case, the court's decision to allow evidence of Jelks's version of the murder, and that Jelks had implicated Johnson in some crimes, but not others, was not an abuse of discretion. Jelks admitted to detectives that he had been the driver during the Mosely drive-by murder, but claimed that he did not have a gun, and did not know there was going to be a shooting. (Supp. IV 906-907, 915, 923-924.) Whether Jelks played a limited, unwitting role in the crime was relevant to the

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130. Should this Court disagree, respondent respectfully requests an opportunity to file a supplemental brief addressing the merits of Allen's due process claim.

issue of his moral turpitude. (Cf. *People v. Wheeler* (1992) 4 Cal.4th 284, 296 ["the admissibility of any past misconduct for impeachment is limited . . . by the relevance requirement of moral turpitude"].) That Jelks implicated Johnson in some crimes, but declined to do so in others, also clearly bore on Jelks's alleged motivation to falsely incriminate Johnson.

Moreover, the allegedly prohibited cross-examination would not have produced a "significantly different impression" of Jelks's credibility. (See *People v. Frye, supra,* 18 Cal.4th at p. 946.) Although Jelks was not specifically impeached with the fact he was charged with murder, the jury was made aware of the key facts bearing on Jelks's credibility -- to wit, that Jelks was facing a very serious charge which carried a potential life prison sentence (RT 3514, 3627-3628, 3641, 3682-3683, 3715-3716, 3749, 4185), and he hoped to obtain some benefit from his testimony (RT 3514, 3628, 3638, 3684).[131] (Cf. *People v. Cornwell* (2005) 37 Cal.4th 50, 95 ["the *source* of whatever fear [the witness] might have entertained that he might face a life sentence was of the most marginal relevance"]; italics in original.)

The jury also was aware of the following facts adversely affecting Jelks's credibility: Jelks was smoking marijuana at the time of the incident (RT 3524, 3544-3545, 3655), which might have impaired his ability to perceive and recollect; he had numerous prior convictions (RT 3640-3641, 3681-3682); Jelks was a former 89 Family gang member (RT 3518, 3643); he had dealt drugs (RT 3626, 3644); Jelks disliked Johnson (RT 3693-3694, 3718-3719); the police

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131. As Allen argues elsewhere in his Opening Brief:

> [T]he jury should be skeptical of Jelks' claims that he was testifying truthfully. After all, Jelks was facing a life sentence in prison and had a very strong need to please the prosecution. He didn't want to spend the rest of his life in prison, and the only way he could avoid that was to provide testimony that assisted the prosecution in convicting [Allen] and codefendant Johnson.

(AAOB 355.)

threatened Jelks with arrest unless he provided information (RT 3717, 3720-3721, 4181-4182, 4184); and Jelks had made inconsistent statements (see RT 5165, 5181-5183).

Thus, as Allen acknowledges, the jury heard "extensive impeachment evidence" against Jelks. (AAOB 556.) There was no Confrontation Clause violation.

B. Detective McCartin

Allen also claims that the court abused its discretion when it refused to allow cross-examination of Detective McCartin regarding the details of Jelks's interrogation and pending case. (AAOB 293-319.) Respondent disagrees.

At a sidebar conference following the prosecutor's redirect examination of Detective McCartin, Johnson's counsel argued:

> The district attorney asked [Detective McCartin] about Mr. Jelks telling the truth about his own case, and that he implicated himself in his own case, and I think that that permits me, without bringing out the fact that Mr. Johnson is also involved in that case, to elicit from [Detective McCartin] that Mr. Jelks made conflicting statements about that case.
>
> [Jelks] initially denied any involvement in it . . . -- first he said he didn't know anything about it, then he said he had heard about it, but he wasn't around at the time, and then finally he makes another statement in which he very tangentially implicates himself as being present at the time of the crime.
>
> And . . . I should be entitled to bring that out so the jury is aware of the fact that [Jelks] made conflicting statements about it. And it's bearing upon his credibility, because it seems that the district attorney's questions are designed to suggest to the jury that . . . [the police] used this ruse and then [Jelks] said, okay, I was involved in this case.

(RT 4241-4242.)

The court ruled that defense counsel could ask Detective McCartin the following questions:

> You can ask him if . . . at an earlier part of the interview . . . Mr. Jelks denied his involvement in this particular crime that they suspected him of . . . . And that it was only at a later point in time when he was told that they had evidence -- apparently told not truthfully . . . against him about that crime, that he then admitted being at the scene and participating. Because he did admit more than being at the scene. . . . [H]e admitted driving a car. So, you can ask those [two] questions.

(RT 4243.)

The following colloquy ensued:

> [JOHNSON'S COUNSEL]: I could not bring out the fact that there was a third version that was in between there?
>
> THE COURT: Well, I don't recall, was there?
>
> [JOHNSON'S COUNSEL]: Yes.
>
> THE COURT: What was it?
>
> [JOHNSON'S COUNSEL]: You know, I didn't know that this was going to happen, and I have my notebook up on the 13th floor . . . . If I could have a minute to get it.
>
> THE COURT: Just in the interest of time, do it the way the court suggests or don't do it.
>
> You can point out to the jury that initially [Jelks] denied his involvement; it was only after the police indicated that they had evidence about that case that he finally made statements that would tend to incriminate him.
>
> [JOHNSON'S COUNSEL]: . . . [I]f that's the sequence of events, that's what I would do. My recollection is that they told [Jelks] they had

evidence that implicated him initially, then he went through the sequence of events.

THE COURT: Your point is what? You came up here to the bench and told me that you wanted to elicit from [Detective McCartin] the fact that [Jelks] didn't . . . just fess up.

[JOHNSON'S COUNSEL]: He made conflicting statements.

THE COURT: Okay, well then you can ask that, did [Jelks] make conflicting statements. Isn't it true that at first he denied it, then it was only later after a good deal of pounding that he came across. However, we are not going to get into the facts of the thing, or if we do we are going to get into all of them.

(RT 4243-4245.)

On recross-examination of Detective McCartin, Johnson's counsel elicited that Jelks initially had given inconsistent statements when asked about his case. (RT 4247.)

Allen argues on appeal:

. . . [T]he trial court's prior ruling that restricted what the defense could present to the jury regarding the details of [Jelks's] interrogation and . . . pending case prevented [Allen] from effectively cross-examining Detective McCartin regarding portions of his testimony that at times was directly contradicted by the discussions contained in the interrogation of Jelks. Further, some of the prohibited cross-examination would have undermined significantly the credibility of . . . Jelks.

(AAOB 294.)

As previously discussed, the claim that the trial court prevented appellants from effectively impeaching Jelks is without merit. (See discussion at pp. 190-194, *ante*.)

With one exception, addressed below, Allen's complaints about Detective McCartin's testimony allegedly "mislead[ing] the jury" about Jelks's interrogation (AAOB 298-318) have been waived. Allen does not cite any objection to, or any thwarted attempt to cross-examine Detective McCartin regarding, the alleged inaccuracies in his testimony. Indeed, Allen acknowledges that the defense was able to "confront[] [Detective] McCartin with portions of the transcript of the interrogation," and "refresh[] McCartin's memory of the interrogation details." (AAOB 303.) The various examples of Detective McCartin's testimony allegedly misleading the jury thus should not be considered.[132/]

Moreover, contrary to Allen's assertions, nothing in the trial court's ruling regarding Jelks prevented the defense from eliciting that "the first time Jelks said anything to the detectives about the Loggins/Beroit homicides was well into the interrogation" (AAOB 301 [italics omitted]); "Jelks was 'scared and reluctant' to . . . talk to the detectives because he was worried they wanted to talk to him about his involvement in" another serious crime (*ibid.* [italics omitted]); "Jelks was not forthcoming at the beginning of the interview because the detectives were asking him about his . . . role in" another serious crime (*ibid.* [italics omitted]); "[Detective] McCartin told Jelks if he wanted to be home for Christmas (i.e., not be arrested and booked on [a serious crime]), Jelks had to tell them what he knew" (AAOB 305); Detective Mathew told Jelks that the detectives had information regarding Jelks's involvement in "additional [serious crimes]" (*ibid.* [italics omitted]); the detectives "'promised Jelks that

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132. Should this Court disagree, respondent respectfully requests an opportunity to file a supplemental brief addressing the claimed inaccuracies in Detective McCartin's testimony.

they would let him go home that day if he told them the truth'" (AAOB 308)[133]; the detectives "impliedly . . . told Jelks . . . that they wanted Jelks to say certain things" (AAOB 311); and "the detectives' 'ruse' during the interrogation actually caused Jelks to lie . . . several times" (AAOB 316).

When Johnson's counsel sought to elicit that Jelks had made conflicting statements about his case, the court allowed counsel to do so. (RT 4241-4247.) The court merely declined to delay the trial while Johnson's counsel left the courtroom to ascertain the details of one of the versions that Jelks had given. (RT 4243-4244.) This was not an abuse of discretion under Evidence Code section 352, much less a Sixth Amendment violation, as the particular details of Jelks's conflicting statements regarding the Mosley murder were insignificant.

C. Detective Sanchez

Allen further argues that the court's ruling regarding Jelks prevented him from cross-examining Detective Sanchez on "her conduct and state of mind as she escorted . . . Jelks to and from court during the trial." (AAOB 319-333.) Such argument is without merit.

On cross-examination of Jelks, defense counsel elicited that Jelks was handcuffed in court. The court noted that it had ordered that Jelks be

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133. On cross-examination, defense counsel elicited that Detective McCartin had told Jelks:

> You give me all the truth that you know on this stuff and I will know if you are lying. You will go home today. [¶] I'm going to show all this to the District Attorney and I'm going to tell them how you cooperated. [¶] I can't promise you that they won't file on you later on. . . . [¶] I can promise that you can go home today. [¶] I'll let you go if you give me truthful information and I will work with the D.A. and whoever else and keep you out of jail.

(RT 4184-4185.) Thus, such evidence not only was not prohibited, but was introduced.

handcuffed when in the courtroom. (RT 3683.) However, the previous afternoon, Jelks walked on the street with Detective Sanchez without handcuffs, smoking a cigarette. (RT 3683-3684.)

Later, Detective Sanchez testified on direct examination:

Q [BY THE PROSECUTOR][.] As an investigator in this case did you transport Mr. Jelks to court?

A[.] Yes.

Q[.] Is Mr. Jelks in custody?

A[.] Yes.

Q[.] During the course of transporting Mr. Jelks, was Mr. Jelks always handcuffed?

A[.] Except for when I let him smoke.

Q[.] Under what circumstances would you uncuff Mr. Jelks?

A[.] I let him smoke before he got into my car.

Q[.] Did you allow Mr. Jelks to walk along the street without having handcuffs on in order to smoke?

A[.] Yes.

Q[.] . . . [W]hy did you do that?

A[.] We were walking to my car and . . . I wanted him to smoke before he got into my car, before I handcuffed him and took him back into custody.

Q[.] Were you concerned about his being a flight risk?

A[.] No.

Q[.] Why not?

A[.] He hasn't displayed any behavior where I had any concern about that. He has been in custody for a while and nothing has happened.

Q[.] Did you do it to show Mr. Jelks some sort of favoritism?

A[.] I just wanted him to smoke, but not in my car.

(RT 3988-3989.)

On cross-examination, defense counsel established that Detective Sanchez did not need to uncuff Jelks in order for him to smoke a cigarette. (RT 3989.)

Defense counsel did not seek to cross-examine Detective Sanchez in the manner Allen suggests on appeal. (See AAOB 322-327.) Allen's claim has thus been waived. Allen cannot, legally or logically, complain that he was prevented from doing something that he never sought to do.

The claim also fails on its merits. Even without eliciting the nature of Jelks's pending case, defense counsel, if they desired, could have cross-examined Detective Sanchez regarding her lack of concern that Jelks posed a flight risk or danger to public safety (see AAOB 320, 322-326), with the facts that Jelks was charged with a serious offense, he faced a potential life sentence, and he was required to be handcuffed while in court. The jury, however, already knew these facts. Further, the key point, which was amply conveyed, was that Jelks was still receiving favorable treatment by law enforcement as a result of his testimony. Such treatment arguably fostered Jelks's hope for "something good" to happen regarding his case (RT 3628), thus fueling his alleged motive to continue to please the prosecution.

D. Adams

Johnson contends that the defense was erroneously prevented from eliciting the following evidence regarding Donnie Adams: (1) before Adams pled guilty to the one conspiracy count, he had been facing a 14-count federal indictment; (2) Adams was a drug dealer at the time of the carwash shooting; and (3) Johnson had accused Adams of being involved in a murder. (JAOB 183-184, 196-199.) Respondent disagrees.

1. The Additional Counts

The prosecutor informed the court and defense counsel that Adams had a prior conviction for possession of narcotics, and that he had pled guilty in a federal case involving a conspiracy to distribute narcotics, for which he was awaiting sentencing. The court indicated that Adams probably could not be impeached with his conviction for simple possession, for such was not a moral-turpitude crime, but Adams could be impeached with the latter case. (RT 4347-4348.) The following discussion ensued between the court and Johnson's counsel:

> [JOHNSON'S COUNSEL]: . . . I would agree that for impeachment purposes [Adams' conviction for possession] wouldn't be [appropriate], in the sense of bearing upon his credibility.
>
> However, . . . one of the offenses that Mr. Adams was charged with is . . . a violation of 21 United States Code section 848(a), which . . . is referred to as . . . intentionally engaging in a continuing criminal enterprise. And the penalty for that offense is not less than 20 years and a maximum of life.
>
> One of the other charges against him, count 1, is a conspiracy to distribute . . . cocaine and cocaine base. The penalty for that is a mandatory minimum of 10 years, with a life maximum. And if someone has suffered a prior felony drug conviction the mandatory minimum becomes 20 years. So, it would have a bearing in that sense.
>
> THE COURT: Isn't the other count already a minimum of 20 years . . . ?
>
> [JOHNSON'S COUNSEL]: That's correct . . . .
>
> [THE COURT]: Well, I think what you'll be entitled to do . . . is to impeach [Adams] with the fact that he's been convicted . . . on a narcotic conspiracy case, and is awaiting sentencing, and that his

potential goes from 20 years to whatever the top end is. We're not going to talk about his [Health and Safety Code section] 11350, it's just not particularly germane. [¶] You point out correctly that it's not a matter that goes to moral turpitude.

Second, in view of the fact that he's already looking at a minimum of 20 years on the other count, the fact of having an 11350 prior that might add something to one of the other counts I find is not particularly relevant. . . .

[JOHNSON'S COUNSEL]: . . . [I]n my view it would be relevant. . . . Mr. Adams was pending numerous charges in the United States District Court in Louisiana. There were 14 counts filed against him. And he was subject to being sentenced on any or all of them if he went to trial and was convicted. And it would seem to me that having made a statement as part of some agreement with the government to . . . lessen his punishment, that the full scope of the punishment that he was facing would be relevant. . . .

THE COURT: The ruling will stand. I think you've got ample ground to impeach [Adams] with right now. In fact, the fact he's awaiting sentence on a federal case with a huge top end is sufficient.

(RT 4348-4351.)

Appellants' jury heard evidence that Adams, an 89 Family gang member, was currently in federal custody. He had been arrested in January 1996, in Inglewood, California, and transported to the state of Louisiana to face federal charges. (RT 4407-4408, 4412, 4420-4421.) A grand jury indicted Adams.[134/] (RT 4421.) Adams pled guilty to engaging in a continuing criminal enterprise, involving the distribution of cocaine, and was awaiting sentencing. (RT 4407,

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134. Johnson's counsel asked Adams if his indictment contained 14 counts, and the prosecutor's relevance objection was sustained. (RT 4421.)

4421-4422.) He faced a sentence of 20 years to life in the United States penitentiary. (RT 4422.)

After Adams had pled guilty, FBI agents contacted him about this case. (RT 4425, 4432-4433, 4437.) Adams hoped that, by testifying, he could somehow reduce his sentence. (RT 4422-4423, 4425.) However, nobody promised him anything in exchange for his testimony. (RT 4417-4418, 4437-4438.)

The trial court's refusal to allow impeachment with the other 13 counts of Adams' indictment was not an abuse of discretion. Since Adams faced a life sentence, with a 20-year minimum, on the count to which he had pled guilty, the additional counts, at best, were of marginal relevance, and would not have produced a significantly different impression of Adams' credibility. (See *People v. Frye, supra,* 18 Cal.4th at p. 946.) Indeed, given Adams' undisputed testimony that he had not been contacted about appellants' case until after his guilty plea, there is no basis to conclude that the other counts played any role in Adams' decision to provide information.

2. Adams Being A Drug Dealer At Time Of Shooting

Adams testified that, after learning of the shooting, he drove to the area of 88th and Central to see what had happened. (RT 4413, 4425-4426, 4435-4436.) At sidebar, Johnson's counsel advised the court that he wanted to ask Adams if he had been dealing drugs then, on the theory that "somebody who is a drug dealer is not going to take himself up to a scene" where there are a number of police officers present. (RT 4426-4427.) The court replied, "I tell you what . . ., I'll let you ask [Adams] if you ask him if your client is a drug dealer too. [¶] No, no." (RT 4426.)

The court's denial of Johnson's request was a proper exercise of discretion. Whether Adams was a drug dealer at the time of the shooting simply had no tendency in reason to disprove that he had driven to the scene to see

what had happened. (See Evid. Code, § 210; *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167 [trial court has broad discretion in determining relevance of evidence].)

3. Johnson Having Accused Adams Of Murder

Johnson's counsel moved to exclude Detective Tapia from the courtroom during Adams' testimony, on the ground that, at some point substantially prior to Adams' interview with the FBI, Detective Tapia told Adams that Johnson had accused him of being involved in a murder. (RT 4402-4404.) Asked by the court if he wanted to elicit such evidence, Johnson's counsel responded:

> I think I do. I may change my mind when [Adams] gets up there, but I think I do, in the sense that . . . it . . . provided a motive for him to say, . . . Johnson said that about me, let me tell you about him [the same] type [of] thing.

(RT 4403.)

The court stated:

> . . . I could see that it might have some relevance. But then again, that leads to other things . . . about the relationship between the [two] that we have some hint about in here.

(RT 4404.) Johnson's counsel disagreed that the proposed evidence "opens the door to any of that other stuff." (*Ibid.*)

The court replied:

> Sure it does. You are suggesting that's what his motive is. Maybe his motive is he knows [Johnson] is good for about 19 different murders . . . . If you are going to suggest that [Adams] has an improper motive to fabricate, it seems to me tit for tat is okay. Why are you [Adams] saying all this stuff . . . ? Is this just to get back at [Johnson] because of

this, or is it because they killed Balding and Stupid and beat on Dumpy, and shot your mother, and all this other stuff that's in here. . . .

(RT 4404.)

The following colloquy occurred:

[JOHNSON'S COUNSEL]: I think that that type of motivation does bear on the witness' willingness to say things . . . .

THE COURT: All right. We're here to deal with this one thing.

[JOHNSON'S COUNSEL]: Okay.

THE COURT: You are here to request Tapia's exclusion. That request is denied. . . . [¶] Proceed at your own peril.

[THE PROSECUTOR]: Are we going to need to 402 the issue of where we're going for impeachment, then?

THE COURT: I don't know. . . . [Y]ou want to think about it a little bit more? [¶] If you want to ask that question, why don't you ask to approach.

(RT 4405.)

Johnson's claim that the court erroneously precluded the above line of questioning has been waived. Johnson's counsel never actually attempted to offer evidence of Johnson's accusation against Adams. Counsel's intent to elicit such evidence was equivocal, and discussed in the context of a motion to exclude a potential witness from the courtroom. Moreover, the court invited Johnson's counsel to approach the bench if he later wanted to question Adams on this subject, but counsel apparently never did so.[135] (See *People v. Bolin* (1998) 18 Cal.4th 297, 312-313 [claim on appeal procedurally barred where no ultimate disposition of motion was made, and defendant was accorded the right

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135. Such an effort would not necessarily have been futile. As the court stated five pages of transcript earlier, in connection with another issue pertaining to Adams, "things are always subject to change." (RT 4400.)

to renew motion, but did not do so]; *People v. Morris* (1991) 53 Cal.3d 152, 195 [objection to admission of evidence forfeited on appeal by failure to press for a ruling].)

In any event, the jury was given an ample basis to question Adams' veracity. Adams was an 89 Family gang member. He had pled guilty to a federal crime involving the distribution of cocaine, which carried a 20-year-to-life sentence. When Adams provided information to law enforcement about appellants' case, and subsequently testified at their trial, he was awaiting sentencing on his own case, and admittedly hoped that his testimony might somehow reduce his sentence.

In closing argument, Johnson's counsel argued regarding Adams' credibility:

> . . . [W]hat's Mr. Adams' situation? Well, he's got a federal case. He's pled guilty to running a continuing criminal enterprise. And he's looking at a sentence to the United States penitentiary of life at the top and the minimum . . . is 20 years. And he's visited by law enforcement and he decides that he might be able to help himself if he's got some information about this case . . . .
>
> Now, you don't get many details from Mr. Adams. But even the few you get, he can't keep straight. . . .
>
> Donnie Adams is the classic . . . example of why there is an instruction . . . given to jurors such as you that evidence of an oral admission . . . ought to be viewed with caution. . . . Because it is the easiest thing to do to make it up. . . . And you ought to view it with double caution when it comes from a guy like Adams who offers it up when he is looking at 20 to life in the federal penitentiary. And he told you he is hoping to get some benefit from it. And you ought to view it

with triple caution when he provides the scantest of details and can't keep them straight.

James Galipeau was on the money about a guy like Adams, a guy in custody who provides information and hopes for a deal. Has low credibility and a strong motive to lie about somebody else to aid his own situation. Guy who pled guilty to running a multi-state continuing criminal enterprise. Is he willing to lie? You bet. Got a motive to lie? Absolutely. . . .

(RT 5184-5185.)

Accordingly, Adams' credibility was amply impeached. Additional evidence that Johnson had accused Adams of being involved in a murder would not have produced a significantly different impression of his veracity. (See *People v. Frye, supra,* 18 Cal.4th at p. 946.)

E. James

Finally, Allen contends that the court abused its discretion when it refused to allow him to cross-examine Marcellus James regarding James's February 1992 police interview. (AAOB 356-378.) Respondent disagrees.

1. Relevant Proceedings Below

James was in jail when he talked to the police about this case in 1994. (RT 4044, 4049.) On cross-examination, Allen's counsel asked James why he was in jail, and the prosecutor objected on the ground of relevance. (RT 4049.) At sidebar, the following discussion occurred:

[ALLEN'S COUNSEL]: I want to get it out of [James], because I think that's how they squeezed statements out of people. . . .

THE COURT: Why was he in custody, what kind of case?

[ALLEN'S COUNSEL]: Wife beating. And usually they say, "We've got this on you," and then they start squeezing.

THE COURT: What happened . . . to his case, do you know? . . .

[THE PROSECUTOR]: There was a conviction for A.D.W., no firearm.

[ALLEN'S COUNSEL]: . . . What I'm getting to, this is a common way that the conversation starts. I think I'm entitled to know the background and what led to his talking.

THE COURT: To some degree, yeah. . . .

[JOHNSON'S COUNSEL]: Your Honor, there's one other point too . . . . The [probation] report . . . talks about other crimes. . . . [¶] It shows an arrest of 2-27-92. . . . [¶] That's the first day [James] talked to the police. . . . [¶] Because there's a transcript of an interview at a later date that makes reference to a previous police interview on this date. . . .

[THE PROSECUTOR]: The subject matter of that interview, though, was the Mosley murder, the drive-by, which is why we didn't go into it. And I have admonished [James] that he can't talk about it, but he was a witness on that case.

THE COURT: I think we ought to stay away from that for that reason. . . .

[ALLEN'S COUNSEL]: I wasn't going to go into that.

THE COURT: . . . [James] said he never talked to anybody up until that period of time [i.e., 1994], although he apparently had very damaging information. It is appropriate . . . for counsel to know the nature of the matter upon which he was in custody at the time. . . .

I'll let you do this: [¶] You can ask [James] if . . . he was in custody at that time on an allegation of . . . domestic abuse.

[ALLEN'S COUNSEL]: Are you talking about 2-27?

THE COURT: No, no. . . . [¶] We are not going to talk about the first --

[ALLEN'S COUNSEL]: They wanted information on this case then.

THE COURT: If you want to get into a situation wherein we're talking about another drive-by shooting, that's what we're getting at.

[ALLEN'S COUNSEL]: I'm going to say "this case here you gave information," that's what I'm going to say.

THE COURT: What I'm going to let you do is elicit from [James] that in 1994 . . . [¶] -- the interview wherein he tells the police that [Allen] confessed to this homicide, that at that point in time [James] . . . was in custody on an allegation that he had abused the female that he lives with, or who is the mother of the kids. . . .

[ALLEN'S COUNSEL]: Okay.

(RT 4049-4053.)

Allen's counsel then resumed his cross-examination of James, as follows:

Q. So, in 1994, . . . you were in custody when you gave the police the statement on this case here; is that correct?

A. Prior to this I had gave them statements before I went to jail.

Q. You had given statements prior to the date of the interview on this case?

THE COURT: I think what [counsel] wants to know, just so we're clear, sir, he's asking you this: [¶] When you told the police that Mr. Allen had made certain statements to you, . . . when you gave the police that information were you in custody at that point? That's all he's asking. . . .

Q. . . . [T]he date of this interview is in 1994 . . .

A. September 21st?

Q. Yes.

A. Yeah, I was in custody.

Q. And what were you in custody for?

A. Probation violation.[136]

Q. And did that have something to do with some abuse involving --

A. Assault with a deadly weapon.

Q. Right. It had something to do with a girlfriend or a --

A. Yes, it did.

Q. Okay. So. You . . . had contact with the police before that date under other circumstances . . .?

A. Yes.

Q. And let's go back a couple of years, or a year, whenever you had contact with the police. You never told them?

[THE PROSECUTOR]: I'm going to object, Your Honor --

THE COURT: No, overruled. You can ask the question.

Q. When you had contact with the police on other occasions before 1994 you never told them about this case, did you?

A. No. . . .

Q. . . . And you had had an opportunity to tell them about this case if you wanted to . . . ?

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136. Without citation to the record, Allen asserts that, in reality:

> Detective McCartin's initial interview with James was on July 11, 1994 when James was in custody on a probation violation hold. James told McCartin about [Allen's] alleged admission at that time. On September 21, 1994 McCartin wanted to re-interview James and show him some photographs . . . . However, James['s] probation revocation had been resolved by that date . . . .

(AAOB 368, fn. 212; see also AAOB 367, fn. 211.) Such factual assertions, which apparently are outside the scope of the record, are not properly made on direct appeal. (See *People v. Rinegold* (1970) 13 Cal.App.3d 711, 717 ["it is well settled in California that on direct appeal from a judgment, a reviewing court will not consider matters outside the record"].)

A. Yes.

(RT 4054-4055.)

2. There Was No Abuse Of Discretion

Allen offers three arguments as to why the probative value of James's February 1992 police interview was substantial. Such arguments are without merit.

First, Allen asserts that if his counsel

> had been allowed to prove (a) that the gang investigators asked James about the Loggins/Beroit murders during the February 27, 1992 discussion, and (b) that James said nothing about [Allen's] admission . . ., the obvious and reasonable inference the jury could have drawn was that James and [Allen] never had that conversation . . . .

(AAOB 363.)

However, Allen's counsel made the same point when he elicited that James had had contact with the police on other occasions prior to 1994, in which he had an opportunity to tell the police about this case, but he never did so. (RT 4055; see also AAOB 359 [James "admitted he had contacts with the police during that interim time period, he could have told the police about [Allen's] admission, but he chose not to"].)

Further, the record does not show that James even had his conversation with Allen before James's February 1992 interview. Rather, it appears that their conversation may have taken place later, in May 1992. (See RT 4072-4073, 4075-4076, 4078-4079.) Allen's claim lacks merit for this reason as well. (See *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 ["if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed"]; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1427 [defendant has burden of providing record adequate to support arguments on appeal].)

Second, Allen argues that if his counsel

> had been allowed to prove (a) that the gang investigators asked James about the Loggins/Beroit murders during the February 27, 1992 discussion, (b) that James provided them information regarding the Loggins/Beroit murders and (c) that James received a benefit on his then pending case, the obvious and reasonable inference the jury could have drawn was that when James told the police of [Allen's] alleged admission in 1994, he was hoping to receive a similar benefit from the police . . . .

(AAOB 363.)

This argument also fails for lack of support in the record. Again, it does not appear that James's conversation with Allen occurred by February 1992. Allen also cites nothing in the record indicating that James provided information about this case in February 1992. To the contrary, James testified that he had not spoken to anybody about this case until 1994. (RT 4044, 4048-4049, 4079.) Nor does Allen point to anything in the record suggesting that James received a benefit in his 1992 case as a result of his having provided information.

Moreover, even assuming, arguendo, Allen could have established that James received a benefit in his 1992 case in exchange for providing information, such evidence would not have produced a significantly different impression of James's credibility. (See *People v. Frye, supra,* 18 Cal.4th at p. 946.) James testified that when he spoke to the police in 1994, he was in custody for a probation violation involving an assault with a deadly weapon. (RT 4054-4055.) Thus, the jury was aware that James had a pending criminal case and, in turn, a motive to provide information in order to obtain favorable treatment.

Third, Allen argues:

> Even if James was not asked, nor did he say anything, about the Loggins/Beroit murders during the February 27, 1992 police interview, inquiry on cross-examination was relevant . . . because . . . [¶] [t]he prosecution presented James to the jury as a good citizen who, until September, 1994, was too frightened to tell the police of [Allen's] admission. . . .
>
> To rebut this evidence and to dramatically impeach James, [Allen] sought to prove that on February 27, 1992 (when James was also in-custody), James provided information to the police regarding [the Mosley] murder . . . in spite of the fear of retaliation that he then would also have been experiencing.
>
> The reasonable and relevant inferences the jury could have drawn from this cross-examination were obvious. Only when James was in-custody and facing criminal charges was he willing to talk to the police about crimes committed by 89 Family Bloods gang members. His motive to receive a benefit in exchange for his information was greater than his fear of retaliation . . . . And, if James had no information regarding the crime he was asked about, he would have been willing to "make it up" because of his desire to receive law enforcement assistance.

(AAOB 364-365; italics and underline omitted.)

Along the same lines, Allen further argues:

> [S]ince the trial court's ruling prohibited [Allen] from establishing that James had previously chosen, while in-custody, to "snitch" on members of the 89 Family gang in spite of his fear of retaliation, James (and the prosecution) had a "ready-made" reason for why he never spoke to the police about [Allen's] admission until 1994.

(AAOB 373-374.)

Contrary to Allen's assertion, James was not presented to the jury as a "good citizen." (AAOB 364.) The jury was aware that James, at a minimum, associated with the 89 Family.[137] (RT 4041, 4072, 4321-4322.) He also had a criminal history, having been in custody for a probation violation involving an assault with a deadly weapon. (RT 4054-4055.) And James initially lied to the police about his source of information that Allen had committed the shooting, claiming he "didn't actually hear it from [Allen]." (RT 4069-4072, 4080-4081.)

Nor does the record reflect that, in order to "rebut . . . evidence [of James's fear] and to dramatically impeach James," Allen's counsel "sought to prove that on February 27, 1992 . . ., James provided information to the police regarding [the Mosley] murder . . . in spite of the fear of retaliation that he then would also have been experiencing." (AAOB 364; emphasis omitted.) To the contrary, Allen's counsel stated in reference to the Mosley murder, "I wasn't going to go into that." (RT 4052.) The statement by Allen's counsel, "I'm going to say 'this case here you gave information'" (RT 4053), was vague, and apparently referred to the present case. Allen should not be allowed to raise the above theory of admissibility for the first time on appeal. (See Evid. Code, § 354, subd. (a); *People v. Hart* (1999) 20 Cal.4th 546, 606 ["To the extent that defendant's assertion of evidentiary error rests upon a theory of admissibility not presented to the trial court, we conclude that defendant has waived this claim"]; *People v. Schmies* (1996) 44 Cal.App.4th 38, 53 [referring to rule requiring specific offer of proof in order to preserve evidentiary ruling for appeal].)

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137. James testified that he used to associate with the 89 Family, but was not a member. (RT 4041, 4072.) According to Detective Barling, James claimed membership in the gang. (RT 4321-4322.)

In any event, the court did not preclude the defense from establishing that James had provided information against members of the 89 Family on another case (without specific reference to the Mosley murder) while in custody in 1992. As indicated above, Allen's counsel elicited that James had had contact with the police on other occasions before 1994, in which he had an opportunity to tell the police about this case, but never did so. (RT 4055.) Had he so desired, Allen's counsel also could have inquired whether, in any of those prior police contacts, James provided information against the gang regarding another case.

Moreover, the jury was aware of the key facts which negatively impacted James's credibility -- to wit, that James was a former 89 Family associate, he had a criminal history, James only came forward with information about this case when faced with his own criminal charge, and when he did so, he made inconsistent statements.[138] Allen acknowledges that James was "significantly impeached." (AAOB 574; see also AAOB 314 [James was "impeached significantly"].)

Appellants' claims that the trial court unduly restricted their ability to cross-examine prosecution witnesses must therefore fail.

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138. Although, as Allen points out, Detective McCartin testified that James was not in custody when the detective spoke to him at South Bureau Homicide in September 1994 (RT 4157-4159; AAOB 367-368), in James's mind, he was in custody (RT 4054). Also, no evidence was presented that James's criminal case allegedly had been resolved by September 1994. (See AAOB 368, fn. 212.) Thus, insofar as appellants' jury was concerned, James had a criminal charge looming above his head at the time he provided information about this case.

VII.

THE ADMISSION OF JOHNSON'S REDACTED STATEMENT TO DONNIE ADAMS DID NOT VIOLATE ALLEN'S RIGHT OF CONFRONTATION

Allen contends that the admission of Johnson's redacted statement to Donnie Adams was "'powerfully incriminating on the issue of [Allen's] guilt,'" and thus violated Allen's right of confrontation. (AAOB 557-586.) Respondent disagrees.

A. Relevant Proceedings Below

Prior to Adams' testimony, Allen's counsel moved to exclude the following portion of a Federal Bureau of Investigation report, in which Adams refers to Allen:

> Adams saw "Evil" and asked him what had happened at the car wash. "Evil" told Adams that "Fat Rat" (Michael Allen . . .) had not really done much for the gang, so he ("Evil") sent "Fat Rat" on a mission so "he ('Fat Rat') could say he was down for the 'hood." "Evil" told Adams that he had given "Fat Rat" a gun and a ski mask for his mission. "Evil" said that the victims were 89 East Coast Crips, remarking, "That's two more Crabs gone."

(Supp. IV CT 1176 [capitals omitted]; RT 4222-4223, 4229, 4373-4374.)

The prosecutor agreed that Johnson's implication of Allen raised a potential *Aranda/Bruton*[139] problem. (RT 4222, 4224.) The prosecutor indicated that she had asked Adams not to mention Allen (RT 4222, 4224), and that she intended to elicit from Adams

> . . . that Mr. Johnson told Mr. Adams that he knew about the shooting; that he sent someone on a mission to get . . . the [two] Crips;

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139. *People v. Aranda, supra,* 63 Cal.2d 518; *Bruton v. United States, supra,* 391 U.S. 123.

that he provided that person a gun and a ski mask and then said, [¶] ["]That's [two] more Crips gone.["]

(RT 4223.)

The court asked Allen's counsel if he wished to be heard regarding the suggested redaction. (RT 4223.) Allen's counsel replied, "Only to -- not really. We made a motion to sever a long time ago . . . [.]" (RT 4224.) Allen's counsel then suggested that "the part that includes someone with a gun on a mission" also be deleted, even if it does not "nam[e] a name." (RT 4224-4225.)

It appeared to the court that Johnson's

> statement could be sufficiently edited to remove reference to Mr. Allen and still get the import of the statement across, to wit that Mr. [Johnson] purportedly said to Mr. Adams that he, Johnson, had sent somebody out to do this killing.

(RT 4224.)

Allen's counsel later argued, citing *People v. Fletcher* (1996) 13 Cal.4th 451, 466:

> Where any reasonable juror may inevitably perceive that the defendant on trial is a person designated by the pronoun or neutral term in the co-defendant's confession, an assumption that a limiting instruction could be successful in dissuading the jury from entering into the . . . path of inference would be little short of absurd.
>
> We've already had testimony talking about a mission. We've already had testimony from Jelks talking about who sent Mr. Allen out with an Uzi down the street. [¶] Who else would the jury think they'd be talking about if we tried to neutralize the statement . . . and talk about some other person on a mission with a ski mask . . .? They certainly would only think that it meant Allen.

(RT 4385-4386.)

The prosecutor countered:

> That would be true if you had a circumstance where there were only [two] people who were involved in the crime. But in this case, factually, you have Mr. Johnson and a bunch of other people out in front of his house. There are any number of other people who could have been sent on the mission to go commit the crime.
>
> And I think the issue that Fletcher really addresses is were it so self-evident as to who that other person is, because there hasn't been . . . other candidates for that particular role, that it becomes . . . almost farcical to substitute a pronoun . . . .
>
> In this particular case there are any number of people who could have been recruited to be sent on the mission. And the redaction that I proposed does not point the finger at Mr. Allen to the exclusion of others. It simply tells the jury that Mr. Johnson was the person that directed somebody to commit this crime. And if the court were concerned about it, then a limiting instruction would be . . . appropriate to say this comment is only being elicited for the purposes of Mr. Johnson, and not for any other purpose.
>
> . . . I don't think that . . . Mr. Johnson directing somebody necessarily points to Mr. Allen.

(RT 4387-4388.)

In ruling that the prosecutor could elicit Johnson's redacted statement, the court explained:

> [Allen's counsel's] concern is that [the statement] might tell the jury inferentially something about the identity of the shooter. Is it incriminatory to [Allen] in that sense? Not really. . . . One person from . . . the house has already identified [Allen] as having left with the

weapon and then returned with it after presumably having fired the shots. [Allen] was identified by another individual at the scene . . . .

The proposed redaction simply says, whoever the shooter was, Johnson sent him out. Does that necessarily mean the jury will leap to the conclusion that that was Mr. Allen that was sent out?

Add to the mix the fact that there apparently are [three] or [four] other individuals present at the scene of this get together. If one believes there was a get together at Johnson's house, it didn't involve just Mr. Johnson and Mr. Allen, but several other gang members . . . .

The jury may find from the statement it could have been anybody there that Johnson sent. And the statement doesn't say who . . . he sent out. I don't know that they would have to leap to the conclusion that it had to be Mr. Allen that was sent.

I think that the statement can be edited in such a way that it does not necessarily cast any additional evidence on [Allen] that isn't already there in many forms.

(RT 4390-4391.)

Adams subsequently testified, in relevant part, as follows:

Q [BY THE PROSECUTOR]. Did Mr. Johnson tell you what happened?

A. Yeah. He said someone got shot up there off Central. . . .

Q. . . . [D]id Mr. Johnson . . . tell you that the killing involved a mission?

A. Yes.

Q. Did Mr. Johnson tell you that he had . . . provided a gun and a ski mask?

A. Yes.

(RT 4414.)

Q [BY JOHNSON'S COUNSEL][.] Did you tell the officers . . . that what Mr. Johnson had told you was that he had sent the shooter to go get a gun and then go do the shooting?

A[.] Yes.

(RT 4434.)

Q [BY THE PROSECUTOR][.] Did you tell the agents back in February that Evil told you that he had given the shooter a gun . . . for his mission?

A[.] Yes.

(RT 4438-4439.)

Immediately following Adams' testimony, the court instructed the jury:

Ladies and gentlemen, before the witness is excused, one admonition. [¶] The testimony from this gentleman having to do with statements attributed to Mr. Johnson are admissible as to Mr. Johnson only. [¶] They are not as to Mr. Allen. Everybody clear on that? [The jurors answered in the affirmative.]

THE COURT: The testimony of this witness is admissible as to each defendant except for those portions of his testimony that dealt with . . . things that he said Mr. Johnson told him. [¶] All of those things, that is related to Johnson only and cannot be considered at all as to Mr. Allen. [¶] All right? [The jurors answered in the affirmative.]

THE COURT: Everybody clear? [The jurors answered in the affirmative.]

(RT 4440-4441.)

And at the end of the case, the court instructed that

[e]vidence has been admitted against one of the defendants, and not admitted against the other. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you against the

other defendant. [¶] Do not consider this evidence against the other defendant.

(CALJIC No. 2.07; CT 861; RT 5068-5069.)

B. Johnson's Redacted Statement Was Properly Admitted

In *People v. Archer* (2000) 82 Cal.App.4th 1380, the Court of Appeal summarized the relevant case law, as follows:

> In *Bruton v. United States, supra,* 391 U.S. 123, the Supreme Court held that a defendant's Sixth Amendment right of cross-examination is violated by the admission of a nontestifying codefendant's confession implicating the defendant. Although a jury may be instructed to disregard the confession in determining the nondeclarant defendant's guilt or innocence, the court recognized that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. [Citations.] Such a context is presented . . . where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial." (*Id.* at pp. 135-136 . . . .)
>
> In *Richardson v. Marsh* (1987) 481 U.S. 200 . . ., the United States Supreme Court limited *Bruton*, holding that the confrontation clause is not violated by the admission of a codefendant's confession that has been redacted "to eliminate not only the defendant's name, but any reference to his or her existence," even if the confession incriminates defendant when considered in conjunction with other evidence. (481 U.S. at p. 211 . . . .) While *Bruton* required that the admission be "powerfully" incriminating, *Richardson* required that it also be "incriminating on its face . . . ." (481 U.S. at p. 208 . . . .)

The confession in *Richardson* was not incriminating on its face, but only became so when linked with evidence introduced later at trial. . . . [¶] The Supreme Court held that in such a case, where the confession is not incriminating to the nontestifying defendant except when linked with evidence introduced later at trial, the judge's instruction to disregard the evidence in assessing the defendant's guilt "may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." (*Richardson v. Marsh, supra,* 481 U.S. at p. 208 . . . .)

In *People v. Fletcher* (1996) 13 Cal.4th 451 . . ., our Supreme Court considered a question left open by *Richardson* -- whether it is sufficient to avoid violation of the confrontation clause to edit a codefendant's extrajudicial statement by replacing references to the nondeclarant's name with pronouns or similar neutral and nonidentifying devices. The court concluded that "the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (13 Cal.4th at p. 456.)

The United States Supreme Court reached a similar conclusion in *Gray v. Maryland* (1998) 523 U.S. 185 . . . . The confession in *Gray* referred directly to the existence of the nonconfessing defendant. It was redacted by removing the defendant's name and replacing it with either the word "deleted" or a blank space set off by commas. "The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve

inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson's* words, 'facially incriminat[es]' the codefendant. [Citation.] Like the confession in *Bruton* itself, the accusation that the redacted confession makes 'is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.' [Citation]." (523 U.S. at p. 196 . . . .)

In reviewing the statement in this case, we find guidance in *People v. Fletcher, supra,* 13 Cal.4th 451: "[W]hen the prosecution proposes to redact one defendant's confession to substitute pronouns or similar neutral terms for the name of a codefendant, the 'contextual implication' approach provides a practical accommodation of the competing interests at stake -- the non-declarant's constitutionally protected rights under the confrontation clause and the interests of the state in the fair and efficient administration of the criminal justice system. We hold, therefore, that editing a nontestifying codefendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights. Rather, the sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at trial." (*Id.* at p. 468.)

(*People v. Archer, supra,* 82 Cal.App.4th at pp. 1386-1388.)

The trial court here properly allowed Johnson's redacted statement. Reasonable jurors would not "inevitably" have drawn the inference that Allen was the unnamed coparticipant to whom the statement referred. (See *People v. Fletcher, supra*, 13 Cal.4th at pp. 456, 466.) Given the evidence that several 89 Family members or associates in addition to Allen were present at Johnson's

house prior to the shooting -- i.e., Jelks, Michael Woodmore (aka "K Mike"), Earl Ray Johnson (aka "Silent"), Jesse Frierson (aka "Ya Ya"), and a Swan gang member (RT 3520-3521, 3561, 4073-4074, 4081, 4310, 4428) -- Johnson could have given the gun to someone other than Allen. Thus, this is not a case where "[a] confession redacted with neutral pronouns may still prove impossible to 'thrust out of mind' [citation]," because "it contains references to . . . information that readily and unmistakably identifies the person referred to as the nondeclarant defendant." (*People v. Fletcher, supra,* 13 Cal.4th at pp. 465-466.)

For the same reason, Johnson's redacted statement did not "powerfully incriminat[e]" Allen. (See *People v. Fletcher, supra*, 13 Cal.4th at p. 467 ["redaction that replaces the nondeclarant's name with a . . . nonidentifying term will adequately safeguard the nondeclarant's confrontation rights unless . . . the confession is [still] 'powerfully incriminating' on the issue of the nondeclarant's guilt"].)

Allen's argument that the jury unlikely understood the court's limiting instruction (AAOB 566-567) is based on a misquotation of the record. The court did not, as Allen asserts, instruct the jury that "'the statements to Mr. Johnson are admissible as to Mr. Johnson only'" (AAOB 567), but that the "statements *attributed* to Mr. Johnson are admissible as to Mr. Johnson only" (RT 4441; emphasis added).

Allen also complains:

> At no time did the prosecutor during her closing argument tell the jury that Adams' testimony, as it related to co-defendant Johnson's admission, could only be considered as to . . . Johnson. At no time did the prosecutor tell the jury that they could not consider that portion of Adams' testimony as to [Allen].

(AAOB 579-580; emphasis omitted.) The prosecutor did not need to do so. The jury was clearly instructed following Adams' testimony, and reminded in the court's concluding instructions, that evidence of Johnson's statement could not be considered against Allen. (RT 4440-4441, 5068-5069; CT 861.)

Lastly, Allen complains that the prosecutor "simply included Johnson's confession with all of the other testimony as she discussed [in closing argument] why both [Allen] and Johnson were guilty." (AAOB 582.) Any such complaint has been waived due to the failure to object at trial. Allen is also incorrect, as the prosecutor did not include Adams' testimony when listing the different sources from which Allen had been identified. (RT 5117-5118.)

Allen's claim of "*Bruton/Fletcher* error" is therefore without merit.

VIII.

THE PROSECUTOR DID NOT FAIL TO DISCLOSE MATERIAL EVIDENCE

Allen claims that the prosecutor committed misconduct by failing to disclose material evidence to the court -- to wit, Marcellus James's statement that Jelks had been the front passenger, not the driver, of the car used in the Mosley murder. (AAOB 229-248.) The claim is meritless.

During a discussion regarding Jelks's pending case, the court asked the prosecutor, "[W]hat, if any, other evidence exists to tie [Johnson and Jelks] to the crime other than Mr. Jelks' statement?" The prosecutor responded, "There is another witness that identifies the [two] of them as being among the perpetrators." The prosecutor subsequently noted that she had misspoken, in that there were two witnesses who had testified about that case and made identifications. One of those witnesses (James) saw the perpetrators together both before the incident and when they returned. The other witness (Keith Williams) was a person to whom admissions had been made. (RT 3585-3586.)

Allen argues on appeal that

> [the prosecutor] failed to tell the court that James had told detectives that Jelks was not the driver. Rather, Jelks was in the right front seat of the car with a .38 caliber handgun, impliedly indicating that Jelks was one of the shooters. The significance of this information was that if James had told the truth, then Jelks was still lying to the detectives when he finally agreed with their accusations that he was just the driver of the car in the drive-by shooting.
>
> Without this additional information which would have cast doubt on the credibility of Jelks' incriminating admission, the trial court assumed Jelks' statement to the detectives was trustworthy as to the Loggins/Beroit murders because he, in the same statement, had

> incriminated himself in his own murder case. Hence, the trial court reasoned that the necessity by the defense to . . . cross-examine Jelks could be significantly limited because his statement to the detectives had indicia of reliability within it.[140/]
>
> On five (5) subsequent occasions during the court's discussion with counsel, the court made it clear it was deciding the prosecution's motion based on its understanding that Jelks was truthful when he admitted that he was the driver . . . . On each occasion, however, the prosecutor failed to advise the court of the additional information. . . . [I]f the trial court had been told that James contradicted Jelks and had told . . . detectives on two occasions that Jelks was not the driver . . ., the trial judge would have viewed Jelks' credibility with considerable distrust. Hence, the trial court would have allowed the defense to fully . . . cross-examine Jelks . . . .

(AAOB 229-230; italics omitted.)

Allen misstates the record. In 1992, when James first talked to the police about the Mosley murder, James stated that Jelks had been *the driver*. (RT 6210-6211, 6216-6217, 6223.) When he testified before the grand jury in 1995, James again identified Jelks as the driver. (RT 6223.) James gave the same testimony at trial. (RT 6198.) It was only in 1994, when James spoke to the police again several years after the incident, that he said Jelks had been in the front passenger seat. James testified that he had been mistaken when he said that. He explained, "It was a while before. . . . I didn't really remember." (RT 6213-6216, 6223.)

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140. The trial court did not engage in such reasoning. It simply ruled that, if defense counsel sought to impeach Jelks with the nature of his pending case, out of fairness, the prosecutor would be allowed to elicit certain additional evidence which also bore on Jelks's credibility. (See pp. 183-185, *ante*.)

Thus, contrary to Allen's assertion, James's statements did not "cast doubt on the credibility of Jelks' incriminating admission." (AAOB 229.) The prosecutor in no way misled the court. (See *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162 [attorney must refrain from acts which mislead or deceive the court].) Also, if defense counsel considered James's 1994 statement to be relevant to the court's analysis, defense counsel could have offered that information. No claim is made that the prosecutor did not timely produce James's statements in discovery.

In sum, there was no prosecutorial misconduct.

IX.

THERE WAS NO INSTRUCTIONAL ERROR

Johnson contends that the trial court misinstructed the jury regarding consciousness of guilt (JAOB 207-218) and motive (JAOB 218-221). Respondent disagrees.

A. Consciousness-Of-Guilt Instructions

The jury was instructed with CALJIC Nos. 2.04 (Efforts by Defendant to Fabricate Evidence), 2.05 (Efforts Other Than by Defendant to Fabricate Evidence), and 2.06 (Efforts to Suppress Evidence). (CT 858-860.)[141] Johnson

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141. CALJIC No. 2.04 provided:

> If you find that a defendant attempted to or did persuade a witness to testify falsely or attempted to or did fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

(CT 858; brackets omitted.)

CALJIC No. 2.05 stated:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(CT 859.)

And CALJIC No. 2.06 provided:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

claims that these instructions were "misleading, unsupported by the evidence, and constituted improper pinpoint instructions." (JAOB 207-208.) Such claims are without merit.

Johnson first argues that consciousness-of-guilt instructions were unnecessary, as they duplicated CALJIC Nos. 2.00 (Direct and Circumstantial Evidence -- Inferences) and 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State). (JAOB 209-210; CT 856-857.) "[T]he general rule is that a trial court may refuse a proffered instruction if it . . . is duplicative." (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) The above instructions were not duplicative. CALJIC Nos. 2.00 and 2.02 say nothing about how a jury is to consider evidence of a defendant's efforts to fabricate or suppress evidence. Indeed, it has been held that, "[w]hen testimony is properly admitted from which an inference of a consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony." (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1104.)

Next, Johnson argues that the consciousness-of-guilt instructions were "unfairly partisan and argumentative." (JAOB 210-212.) This Court has repeatedly rejected such arguments. (See *People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting contention that CALJIC Nos. 2.03, 2.04 and 2.06 are argumentative and fundamentally unfair]; *People v. Crew* (2003) 31 Cal.4th 822, 848-849 [rejecting claim that CALJIC Nos. 2.05 and 2.52 are "impermissible 'pinpoint' instructions to consider specific pieces of evidence against" defendant]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [finding CALJIC Nos. 2.03, 2.06, and 2.52 were proper and did not violate any of defendant's constitutional rights].)

Johnson's complaint that the consciousness-of-guilt instructions are "almost identical" in structure to defense pinpoint instructions which this Court

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(CT 860; brackets omitted.)

found to be argumentative in *People v. Mincey* (1992) 2 Cal.4th 408 (JAOB 210-211), is without merit. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [finding *Mincey* "inapposite"].) In *People v. Mincey, supra,* the trial court refused to give two instructions suggesting that the jury should acquit the defendant of torture-murder if "the beatings were a misguided, irrational and totally unjustifiable attempt at discipline rather than torture." (2 Cal.4th at p. 437.) Finding that the trial court's refusal was proper, this Court explained:

> In asking the trial court to emphasize to the jury the possibility that the beatings were a "misguided, irrational and totally unjustifiable attempt at discipline rather than torture," defendant sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense. Because of the argumentative nature of the proposed instructions, the trial court properly refused to give them.

(*Ibid.*)

The CALJIC consciousness-of-guilt instructions, by contrast, are not argumentative, but instruct the jury how to evaluate this potentially damaging type of evidence. As explained in *People v. Jackson* (1996) 13 Cal.4th 1164:

> [E]ach of the four instructions made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.] We therefore conclude that these consciousness-of-guilt instructions did not improperly endorse the prosecution's theory . . . .

(*Id.* at p. 1224.)

Johnson next asserts that there was insufficient evidence that he sought to fabricate or suppress evidence in this case. (JAOB 212-214.) "'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 137.) Here, ample evidence existed to support the consciousness-of-guilt instructions.

The jury heard Johnson's intercepted telephone calls, in which Johnson directed Connor's brother to "school" Connor about the statement Connor had given the police, and to give Connor a "crash course." (See Supp. IV CT 393, 398-399, 402-403.) When discussing jury instructions, the court indicated that it intended to give CALJIC No. 2.06. (RT 4911.) The prosecutor requested that CALJIC Nos. 2.04 and 2.05 also be given, explaining:

> [T]he request by the People was with respect to 2[.]04 and 2[.]05, efforts by the defendant to fabricate evidence and efforts by persons other than the defendant to fabricate evidence. My offer on that is in contacting Mr. Connor's brother, Billy, by instructing Billy to school his brother, it . . . hadn't been proven conclusively that that means tell your brother not to testify. Schooling according to the use that it came in could also include altering testimony or fabricating testimony. . . .
>
> Defendant Johnson contacted people, tried to convince them . . . to be schooled, which is subject to interpretation as to whether that means don't show up or whether that means if you show up, say something that's favorable to me. . . .

(RT 4916-4917.)

Johnson argues that there was insufficient evidence to warrant these instructions, because "[t]he prosecution merely surmised that 'schooling' could

be interpreted to mean altering or fabricating evidence, but there was nothing in the record to support this." (JAOB 213.) Respondent disagrees. A reasonable juror certainly could infer in this context that to "school" Connor meant to teach him what to say, or that he was not supposed to "snitch."

As stated by the trial court, Johnson was

> trying to get people to change their testimony, either because he thinks they're lying . . ., or because he thinks they're telling the truth. Whatever, he [doesn't] want them up there saying what they've said.

(RT 4704.) Johnson's counsel acknowledged that "that's an argument that the People are entitled to make to the jury." (RT 4705.)

Johnson further argues on appeal that "there was insufficient evidence that [he] acted out of consciousness of guilt as to the charged crimes as opposed to other crimes to warrant the giving of CALJIC 2.06." (JAOB 214.) To the contrary, it is obvious that Johnson's efforts to intimidate Connor related, at least in part, to the present case.[142/]

Connor implicated Johnson in the carwash shooting, telling the police in a tape-recorded interview that he had seen Allen walk back to Johnson's house to get the gun, and return to Johnson's house after the shooting. (See Supp. IV CT 372, 374, 376, 378-382.) In an intercepted telephone call, Johnson later referred to an "hour and a half statement" that Connor had given. (Supp. IV CT 398.) Johnson was aware that Connor had made statements regarding both the Nece Jones murder and the instant murders, stating: "He the one that got Reco in jail. . . . Then he say he was up at the car wash when Fat

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142. Johnson did not contend at trial that his efforts to "school" Connor did not pertain to the charged offenses. Rather, Johnson's counsel argued that it was never "suggested that [Connor] should make up something." (RT 4917.) And, although Johnson's counsel expressed his belief that Johnson's conduct did not "rise to the level of an effort to suppress evidence," he acknowledged that CALJIC No. 2.06 "adequately covers whatever reasonably could be argued from the telephone conversations." (RT 4918.)

Rat supposedly had done whatever they said he did . . . ." (Supp. IV CT 399.) After Johnson had directed Connor's brother to "school" Connor (Supp. IV CT 393), Connor told a detective that he would testify against Allen, but not against Johnson because Johnson had "too many followers" (RT 3987-3988). When Connor subsequently took the witness stand at trial, he disavowed his prior statements implicating Johnson in the carwash shooting. (RT 3377, 3379-3380.) Thus, Johnson's efforts to intimidate Connor not only related to this case, but were successful.

Johnson's references to the note seized from Johnson in jail, and to Jelks's testimony that he had been told Johnson wanted him killed (JAOB 213-214, 216), are misplaced. That evidence was not offered to show consciousness of guilt, and the jury was instructed on the limited purposes for which such evidence could be considered. (RT 3632-3633, 4805.) The prosecutor's closing argument regarding consciousness of guilt pertained only to Johnson's efforts to intimidate Connor. (RT 5131-5133.)

Lastly, Johnson argues that CALJIC No. 2.06 "embodie[d] an irrational permissive inference," because Johnson "may have [had] 'consciousness of guilt' of an uncharged offense just as easily as he might have [had] 'consciousness of guilt' of a charged offense," and because "threats against witnesses -- even if tied to this case -- may have reflected not consciousness of guilt, but [Johnson's] anger at being falsely accused." (JAOB 214-217.) Respondent disagrees.

"A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180; see also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244 ["Instruction on an entirely permissive inference is invalid as a matter of due

process only if there is no rational way the jury could draw the permitted inference"].)

Here, as discussed above, there was ample evidence for a reasonable juror to find that Johnson's efforts to intimidate Connor concerned Connor's statement about the charged offenses. Johnson's argument that his threats "may have reflected not consciousness of guilt, but [his] anger at being falsely accused" (JAOB 216), is also unpersuasive. Johnson sought to have Connor "schooled" with a "crash course" in order to make him change his statement, and was willing to risk a five-year sentence for witness tampering to do so. (See Supp. IV CT 393, 395-396.) Whether Johnson was merely angry at having been falsely accused, or wanted to prevent Connor from being a "snitch" and telling the truth, was a factual matter for the jury to decide. A rational juror certainly could have reached the latter conclusion.

B. Motive Instruction

The trial court instructed the jury, without objection, with CALJIC No. 2.51:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(CT 873.)

Johnson claims that this instruction erroneously allowed the jury to find guilt based on motive alone, and shifted the burden to the defense to show an absence of motive to establish innocence. (JAOB 218-221.) This Court has previously rejected such claims.

In *People v. Cleveland* (2004) 32 Cal.4th 704, this Court explained that CALJIC No. 2.51

did not shift the burden of proof. It merely told the jury it may consider the presence or absence of motive. [Citations.] The motive instruction did not itself include instructions on the prosecution's burden of proof and the reasonable doubt standard, but it also did not undercut other instructions that correctly informed the jury that the prosecution had the burden of proving guilt beyond a reasonable doubt.[143]

Cleveland also argues that because the motive instruction, unlike the court's instruction on attempts to suppress evidence, did not specifically say that evidence of motive alone is insufficient to prove guilt, it implied that such evidence alone may be sufficient. We find this claim not cognizable. This argument merely goes to the clarity of the instruction. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." [Citation.] If defendants had thought the instruction should be clarified to avoid any implication that motive alone could establish guilt, they should have so requested. . . . We also find no error and no prejudice. The court fully instructed the jury on the reasonable doubt standard. We find no reasonable likelihood the jury would infer from the motive instruction that motive alone could establish guilt. . . .

(*Id.* at p. 750; see also *People v. Snow* (2003) 30 Cal.4th 43, 97-98 [CALJIC No. 2.51, as given, "[told] the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder. When

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143. Appellants' jury was instructed with CALJIC No. 2.90 on the presumption of innocence and the People's burden of proving guilt beyond a reasonable doubt. (CT 884.) The jury also received CALJIC Nos. 8.71, 8.80.1, 17.15, and 17.19, which referred to the prosecution's burden of proof beyond a reasonable doubt. (CT 893, 895, 901-904.)

CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No. 8.10),[144] there is no reasonable likelihood [citation] it would be read as suggesting that proof of motive alone may establish guilt of murder" (original italics)]; *People v. Petznick* (2003) 114 Cal.App.4th 663, 685 ["Since CALJIC No. 2.51 very plainly establishes that motive is not an element of the crimes, it is hard to imagine how a jury might conclude that motive alone would be sufficient to establish guilt. In light of the instructions as a whole it is not reasonably probable the jury would have understood the instruction as defendant urges"].)

Johnson's claims of instructional are therefore without merit.

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144. Appellants' jury received these instructions. (CT 887, 888.)

X.

THE TRIAL COURT PROPERLY DISMISSED JUROR NO. 11

Appellants contend that the trial court abused its discretion in dismissing Juror No. 11 during deliberations. (AAOB 620-650; JAOB 29-73.) Respondent disagrees.

A. Relevant Proceedings Below

Throughout the trial, the jurors were instructed prior to recesses not to form or express any opinions about the case until the matter was submitted to them. (See, e.g., RT 3326, 3453, 3582, 5325.)

Before closing arguments, the court told the jury:

> . . . [P]lease, follow my instructions and also make sure that your fellow jurors do so. While you are deliberating and everything else, it is important that this case and all cases be decided on the law. And if any juror is unable or unwilling to follow the court's instructions at any point in time during the trial, including during deliberations, it is that juror's duty and all jurors' duty to bring that to my attention so that we can deal with the problem. That's the only way we are ever going to get a fair and just resolution of these matters here.

(RT 5060-5061.)

The court then instructed the jurors, inter alia, that they "must base [their] decision on the facts and the law," they "must decide all questions of fact . . . from the evidence received in this trial and not from any other source," and they "must not . . . consider or discuss facts as to which there is no evidence." (CALJIC Nos. 1.00, 1.03; CT 848, 852; RT 5061, 5063-5064.)[145]

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145. The jury was similarly instructed prior to opening statements. (RT 3231, 3235.)

The jury began deliberations on Wednesday, August 20, 1997. (CT 824; RT 5237.) On August 26, 1997 (the fourth day of deliberations), at about 4 p.m., the jury appeared to have left for the day. When the bailiff went to lock the jury room, he found Juror Nos. 4 and 5 still inside the room at about 4:10 p.m. (RT 5283-5284, 5317, 5319; CT 833.) Juror No. 5 was the jury foreperson. (RT 5254, 5286.) The two jurors indicated that they had to speak privately with the judge that afternoon. The bailiff directed them to put their concern in writing,[146] but they stated, "We don't have the courage to write it out. And if we don't deal with it today, we probably won't have the courage to deal with it tomorrow." (RT 5284-5285, 5317, 5319-5320.) After conferring with the judge, the bailiff told Juror Nos. 4 and 5 that the judge could not talk to them, and that they had to leave. (RT 5285-5286.)

The following morning, the court informed counsel about what had occurred. (RT 5283-5286.) The court then asked the foreperson, outside the presence of the other jurors, to explain the cause of his concern. (RT 5311-5312.) The foreperson stated:

> It creates quite a difficulty for me personally and I am very uncomfortable with this whole procedure.[147] . . . [¶] Part of me wants to say that the situation has been resolved, but I know it has not been. [¶] Basically I believe that one of the jurors made up [his] mind prior to the deliberations. . . .
>
> . . . [L]ast Thursday [i.e., the second day of deliberations] in the morning there was a comment made that: [¶] When the prosecution

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146. The court had instructed the jury that, "[d]uring deliberations, any question or request the jury may have should be addressed to the Court on a form that will be provided." (CALJIC No. 17.43 [brackets omitted]; CT 910; RT 5095.)

147. The foreperson indicated that he could not sleep the previous night. (RT 5320.)

rested, she didn't have a case. . . . [¶] So I said immediately: [¶] Does that mean that you had made up your mind? [He] hesitated and he said: [¶] No. No. No. I haven't made up my mind. I'm undecided.

So we went on with the deliberations. [¶] But everything has pointed to the fact that there is not one piece of evidence that is acceptable to the person or the comments. [¶] We just finished a preliminary round and he voted undecided and the other people were still undecided and when they explained where they were -- . . .

I don't even know if I should be coming forward with this, but my understanding in other trials . . . -- [¶] What I was hoping for was some sort of direction from the court.

(RT 5312-5315.)

The foreperson identified the juror in question as Juror No. 11. (RT 5316.) Asked by the court, "When did [Juror No. 11's comment] occur and what was the comment again?" the foreperson responded:

. . . [S]ome people wanted immediately to vote, and I said: [¶] Let's not do that. [¶] And generally things went very well.

But I sensed right away whenever anybody would speak, [Juror No. 11] would make some remark that was contrary to what the person was saying. [¶] So on Thursday I had already felt that there was a tension . . . . [¶] And on Thursday, I forget what precipitated his comment, but he said: [¶] . . . [W]hen the prosecution rested, I knew she didn't have a case. . . . [¶] So I immediately said: [¶] Does that mean that you've already made up your mind? [¶] And there was a little hesitation and then he said: [¶] Oh, no. No. I haven't made up my mind. [¶] I took him at his word.

(RT 5316-5317.)

Over defense objection, the court decided to conduct individual inquiries of the other jurors. (RT 5326, 5331-5332.)[148] The court explained:

> It appears to me that [the foreperson] is a fairly conscientious juror. . . . He has been on juries before. He is a mature individual and an intelligent one, it would appear to the court. . . . [A]s I recall it, he is the person who was in the seminary for some period of time. He has wrestled with what he perceives to be a problem and wondered whether to bring it to the court's attention, and how to do so. I don't think that what is going on is a simple disagreement of opinion. I doubt very much that if that was all it was he would have gone through what he indicates he's gone through, staying up at night, and referring, as I said to counsel, [to] whether he would have the courage to bring this information forward. I mean, it's unusual to frame a simple disagreement . . . among jurors in that fashion.
>
> So, there may be something more that we need to learn. . . .

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148. Allen's counsel argued:

> . . . I don't think the court has heard anything from the foreman that is not typical of [a] jury. The foreman says someone comes in and says, [¶] I didn't like the People's case, it was no good, . . . then in response to a question, [¶] Will you continue to talk? Will you continue to listen? he says, [¶] Yeah, I'll listen to you.
>
> If he continues to listen and continues to reject any positions any one else takes, that's just common jury deliberation . . . . [¶] . . . Where has he said that he's not going to take part in deliberations? He might continue to reject positions, but that's the way jury deliberations go.
>
> So I don't think we ought to do anything. . . .

(RT 5328-5329; see also RT 5357, 5360.)

Johnson's counsel similarly argued that no action should be taken with respect to Juror No. 11, and that "there's an insufficient basis . . . to become any further involved in the jury's deliberations." (RT 5330; see also RT 5357-5360.)

(RT 5332-5333.)

The court subsequently asked the foreperson whether there were "any further expressions . . . that led you to believe that perhaps [Juror No. 11] had his mind made up prior to the commencement of deliberations?" The foreperson replied, "Numerous." (RT 5335.) Asked, "Was it a simple disagreement between jurors, or was it something else going on in your mind?" the foreperson answered:

> No. Every time a comment was made, or any time someone was speaking there usually was some comment made by that juror, which deprecated that particular argument, or particular opinion. . . . [¶] . . . I've been on [five] other cases, and I don't ever recall anything like this happening before.

(RT 5335-5336.)

The foreperson explained:

> . . . [F]rom the very beginning it's the same attitude, . . . there is no evolution. . . . [Y]ou can see as people deliberate there's a process that takes place, and I was hoping for that process, but . . . I never saw it happen. . . .
>
> . . . [U]sually people will come in and they are eager to discuss the case, and . . . they usually will go around and deal with . . . the questions that they have . . . .
>
> . . . [T]hough [Juror No. 11] participates in the discussions, it's the same position from what it was in the beginning. . . . [A]nd then when you add to that what I think are these comments when other people are speaking, it's been a most unpleasant foreperson job because of that.

(RT 5336-5337.)

When asked, "What sort of comments are you referring to?" the foreperson said that there were "so many." The foreperson gave as an example:

"Someone says, [¶] . . . [M]aybe he's telling the truth," then Juror No. 11 would interrupt and say, "[Y]eah, maybe he's lying." (RT 5337.)

The court asked the foreperson whether any jurors had been discussing matters that were not in evidence.[149] (RT 5340.) The foreperson stated, "I think there's been more than I've seen in other cases," but he attributed that to the "difficulty" and "complexity" of this case. He noted that "there have been comments by the jurors that people are not sticking to the facts." (RT 5341.)

Lastly, the foreperson said that he "regret[ted] having to come and do this, but my own internal integrity would not allow me not to speak up on the matter." (RT 5342.)

The court next questioned Juror No. 4. Juror No. 4 stated that she had wanted to speak to the court the previous afternoon because she

> . . . felt that there were . . . some problems with . . . the deliberation process, and I wanted some clarification on whether what was happening was . . . inappropriate. . . .
>
> I felt that [Juror No. 11] had made up [his] mind before we deliberated, and that during deliberations [he was] misconstruing evidence to support the way that [he] had already made up [his] mind.

(RT 5348-5349.)

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149. Earlier, following a jury question regarding the existence of any reward monies associated with this case, such as from a "tax payer type fund" (CT 831; RT 5262-5263, 5270-5272), the court admonished the jury:

> It appears to the court that the jury is speculating about matters that they should not speculate about. [¶] There is no evidence in the record suggesting any reward fund out there and you are talking about things that are not in any way supported by the evidence in the case and you are not to do so. [¶] You must confine your discussions to the evidence and the law, that is, the evidence received in this courtroom and the law that I gave you.
>
> . . .

(RT 5276.)

Juror No. 4 explained that, "[r]ight at the very beginning when we . . . went around the table and we . . . expressed how we were leaning, . . . [Juror No. 11] was very forceful about his opinions." (RT 5350.) The foreperson asked Juror No. 11 "if he had already made up his mind, . . . and the juror denied it." Juror No. 4 felt that Juror No. 11 "wasn't being completely honest about that," "[b]ecause whatever piece of evidence we addressed he would make very strong pronouncements about how he felt about it, and always these pronouncements were to support his . . . opinion, and they often really had no logic to them at all." (RT 5349.)

Juror No. 4 cited as an example when the jury was

> discussing one of the witnesses and there was an issue of timecards. . . . [¶] And the witness had mentioned that he had a person named Jose punch in for him.[150/] . . . [¶] And [Juror No. 11] said, [¶] That's a lie. I know Hispanics, they never cheat on timecards, so this witness was at work, end of discussion.

(RT 5349-5350.)

Juror No. 4 further stated that she "was waiting to see . . . if [Juror No. 11] would listen to others' opinions and modify his own opinions in light of that," but "there was never any indication that he . . . changed or deviated from his original belief." (RT 5352.)

Asked if she recalled a juror making any comment to the effect of, "I knew [the prosecutor] didn't have a case," Juror No. 4 responded that such a comment had been made several times. (RT 5352-5353.) That morning, Juror No. 11 said he had been "waiting for the prosecuting attorney to . . . bring her case forward, and it never happened." (RT 5353.)

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150. Connor testified that the person who would falsely punch in for him was named Jose. (RT 3395.)

The court then inquired individually of the remaining jurors. Juror No. 1 indicated that no juror had failed to meaningfully participate in the deliberations. However, there were some who appeared to enter the deliberations with a fixed position prior to discussing the case. (RT 5362.)

Juror No. 1 explained:

> . . . [W]hen we first got into the jury room the first thing that some member said was, [¶] They didn't prove their case. [¶] And they seemed to have their mind set . . . already. They didn't come in and give it time to deliberate. . . .

(RT 5362.) Juror No. 1 had written down that, "when we entered, . . . one said right away, [¶] They didn't prove their case. And another one said basically the same thing." (RT 5364.)

Juror No. 1 identified Juror No. 12 as having said he had already determined from the evidence before we were dispatched to the jury room that the defendants in his mind were, you know, one way or the other . . . -- but the deliberations just confirmed his feeling toward it.

(RT 5365-5366.)

According to Juror No. 1, Juror No. 11 was "involved in the deliberations . . . for the most part. But he seems to take the attitude, where if he doesn't like what someone is saying he's not there mentally." (RT 5367.)

Juror No. 2 heard more than one juror, including Juror No. 12, make a statement indicating that "they had been convinced of how they would vote . . . [¶] . . . as we heard the last testimony and evidence." (RT 5372-5374.) However, Juror No. 2 did not hear any juror say that he "didn't need to come in here to do anything," or that he was "unchanged about anything they heard in here." (RT 5375-5376.)[151]

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151. Based on the questioning thus far, the court noted:

> I think . . . I'm getting a fairly clear sense of what is going

According to Juror No. 3, no juror appeared to begin deliberations with a fixed opinion about how the case should turn out, and all jurors had taken part in the deliberations. (RT 5383-5384.)

Juror No. 6 "sort of had the feeling" that Juror Nos. 11 and 7 entered the deliberations with their minds already made up. (RT 5388-5390.) Juror No. 6 explained that, "when we went through the door," one of these jurors said in passing that he "didn't feel that anything was proved to them," and the other replied, "I don't think anything has been proved either." (RT 5389-5390.) Following a short discussion, however, "everybody said that they were undecided." (RT 5390.) Juror No. 6 also recalled Juror No. 11 stating with regard to timecards, "I don't think a Hispanic person would do that kind of thing." (RT 5392-5393.)

Juror No. 7 heard Juror Nos. 11 and 3 say, "I had my mind made up before I already came in here." (RT 5398-5400; see also RT 5405, 5408.)

According to Juror No. 8, Juror No. 12

> might have said from all the testimony that he had heard, . . . that he . . . just about had made up his mind when he left the jury box about how he felt about this case.

(RT 5407-5408.)

Juror No. 8 heard Juror No. 11 say

> on. . . . I don't know that I will speak to everybody. I will speak to a couple of more. I want to speak to 11 and 12. . . . What it seems to me at this point is happening is the following: [¶] I'm not convinced at this point in the inquiry that there is any gigantic problem at all. People have made comments as jurors will do. I have not yet heard anybody, at least in a convincing way, convince me there's been misconduct at this point.

(RT 5379.) The court subsequently decided that it would speak briefly to all 12 jurors. (RT 5380, 5382.)

a Hispanic person was the type of person that went to work everyday, cared a lot about their jobs and cared enough about their jobs and not messing around with people's time cards.

(RT 5409.)

Juror No. 9 described Juror No. 11 as being "a bit less open minded" than the other jurors. However, Juror No. 11 "talk[ed] about the case," "[said] that he [was] willing to hear the others," and "seem[ed] willing to listen." (RT 5411-5412.) Juror No. 9 heard Juror No. 11 indicate that, "from his experience with Hispanics, . . . he knows that they wouldn't lie. . . . They wouldn't forge a time card." (RT 5413-5414.)

Juror No. 10 was "sure" that Juror No. 11 entered the deliberations already having decided the case. (RT 5414-5415.) However, Juror No. 11 "recanted . . . in the end." (RT 5415.) Juror No. 10 explained:

The foreman asked [Juror No. 11] if he [had his mind made up] because it sounded like he did and so he said yeah, but then he . . . [¶] . . . said that he was willing to be open minded like all of us.

(RT 5414.)

Juror No. 10 heard Juror No. 11 say that he did not believe anybody would falsify a timecard; Juror No. 10 did not hear the word, "Hispanic." (RT 5418.)

The court had the following discussion with Juror No. 11:

THE COURT: Sir, do you believe that you or any other juror or jurors entered the deliberations already having decided the case?

JUROR NO. 11: No. I didn't.

THE COURT: Do you believe anybody did?

JUROR NO. 11: No. I have no knowledge.

THE COURT: Did you hear any juror or did you, yourself, make any comment that might suggest that a juror had their mind made up including you?

JUROR NO. 11: I was asked by the foreman, but I hadn't made up my mind.

THE COURT: What was said immediately before the foreman asked you that question?

JUROR NO. 11: We were going over the witnesses. . . . [¶] I had made a statement about a witness and then he asked me.

THE COURT: What statement was it that you made?

JUROR NO. 11: I was doubting one of the witnesses . . . earlier on and it was the second time that he asked me had I made up my mind.

THE COURT: Did you make a statement either in jest or in seriousness, . . . to the effect that you had your mind made up already about the case, or that you decided . . . when the People rested that you knew they didn't have a case . . . [?]

JUROR NO. 11: Yes.

THE COURT: Tell me what it was that you said and when it was that you said it?

JUROR NO. 11: I said it today. . . . [¶] I said that when the prosecution rested, that they had not convinced me.

THE COURT: That was the statement that you made today or some earlier time during the deliberations?

JUROR NO. 11: . . . I said that today. But . . . I think I said something about it before.

THE COURT: You think you may have said something along the same lines the day that the foreman asked you if you had already made your mind up?

JUROR NO. 11: No. No. I didn't. . . . [¶] We had listed the early witnesses and we were going over them and then he asked me that. . . . [¶] He seemed to think that I had something against the witnesses. . . .

THE COURT: Was it pretty early on in the deliberations?

JUROR NO. 11: Yes. . . .

THE COURT: Do you remember making a statement or hearing somebody make a statement . . . to the effect that Hispanics wouldn't falsify a time card . . .?

JUROR NO. 11: Yes. I said that. . . . [¶] I said that it has been my knowledge that [Hispanics] don't do things like punch out other people's time cards. . . .

THE COURT: . . . Was there any evidence whether a Hispanic would or would not falsify a time card or is that something based on your experience?

JUROR NO. 11: Job experience. . . .

(RT 5419-5422.)

According to Juror No. 12, it did not appear that any juror entered the deliberations already having made up his mind about the case. (RT 5424.) Juror No. 12 had made a statement that he "was pretty sure when I entered the jury room of what my decision would be, about 85 percent sure." (RT 5425.) He "had some thoughts when [he] first walked in, but [he] stayed open to kicking them around with the jury to find out if there was a possibility that [he] could be wrong." (RT 5424; see also RT 5430.) Juror No. 12 heard one of the jurors say that Hispanics would not falsify a timecard. (RT 5426.)

The prosecutor asked that Juror No. 11 be excused for misconduct, based on his having reached a decision before the case was submitted, and having brought into the jury room extraneous information about Hispanics. (RT 5431-5433.) Defense counsel opposed the removal of Juror No. 11,

arguing that he had continued to participate in the deliberations. (RT 5433-5434, 5439.) As to Juror No. 11's view about Hispanics, defense counsel argued that "when jurors discuss matters, . . . everybody draws back upon their past experiences," and "what Juror No. 11 says about time cards in the total picture of everything is very minor." (RT 5434-5435, 5440.)

The court stated that

> . . . we specifically asked this jury over and over [during voir dire] if any of these folks thought that the race of a person involved in the case . . . should play any part.[152/]
>
> I find it disconcerting that . . . a juror comes to a conclusion about how a person would act when that person is not even before the court. [¶] And that is based solely on the person's name and draws an inference this must be a Hispanic and draws a further inference that a Hispanic behaves in a certain way. [¶] That is discussed where there is no evidence at all on the record. [¶] . . . It certainly would indicate that there may be a problem with that juror's ability to follow and understand the law which is decide the case based on the evidence, reasonable inference to be drawn therefrom, and the law that applies.
>
> I see no evidence about the way Hispanics as a group behave and certainly there could be no evidence because people do not behave in a group fashion; nor is there any support in the law that the court gave them. [¶] After hammering on these folks for [four] days during voir dire and stressing these kinds of issues, one wonders why this person finds it appropriate to decide any issue in this case by deciding certain classes

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152. Juror No. 11 was previously Alternate Juror No. 3. (See RT 3968-3969, 5405, 5408.) During voir dire, the court asked then Prospective Alternate Juror No. 3: "Do you think the race of a victim, defendant, juror or witness is apt to influence your decision?" Prospective Alternate Juror No. 3 responded, "No." (RT 3107-3108.)

of people are apt to or are to be expected to behave or not behave in certain ways.

. . . [I]t's equally inappropriate if the juror were to say: [¶] African Americans as a group do "X". [¶] Caucasians do as a group "Y". . . . [¶] And that is how I have this case figured out. [¶] It causes me concern . . . .

(RT 5435-5436.)

The court excused Juror No. 11 for cause. (RT 5452.) In doing so, the court explained:

. . . [I]t would appear to me that the consensus is, having now questioned 12 jurors, including No. 11, that the juror made it relatively clear to a majority of the jurors here that he had decided the case; that he had his mind made up . . . at a time before the matter had been submitted to the jury.

Not just that he had sort of a tentative feeling about some things, but . . . apparently as early as last Thursday he made a statement to the effect, and I do credit the foreman's memory about this, that: [¶] they didn't have a case when they rested, or words to that effect. [¶] [Juror No. 11] apparently, according to his own statement in open court, has repeated that statement again during deliberations today. [¶] That is what No. 11 himself just indicated. . . .

I would agree that the mere fact that he is groggy is not a ground to excuse him . . . [¶], although that gives the court some additional concern about his ability.[153/]

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153. Jurors indicated that, on one or two occasions, Juror No. 11 had appeared to doze off momentarily. But since then, when Juror No. 11 got sleepy, he would stand up in order to stay awake. (See RT 5367-5368, 5385-5387, 5390-5392, 5408, 5412-5413, 5417-5418, 5422-5423, 5427-5428.)

I have a third concern, which is his absolutely using evidence not before this court, trying to decide an issue of some importance having to do with the presence or absence of an alleged eyewitness . . . . [¶] That is what the time card comes down to . . . . [¶] That is an important issue to be resolved in the case and that is not one that should be resolved . . . based on things outside the record such as this juror's opinions about how Hispanics behave in various situations.

That is not right or lawful and it is a direct and prejudicial violation of the court's order to this jury to decide this case based on its facts and the law. . . .

My finding of fact is that the statement [regarding Hispanics] was made and that [Juror No. 11] is using facts not in the record to decide this case. . . . That is inappropriate.

I also find that [Juror No. 11] made the statements attributed to him, to wit, that his mind was made up prior to the case being submitted. [¶] And I further find that he apparently reiterated that feeling today.

So it is not a problem in that people say a lot of things and they toss things around in deliberations. . . . [¶] . . . [B]ut it is a situation that with all things considered, the opinions of a large number of jurors, including the foreperson who worried about this and gave it a great deal of thought, and I gave his impression a great deal of weight in not being an unintelligent or dishonest fellow, and given the court's own assessment of the credibility of the various jurors, some of whom are quite straight forward, others who downcast their eyes in an obvious fashion when asked certain questions and only gave up certain information, including No. 11[.] I find that he made the statements attributed to him in having made up his mind and that he has done so and that he further attempted

to decide a rather important issue from things outside the record which is . . . inappropriate.

He will be excused for legal cause.

(RT 5448-5452.)

The court then excused Juror No. 11, seated an alternate, and instructed the jurors to begin deliberations anew. (CT 837; RT 5452, 5461-5462, 5466, 5469-5470, 5474.)

B. Applicable Law

In general, a juror commits misconduct by violating his oath, or by failing to follow the instructions and admonitions given by the court. (*In re Hamilton* (1999) 20 Cal.4th 273, 305.)

Section 1122, subdivision (b), provides:

. . . [A]t each adjournment of the court before the submission of the cause to the jury, . . . [the jury shall] be admonished by the court that it is their duty not to . . . form or express any opinion [on any subject connected with the trial] until the cause is finally submitted to them.

(§ 1122, subd. (b).) Appellants' jury was so instructed. (See, e.g., RT 3326, 3453, 3582, 5325.) It is "serious misconduct" for a juror to prejudge the case. (See *In re Hitchings* (1993) 6 Cal.4th 97, 118, 121; *Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361.)

It is also misconduct for a juror to decide a question of fact based on information not received at trial. (See *In re Lucas* (2004) 33 Cal.4th 682, 696 ["A juror may commit misconduct by receiving or proffering to other jurors information about the case that was not received in evidence at trial"]; *In re Hamilton, supra,* 20 Cal.4th at p. 294 ["An impartial jury is one in which . . . every member is capable and willing to decide the case solely on the evidence before it" (internal quotation marks omitted)]; *ibid.* ["When the overt event is a direct violation of the oaths, duties, and admonitions imposed on . . . jurors,

such as when a juror . . . consciously receives outside information, . . . or shares improper information with other jurors, the event is called juror misconduct"]; *In re Malone* (1996) 12 Cal.4th 935, 963 ["Jurors' views of the evidence . . . are necessarily informed by their life experiences . . . . A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct"]; *People v. Gainer* (1977) 19 Cal.3d 835, 848 ["the decisions of both this court and the United States Supreme Court reflect the importance of restricting the foundation for the jury's decision to the evidence and arguments presented at trial"]; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1338 ["Evidence obtained by jurors from sources other than in court is misconduct"]; CALJIC No. 1.03 [jurors "must decide all questions of fact . . . from the evidence received [at] trial and not from any other source"].)

Section 1089 provides, in pertinent part:

> If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate . . . .

(§ 1089.)

To be discharged, "a juror's inability to perform as a juror must appear in the record as a demonstrable reality." (*People v. Samuels* (2005) 36 Cal.4th 96, 132, citing *People v. Cleveland* (2001) 25 Cal.4th 466, 474 [internal quotation marks omitted].) While "[n]either section 1089 nor Code of Civil Procedure section 233 define 'good cause[,]' [i]t is clear . . . that a juror's serious and wilful misconduct is good cause to believe that the juror will not be able to perform his or her duty." (*People v. Daniels, supra,* 52 Cal.3d at p. 864; see also *People v. Diaz* (1984) 152 Cal.App.3d 926, 934 ["A juror's

misconduct is good cause which . . . may permit the court to replace him or her with an alternate"].)

An appellate court reviews a trial court's decision to discharge a juror for abuse of discretion. If there is any substantial evidence supporting the trial court's ruling, it will be upheld. (*People v. Samuels, supra,* 36 Cal.4th at p. 132; *see also People v. Boyette, supra,* 29 Cal.4th at p. 462 ["[U]nder section 1089, a trial court 'has *broad discretion* to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve.'" (italics in original)].)

"When a trial court is put on notice that good cause to discharge a juror may exist, 'it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged . . . .'" (*People v. Farnam, supra,* 28 Cal.4th at p. 141, citing, inter alia, *People v. Burgener* (1986) 41 Cal.3d 505, 520.) "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." (*People v. Cleveland, supra,* 25 Cal.4th at p. 478; internal quotation marks omitted.)

"The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) However,

> . . . a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's

instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.

(*People v. Cleveland, supra,* 25 Cal.4th at p. 485.)

C. There Was No Abuse Of Discretion

Initially, appellants claim that the court abused its discretion in continuing to question the jurors once it became apparent there was no juror misconduct. (JAOB 45-54; AAOB 627-632.) This claim is without merit.

The foreperson reported that, on the second day of deliberations, Juror No. 11 had commented: "[W]hen the prosecution rested, I knew she didn't have a case." (RT 5314-5317.) By making this comment, Juror No. 11 revealed that he had violated the court's repeated instructions not to form any opinions about the case until it was submitted to the jury. (See, e.g., RT 3326, 3453, 3582, 5325.)[154] Prejudging a case constitutes "serious misconduct." (See *In re Hitchings, supra,* 6 Cal.4th at pp. 118, 121; *Clemens v. Regents of University of California, supra,* 20 Cal.App.3d at p. 361.)

Contrary to Johnson's suggestion, this is not a case where a juror merely "'. . . c[a]me to a conclusion about the strength of [the] prosecution's case early in the deliberative process and then refuse[d] to change his . . . mind despite the persuasive powers of the remaining jurors.'" (JAOB 47-48, citing *People v. Bowers* (2001) 87 Cal.App.4th 722, 734.) Here, Juror No. 11 reached a conclusion that the prosecutor "didn't have a case" as soon as the prosecutor rested, before being instructed on the law and hearing the prosecutor's closing argument.

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154. Further reflecting Juror No. 11's prejudgment of the case, the foreperson indicated that Juror No. 11 would interrupt other jurors while they were speaking with deprecating comments about their opinions. (RT 5316-5317, 5335, 5337.)

Accordingly, after questioning the foreperson, the court acted well within its discretion in inquiring of the other jurors regarding Juror No. 11's potential misconduct. (See *People v. Farnam, supra,* 28 Cal.4th at p. 141; *People v. Beeler, supra,* 9 Cal.4th at p. 989.)

The court next questioned Juror No. 4, who, along with the foreperson, had urgently requested to speak to the court the previous afternoon. (RT 5283-5285, 5317-5318, 5348.) During the questioning of Juror No. 4, it was revealed that Juror No. 11 had committed additional misconduct by concluding -- based on his extra-record opinion about Hispanics -- that Connor had lied about being a witness to the shooting because "I know Hispanics, they never cheat on timecards, so this witness was at work, end of discussion." (RT 5350.) Juror No. 11's misconduct in this regard was twofold.

First, Juror No. 11 (then Alternate No. 3)[155] took an oath to render a verdict "according only to the evidence presented . . . and to the instructions of the court." (RT 3156; see Code Civ. Proc., § 232, subd. (b).) When Juror No. 11 was substituted in as a juror, the court asked him, "Sir, . . . you will now be [one] of the 12 trial jurors deciding the case. [¶] You are clear on your duties now?" Juror No. 11 answered, "Yes." (RT 3969.)

Second, at the end of the case, the jurors were instructed that they "must base [their] decision on the facts and the law," they "must decide all questions of fact . . . from the evidence received in this trial and not from any other source," and they "must not . . . consider or discuss facts as to which there is no evidence." (CALJIC Nos. 1.00, 1.03; CT 848, 852; RT 5061, 5063-5064.) The jury was similarly instructed prior to opening statements. (RT 3231, 3235.)

By deciding a key credibility issue in the case based on his extraneous opinion about Hispanics, Juror No. 11 thus committed egregious misconduct, directly violating both his oath as a juror and the court's instructions. (See, e.g.,

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155. See footnote 152, *ante*.

In re Hamilton, supra, 20 Cal.4th at p. 305 [juror commits misconduct by violating oath or failing to follow court's instructions].) Such misconduct was even more troublesome given that the issue of race had been discussed in voir dire, and Juror No. 11 affirmed that a person's race was not apt to influence his decision. (RT 3107-3108.) Thus, Juror No. 11 was specifically aware of the impropriety of basing a decision on race, yet he did so anyway.

After questioning Juror No. 4, the court inquired of the remaining jurors in numerical order. Following its questioning of Juror No. 2, the court stated:

> I'm not convinced at this point in the inquiry that there is any gigantic problem at all. People have made comments as jurors will do. I have not yet heard anybody, at least in a convincing way, convince me there's been misconduct at this point.

(RT 5379.)

Allen argues, "Because the court stated unequivocally that there was no misconduct, . . . the court . . . erred in its[] decision to pursue the investigation." (AAOB 637.) Johnson similarly argues that, "[h]aving found no misconduct, the court should have ceased all inquiry." (JAOB 48.) In *People v. Cleveland, supra,* this Court cautioned that a trial court's "inquiry should cease once the court is satisfied that the juror at issue . . . has not . . . committed misconduct." (25 Cal.4th at p. 485.) Here, the quoted comments by the trial court were merely tentative, and did not reflect the court's "satisfaction" that no misconduct had occurred. Indeed, the court prefaced its comments by stating:

> *I think* . . . I'm getting a *fairly clear* sense of what is going on. . . . *I don't know* that I will speak to everybody. . . . What it *seems to me at this point* is happening is the following . . . .

(RT 5379; italics added.)

In any event, an appellate court reviews a trial court's ruling, not its rationale. (See *Belair v. Riverside County Flood Control Dist.* (1988) 47

Cal.3d 550, 568; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80.) Based on the court's questioning of the foreperson and Juror No. 4, the court had ample grounds to continue its inquiry.

Next, Johnson argues that the court "aggressively questioned the remaining jurors in a manner that was broad in scope and far from neutral." (JAOB 49-53.) Allen likewise characterizes the manner of the court's questioning as "aggressive." (AAOB 632-636.) Preliminarily, such complaints have been waived because there was no objection to the manner of the court's questioning at trial. (See *People v. Anderson* (1990) 52 Cal.3d 453, 468 ["objections to noninstructional statements or comments by the trial court must be raised at trial or are waived on appeal"]; cf. also *People v. Corrigan* (1957) 48 Cal.2d 551, 556 ["It is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred"].)

Appellants' complaints also lack merit. As his first example of allegedly unneutral questioning, Johnson cites the court's statement to Juror No. 1: "What I'm here to inquire about is a potential problem that has come to mind." (JAOB 49; RT 5362.) Respondent fails to see the unneutrality of the court's reference to a *potential* problem, or any of the other statements appellants cite.

Respondent also disagrees that the court's questioning of the remaining jurors was impermissibly "broad in scope." (JAOB 49.) The court's inquiry focused on the potential misconduct revealed during the questioning of the foreperson and Juror No. 4 -- to wit, Juror No. 11's prejudgment of the case and consideration of extra-record information. The additional issue of Juror No. 11 falling asleep during deliberations arose in response to a question regarding his prejudgment of the case. The court asked Juror No. 1, "[I]s there anybody who is actually failing to deliberate in a meaningful way and listen to other jurors give his or her views . . .?" to which Juror No. 1 responded, "[W]ell, I

personally had to speak to [Juror No. 11]. He seemed to be nodding off and going to sleep on us." (RT 5366-5367.)

Appellants' contentions that the court's questioning "made it abundantly clear that the court was displeased with any jurors who believed strongly that the prosecution's case was weak" (JAOB 53; see also AAOB 649), and had a "chilling effect" by "demonstrat[ing] that whatever any of the jurors would say during the course of their deliberations was open to scrutiny" (JAOB 53; see also AAOB 639-641, 649), have also been waived because there was no objection to the manner of the court's questioning. These contentions are also without merit. The court inquired into the substance of the jury's discussions only insofar as was relevant to determining whether any jurors had committed misconduct by prejudging the case, or considering matters outside the record. Nor did the court intimate any preference as to how the case should ultimately be decided.

For example, during the questioning of Juror No. 1, Juror No. 1 indicated that three jurors had had the mindset from the beginning that "all the witnesses are unreliable, all the testimony is unreliable." Juror No. 1 added that it was his impression these jurors were "not really working." (RT 5363.) The court replied:

> Well, again, . . . people are entitled, obviously, to their own opinions on a case. . . . [A]nd I'm not really concerned with which way it's going, or who is going a particular way. All I'm trying to determine . . . is if any juror at the outset, that is right at the get go of deliberations, already had their mind made up to the degree that deliberations were a sham, or were meaningless, or weren't real deliberations . . . .

(RT 5363; see also RT 5349 (court's statement to Juror No. 4: "I don't want to know specifically all the reasoning, and so forth, that's going on in the jury room at all; I'm really not interested in that"); RT 5374 (court's statement to

Juror No. 2: "I don't want you to tell me [whether Juror No. 12 voted guilty or not guilty]. All I'm trying to find out is if there's been some comment by that juror, or any other juror, that leads you to believe that . . . when both sides had rested . . ., that somebody says, [¶] Well, I've got my mind made up; I knew then"); RT 5388 (court's statement to Juror No. 6: "My question is . . . not whether somebody during the course of deliberations came to a certain conclusion . . . . [¶] I want to know if anything was said that led you to believe that . . . or one or more jurors . . . had come into the deliberations with their minds already made up").[156]

Moreover, after Juror No. 11 was excused, the court emphasized to the remaining jurors:

> . . . [Juror] Number 11 was not excused by the court due to the fact he was voting guilty or not guilty. Whichever way he was going is of absolutely no concern to this court.
>
> Do not assume or infer from the fact that [Juror No.] 11 has been excused that the court is expressing an opinion . . . as to how this case should turn out, or if it will turn out. Whether it be a guilty verdict or a not guilty verdict is of absolutely no concern to this court. That's up to the jury.
>
> And do not get the idea that [Juror No.] 11 was excused due to the fact that he was voting a particular way on the case. That's not it at all.
>
> . . .
>
> Really, please, do not form any opinions or impressions about how I feel about this case at all based on the fact that [Juror No.] 11 is no

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156. Allen's assertion that "[J]urors #1 and #2 clearly felt they had been subjected to a vigorous interrogation by a trial judge who was obviously displeased that they had not yet reached a unanimous verdict" (AAOB 636), is without any basis.

longer with us. [¶] Is everybody clear on that? [The jurors answered in the affirmative.] [¶] I think that's very important.

(RT 5465-5468.)

After seating an alternate, the court further instructed the remaining jurors that they "must not consider [the fact that a juror has been replaced by an alternate] for any purpose." (RT 5470.) There is no reason to believe that the jury did not follow the above instructions.

Johnson next argues that there was insufficient evidence Juror No. 11 was not participating in the deliberations. (JAOB 54-64.) Allen similarly asserts that "there was nothing that even approached a 'demonstrable reality' that Juror #11 was refusing to deliberate." (AAOB 632; see also AAOB 641-645.) However, the court did not excuse Juror No. 11 for refusing to deliberate, but for prejudging the case, and deciding an important issue based on information outside the record. (RT 5448-5452.) Johnson's characterizations of Juror No. 11 as having "at most viewed the facts differently from some of the other jurors" (JAOB 55), or "[a]t most . . . offended other jurors [by his manner] and . . . used 'faulty logic'" (JAOB 57-58), completely miss the mark.

Johnson alternatively argues that, even if it were true Juror No. 11 "inappropriately 'had his mind made up . . . at a time before the matter had been submitted to the jury[,]' . . . it is not a ground for dismissal, particularly where the juror continued to participate in the deliberations." (JAOB 63.) Respondent disagrees. As indicated above, prejudging a case is "serious misconduct." (See *In re Hitchings, supra,* 6 Cal.4th at pp. 118, 121; *Clemens v. Regents of University of California, supra,* 20 Cal.App.3d at p. 361.) Further, Juror No. 11 was excused not only for prejudging the case, but also for deciding an important credibility issue based on his extra-record opinion about Hispanics.

Next, Johnson claims that the manner in which the court learned of Juror No. 11's statement about Hispanics improperly intruded into the jury's

deliberative process, and violated Johnson's rights to a fair trial and impartial jury. (JAOB 64-65.) Respondent disagrees.

In *People v. Cleveland, supra,* this Court cautioned that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations," and that "[t]he inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (25 Cal.4th at p. 485.) On the other hand, "[w]hen a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged" (*People v. Farnam, supra,* 28 Cal.4th at p. 141 [internal quotation marks omitted]), and "[g]rounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations" (*People v. Cleveland, supra,* 25 Cal.4th at p. 478 [internal quotation marks omitted]; *see also id.* at p. 484 [Evidence Code section 1150, while rendering evidence of the jurors' mental processes inadmissible, expressly permits . . . the introduction of 'statements made . . . within . . . the jury room.'"])

Juror No. 11's misconduct in considering information outside the record was revealed during the court's questioning of Juror No. 4. Juror No. 4 stated that the foreperson had asked Juror No. 11 "if he had already made up his mind, . . . and [Juror No. 11] denied it." Juror No. 4 felt that Juror No. 11 "wasn't being completely honest about that," "[b]ecause whatever piece of evidence we addressed he would make very strong pronouncements about how he felt about it, and always these pronouncements were to support his . . . opinion, and they often really had no logic to them at all." (RT 5349.)

The court asked Juror No. 4 for an example of what she meant, and explained to her:

. . . I don't want to know specifically all the reasoning, and so forth, that's going on in the jury room at all; I'm really not interested in that. But maybe if you could give me an example of what you are talking about, or maybe you could say it in a different way for me.

(RT 5349.)

Juror No. 4 responded:

. . . Well, an example would be when we were discussing one of the witnesses and there was an issue of timecards. . . . [¶] And the witness had mentioned that he had a person named Jose punch in for him. . . . [¶] And [Juror No. 11] said, [¶] That's a lie. I know Hispanics, they never cheat on timecards, so this witness was at work, end of discussion.

(RT 5350.)

Johnson contends that the court's request for an example was an improper intrusion into the specific content of the jury's deliberations. (JAOB 65.) Respondent disagrees. The court merely asked Juror No. 4 for "an example of what [she was] talking about." And the court explained that it did not "want to know specifically all the reasoning . . . that's going on in the jury room at all; I'm really not interested in that." (RT 5349.) Indeed, had the court not asked for that example, Juror No. 11's gross misconduct in deciding an issue based on race would have gone undiscovered.

But even assuming, arguendo, that the court's request for an example was improper, it did not, as Johnson contends, violate his "rights to a fair trial and an impartial jury." (JAOB 65.) In *People v. Cleveland, supra,* this Court explained that

[j]urors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations.

(25 Cal.4th at p. 476; *see also id.* at p. 484 ["to avoid a chilling effect on the jury's deliberations, a trial court may decline to require jurors to testify when the testimony will relate primarily to the content of the jury deliberations" (internal quotation marks omitted)].)

There is no reasonable possibility that the court's mere request for an example of what Juror No. 4 was talking about had any chilling effect on the jury's deliberations. As previously indicated, the court explained to Juror No. 4 that it was "really not interested in" "all the reasoning . . . that's going on in the jury room." (RT 5349.) Moreover, following the discharge of Juror No. 11, the court emphasized to the remaining jurors that Juror No. 11 "was not excused . . . due to the fact he was voting guilty or not guilty" (RT 5465-5466); not to "assume or infer from the fact that [Juror No.] 11 has been excused that the court is expressing an opinion . . . as to how this case should turn out, or if it will turn out. Whether it be a guilty verdict or a not guilty verdict is of absolutely no concern to this court" (RT 5466); and "you may deliberate in any way you see fit" (RT 5473).

Johnson further argues that, "[i]n any event, Juror 11's alleged statement that based on his job experience, Hispanics do not falsify time cards certainly was not grounds to exclude the juror." (JAOB 65-70.) This argument is meritless. Initially, Juror No. 11's statement about Hispanics was not just an "alleged" statement; Juror No. 11 admitted having stated, "[I]t has been my knowledge that [Hispanics] don't do things like punch out other people's time cards." (RT 5422.)

Johnson's characterization of Juror No. 11's statement about Hispanics as "merely an off-the-cuff remark" (RT 66) is contrary to the record. Juror No. 4 recalled Juror No. 11's statement as having been, "That's a lie. I know Hispanics, they never cheat on timecards, so this witness was at work, end of

discussion." (RT 5350.)[157] Such cannot be dismissed as a mere off-the-cuff remark. Whether other jurors would have taken Juror No. 11's comment seriously (JAOB 66, 68) is beside the point. By making that comment, Juror No. 11 showed, as a "demonstrable reality" (*see People v. Cleveland*, supra, 25 Cal.4th at p. 474), that he had seriously violated his oath and the court's instructions, and was unfit to serve on this case.[158]

Nor is it significant that Juror No. 11 may not have been alone in commenting on facts outside the record. (JAOB 67.) Had defense counsel believed that other jurors committed prejudicial misconduct in this regard, they were free to request such jurors' removal. As stated by the trial court:

> . . . [A]s to other things that we heard during the colloquy with the 12 jurors, . . . I'm sure counsel heard other things that could conceivably be characterized as inappropriate deliberation. The court is not addressing those other matters and those other jurors due to the fact that I'm assuming that all counsel here, having heard what you heard, are not asking that any other jurors be excused . . . .

(RT 5474.) When the court asked defense counsel if they had any comments, each said, "No." (RT 5475.)

Next, Johnson argues that Juror No. 11's misconduct was "cured by the court's admonition that jurors should not speculate about matters outside the

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157. Juror No. 9 similarly heard Juror No. 11 express, in definitive fashion, that "from his experience with Hispanics, . . . he knows that they wouldn't lie. . . . They wouldn't forge a time card." (RT 5413-5414.)

158. As the trial court stated at the hearing on appellants' motions for new trial:

> That statement of [Juror No. 11's about Hispanics] is out in left field and demonstrates . . . beyond any real doubt in the court's opinion his inability to serve and hear [this] case appropriately.

(RT 7636.)

record." (JAOB 67-68.) As noted above, following a jury question regarding the existence of reward monies, the court admonished the jury that "[t]here is no evidence in the record suggesting any reward fund out there," and "[y]ou must confine your discussions to . . . the evidence received in this courtroom." (RT 5276; see fn. 149, *ante*.)

As a threshold matter, Johnson's argument should not be entertained on appeal, because the record does not show Juror No. 11 made his statement about Hispanics before the above admonition was given.[159] Of course, if Juror No. 11 made the comment afterwards, the admonition could only have exacerbated, not cured, Juror No. 11's misconduct.

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159. The following portion of the record, cited by Johnson, does not necessarily establish that Juror No. 11's comment occurred prior to the court's admonition:

> THE COURT: Did you hear anybody make a statement about Hispanics not falsifying time cards . . . [?]
>
> JUROR NO. 12: That was made, yes.
>
> THE COURT: Who said that?
>
> JUROR NO. 12: Let me think back now. I can't remember which juror it was. . . .
>
> There was bickering going on, nitpicking things that we eventually ironed out. [¶] And little statements were being made back and forth between [two] or [three] members of the jury and a few people got a little insulted. But we hashed the situation out.
>
> And it came all to a head when we came to court for the second question and you cleared the air with that.
>
> THE COURT: The reward deal?
>
> JUROR No. 12: Yeah. [¶] There was too much speculation going on and that is what a lot of the nitpicking was about too. [¶] So we kept trying to focus everybody on the facts. But when we came into the room, you more or less got that cleared up when we had the second question and the bickering stopped.

(RT 5426-5427; JAOB 68.)

But even assuming Juror No. 11's comment occurred before the subject admonition, Johnson's argument still fails. By deciding an important issue based on his extraneous opinion about Hispanics, Juror No. 11 had already committed a gross breach of his oath and the court's earlier, repeated instructions not to consider facts outside the record. (See RT 3156, 3231, 3235, 5061, 5063-5064; CT 848, 852.) Clearly, the court did not abuse its discretion in implicitly deciding that anything short of removal was inadequate to cure the prejudice to the prosecution from Juror No. 11's misconduct. (Cf. *People v. Daniels, supra,* 52 Cal.3d at p. 865 ["[W]e believe the misconduct . . . did indicate that Juror Francis was unable to perform his duty. That duty includes the obligation to follow the instructions of the court, and a judge may reasonably conclude that a juror who has violated instructions . . . cannot be counted on to follow instructions in the future"].)

Accordingly, the record shows as a "demonstrable reality" that Juror No. 11 was unable to perform his duties in this case, and he was properly excused. There was no abuse of discretion.

XI.

THE TRIAL COURT PROPERLY DECLINED TO REMOVE THE FOREPERSON AND JUROR NO. 4

Appellants contend that the trial court erroneously refused to remove the foreperson and Juror No. 4, based on their misconduct in meeting privately to discuss the conduct of Juror No. 11. (JAOB 74-80; AAOB 650-656.) Respondent disagrees.

A. Relevant Proceedings Below

Respondent respectfully incorporates herein by reference the proceedings discussed at pages 238 to 253, *ante*.

During its inquiry into Juror No. 11's misconduct, the trial court asked the foreperson: "Apparently last night, when the jurors left, you and [Juror No.] 4 remained and . . . wanted to speak with the court." The foreperson responded, "Yes." The court asked, "Was it on the same subject that we are dealing with now[?]" and the foreperson answered, "Yes." (RT 5317-5318.)

Johnson's counsel argued that the foreperson and Juror No. 4 had committed misconduct by having a discussion about the case outside the presence of the other jurors. (RT 5326-5327, 5330-5331.)[160] The court subsequently inquired of the foreperson:

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160. The jury had been instructed:

> During periods of recess, you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.

(CALJIC No. 17.52; CT 913; RT 5096-5097; see also CALJIC No. 1.03; CT 852; RT 5064 ["You must not discuss this case with any other person except a fellow juror, and then . . . only when all twelve jurors are present in the jury room"]; RT 3235-3236 ["You must not talk among yourselves . . . on any subject in any way connected with the trial, except when . . . all 12 jurors . . . are in the jury room"].)

THE COURT: . . . When you and [Juror] Number 4 were together in the jury room yesterday after the other jurors left, . . . were there discussions about the facts of the case, the witnesses --

[FOREPERSON]: No.

THE COURT: -- the law?

[FOREPERSON]: (Shakes head in the negative.)

THE COURT: What was discussed?

[FOREPERSON]: Just -- I knew -- she had had a couple verbal situations with [Juror No. 11]. . . . [¶] And I knew . . . on Monday she just didn't want to speak on the case, because she felt every time she opened her mouth, you know -- and they kind of settled that in the afternoon. And then yesterday there were some situations, and I just sensed that she felt similar to the way I did. [¶] And I asked her . . . if she felt the way as I did, and she said, yes.

THE COURT: How did . . . it come about that you [two] remained in the jury room when the others left . . . ? . . .

[FOREPERSON]: . . . In the previous break is when I asked her if she felt the same way I did, and she said, yes. And . . . I said I felt that it ought to be brought to the attention of the court. And she says, [¶] I think I do too.[161/]

THE COURT: When was that, yesterday?

[FOREPERSON]: Yesterday afternoon.

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161. The court earlier instructed the jury:

> [I]f any juror is unable or unwilling to follow the court's instructions at any point in time during the trial, including during deliberations, it is that juror's duty and all jurors' duty to bring that to my attention so that we can deal with the problem. That's the only way we are ever going to get a fair and just resolution of these matters here.

(RT 5060-5061.)

THE COURT: . . . And where did that conversation occur?

[FOREPERSON]: Right out here (indicating).

THE COURT: Right out in the hallway?

[FOREPERSON]: (Nods head in the affirmative.)

THE COURT: Were there any other discussions in the hallway, or anywhere else . . . -- other than when all 12 are together . . . -- that related to this matter in some way?

[FOREPERSON]: No. No. As I said, I was hoping to not be sitting here.

(RT 5337-5339.)

Later, the court inquired of Juror No. 4:

THE COURT: . . . How did you [and the foreperson] come to the conclusion . . . to stay for some minutes after the other jurors had left yesterday?

JUROR 4: Well, at the break he said to me, [¶] You know, I'm having great difficulties with this case. And I said, [¶] Yes, I am as well. And . . . basically what he said was, [¶] I don't want to go into specifics, but do you think you know what I mean? [¶] And I said, [¶] Yes, I probably do. I probably am having the same difficulties that you do, because it's so self-evident. [¶] And he said, [¶] Do you want to stay after and present something to the court so that we can get some clarification? [¶] And I said, [¶] Yes, I feel strongly enough about it to do that.

THE COURT: When he made that comment to you about this problem, [Juror] Number 11, is that what you were thinking about?

JUROR 4: Yes.

THE COURT: Did you perceive or believe that that's what he was speaking of?

JUROR 4: Yes.

THE COURT: And when you were there in the jury room with [the foreperson], when the others had left, did you discuss with him the facts, the law, the witnesses, things of that nature?

JUROR 4: No. I think basically we did discuss . . . Juror Number 11 and . . . we both expressed some of the things that I've talked to you about.

THE COURT: Okay. Ma'am, is there anything else that yesterday caused you and [the foreperson] to remain behind, or is this the subject matter which was involved?

JUROR 4: . . . Well, there was one other additional thing. [The foreperson] said, [¶] I have been thinking about going to the judge and asking to withdraw from this case because I feel so uncomfortable about it. . . . [¶] . . . And I said, I have as well.

(RT 5354-5356.)

Johnson's counsel requested that the foreperson and Juror No. 4 be excused.[162/] (RT 5431.) Johnson's counsel argued:

. . . [A]lthough they did not discuss the law, and they did not discuss the facts of the case, they did discuss a subject connected with the trial. They discussed the jury deliberations among themselves . . . . [T]hey discussed . . . what means they would employ to try to have the court's assistance in removing Juror No. 11 who appears to be a juror who is voting "not guilty".

I think the obvious inference is to find that these other jurors are voting guilty, . . . and what way to get this juror out of the jury room so they can proceed to come back with a guilty verdict.

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162. Allen's counsel joined in this request. (RT 5443.)

I think it is highly inappropriate and in violation of the court's instructions for [two] jurors to sit back there and form this mini-alliance to try to get rid of another juror. . . .

(RT 5431, 5441-5443.)

The prosecutor countered:

I believe even if the court were to characterize [the foreperson and Juror No. 4's] conduct as misconduct, it does not rise to the level of misconduct which would give the court good cause for excusing the jurors. . . . [¶] The foreman and Juror No. 4 did not . . . express their intention to come before the court for the purpose of having Juror No. 11 excused. [¶] What they expressed . . . was that they were seeking guidance from the court as to what they should do in order to allow the process to continue. . . .

I don't believe that what they did constituted deliberations on the subject matter that was submitted to them. [¶] I will concede that it was related to the subject matter because it was the conduct of the process. . . .

If it characterizes misconduct, I don't believe it rises to the level of serious and willful misconduct. [¶] And I don't think that it rises to the level of good cause that this court would have to find in order to excuse those [two] jurors.

(RT 5444-5446.)

The court denied defense counsels' request, explaining:

. . . [T]echnically speaking, I would characterize it as, . . . I don't know if misconduct is the word, but it is activity that is not in compliance with the court's order. [¶] So I guess that is misconduct.

I believe a reading of the instruction is to be taken fairly literally. [¶] Do not talk about any subject connected with the case until you are all

there, with the potential exception of such minor things as asking another juror in the hall: [¶] What time do we come back tomorrow, something of that nature, I would believe it to be so trivial not to be important.

This was unusual. [¶] [Two] jurors apparently felt the need to discuss whether they should tell the court something about another juror. [¶] That should be done in the presence of all jurors, or absent that, the jurors could send a note out individually . . . .

So you [referring to Johnson's counsel] are right. [¶] It was not appropriate and in violation of the court's instructions. [¶] As you point out, not every act of misconduct should result in a juror being excused.

I find beyond any reasonable doubt that the conduct of [the foreperson and Juror No. 4] is in no way harmful to your client or prejudices his right to a fair trial.

Just the contrary. [¶] It seems to me that those are [two] quite conscientious jurors . . . . [¶] . . . [The foreperson] appears to me to be truthful. [¶] He appears to be conscientious in doing his best to do his job on this case and see that others do as well. He indicated that he did not sleep last night worrying about this situation.

He indicated that he kept it to himself for several days even though he felt that being a juror [four] or [five] times, including as we know here on a murder case, that this was not right or the usual situation where jurors do not agree sometimes, but they have a situation of somebody going in with a real firm mindset and the mind made up on the case. And he wanted to know how to handle it without hurting anybody's feelings and he has done so.

I can't find that that is good cause to excuse [the foreperson] from further participation in the case. [¶] Likewise, I make the same finding as to [Juror] No. 4.

(RT 5446-5448.)

B. Applicable Law

Section 1128 provides that

[t]he court shall fix the time and place for deliberation. The jurors shall not deliberate on the case except under such circumstances. If the jurors are permitted by the court to separate, the court shall properly admonish them.

(§ 1128.)

Such admonishment is contained in CALJIC No. 17.52, which provides:

During periods of recess, you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.

(See also CALJIC No. 1.03 ["You must not discuss this case with any other person except a fellow juror, and then . . . only when all twelve jurors are present in the jury room"].) Appellants' jury was so instructed. (CT 852, 913; RT 3235-3236, 5064, 5096-5097.)

A juror commits misconduct by failing to follow the court's instructions. (*In re Hamilton, supra,* 20 Cal.4th at p. 305.)

Juror misconduct generally raises a rebuttable presumption of prejudice, but "[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant."

(*In re Lucas, supra,* 33 Cal.4th at p. 696, citing *In re Hamilton, supra,* 20 Cal.4th at p. 296; see also *People v. Marshall* (1990) 50 Cal.3d 907, 949 [if defendant shows juror misconduct, prejudice is presumed; the state must then rebut the presumption or lose the verdict].)

"Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Majors* (1998) 18 Cal.4th 385, 417; see also *People v. Ault* (2004) 33 Cal.4th 1250, 1263-1264.)

C. The Trial Court Correctly Found The Foreperson And Juror No. 4's Alleged Misconduct To Be Nonprejudicial

As noted above, the jury was instructed:

> [I]f any juror is unable or unwilling to follow the court's instructions at any point . . ., including during deliberations, it is that juror's duty and all jurors' duty to bring that to [the court's] attention so that we can deal with the problem.

(RT 5060-5061.)

The jurors also were instructed, however, that they may not discuss any subject connected with the trial unless all 12 of them were present in the jury room. (CT 852, 913; RT 3235-3236, 5064, 5096-5097.)

By discussing outside the presence of the other jurors whether to report Juror No. 11's conduct to the court, the foreperson and Juror No. 4 committed, at most, a technical violation of the latter instruction. It is undisputed that the foreperson and Juror No. 4 did not discuss the facts or law of the case outside the other jurors' presence. (See RT 5338, 5355, 5442; AAOB 654.)[163] Nor did

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163. Johnson's citation to *State v. Fields* (Ohio App. 1998) 1998 WL 430536 (JAOB 78-79), an unpublished out-of-state case, is unpersuasive. With exceptions not applicable here, California Rule of Court 977 precludes the citation of unpublished California appellate opinions. (Cal. Rules of Court, rule 977(a).) By parity of reasoning, unpublished out-of-state cases should also be

they even discuss the specifics of the perceived problem, for it was "so self-evident." (See RT 5338, 5354-5355.)

Contrary to appellants' assertion, there was no evidence that the foreperson and Juror No. 4 had "schemed" to get Juror No. 11 discharged. (JAOB 78; AAOB 654.) The foreperson stated that he had told Juror No. 4 that he "felt that it [i.e., Juror No. 11's conduct] ought to be brought to the attention of the court." (RT 5339.) Juror No. 4 similarly reported that the foreperson had asked her if she wanted to "present something to the court so that we can get some clarification." (RT 5355.) The foreperson did not request Juror No. 11's removal, but asked the court for "some sort of direction." (RT 5315.) And the trial court, which was in a position to observe the demeanor of the foreperson and Juror No. 4, made credibility findings[164] that these jurors seemed to be "quite conscientious," and that the foreperson appeared to be "truthful," to be "doing his best to do his job . . . and see that others do as well," and not to harbor a "vendetta" against Juror No. 11. (RT 5447, 5450.) (See *Thompson v. Keohane* (1995) 516 U.S. 99, 111 [juror impartiality is a factual issue, the resolution of which "depends heavily on the trial court's appraisal of witness credibility and demeanor"; "a trial court is better positioned to make decisions of this genre, and [this Court] has therefore accorded the judgment of the jurist-observer 'presumptive weight.'"]; *People v. Turner* (1994) 8 Cal.4th 137,

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uncitable. But even if the unpublished Ohio decision in *State v. Fields* could be considered (see *Brown v. Franchise Tax Bd.* (1987) 197 Cal.App.3d 300, 306, fn. 6), that case is distinguishable. In *Fields*, the two jurors in question had discussed "the case" (1998 WL 430536, *3), presumably referring to the facts and/or law. Such did not occur here.

164. The court expressly referred to its "assessment of the credibility of the various jurors." (RT 5452.)

205 ["trial court was in the best position to observe [juror's] demeanor and assess his credibility"].)[165/]

There is thus no "reasonable probability of prejudice," i.e., no "substantial likelihood" that the foreperson and Juror No. 4 were actually biased against appellants. (See *In re Lucas, supra,* 33 Cal.4th at p. 696.) Indeed, the trial court found "*beyond any reasonable doubt* that the conduct of those jurors [was] in no way harmful to [appellants] or prejudice[d] [their] right to a fair trial." (RT 5447; italics added.) Given the minor nature of the asserted misconduct, and the evident good faith of the foreperson and Juror No. 4 in bringing Juror No. 11's conduct to the court's attention,[166/] any presumption of prejudice has been amply rebutted. (See *In re Lucas, supra,* 33 Cal.4th at p. 696 [presumption of prejudice is rebutted if the entire record, including the nature of the misconduct and the surrounding circumstances, indicates there is no reasonable probability of prejudice].)

Accordingly, appellants' juror misconduct claim must fail.

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165. At the hearing on appellants' motions for new trial, the court further observed:

> Apparently . . . [the jury was split] 9 to 3 at the time this issue arose. [¶] So assuming that is correct, it does not appear to me that the foreperson and any other juror . . . was attempting to somehow oust the lone dissenting voice since apparently there were three at that point.

(RT 7632.)

166. Juror No. 11, himself, admitted having made the statements attributed to him. (See RT 5421-5422.)

XII.

THE TRIAL COURT DID NOT COERCE THE JURY'S VERDICTS

Lastly, appellants contend that the trial court improperly coerced the jury into reaching a verdict after the jury reported a deadlock as to Allen. (AAOB 656-673; JAOB 80-90.) Respondent disagrees.

A. Relevant Proceedings Below

On August 27, 1997, the court excused Juror No. 11 for cause, seated an alternate, and instructed the jurors to begin deliberations anew. (CT 837; see pp. 251-253, *ante*.) The newly-constituted jury commenced deliberations at 3:35 p.m. They deliberated until 4 p.m. (CT 837.)

On August 28, 1997, the jury deliberated from 9:17 a.m. to 10:25 a.m., 10:50 a.m. to 12 p.m., and 1:35 p.m. to 2:55 p.m. The jury resumed deliberations at 3:15 p.m. (CT 839.) At 3:58 p.m., the jury submitted a note to the court stating that it was "unable to reach a unanimous verdict re Mr. Allen." (CT 839-840.) The jury then left for the day at 4 p.m. (CT 839.)

On the morning of August 29, 1997, Allen's counsel moved for a mistrial based on the jury's reported deadlock. (RT 5478-5479.) The court indicated that it would inquire of the jury. (RT 5479.)

The court engaged in the following colloquy with the jury:

> THE COURT: We have your note, folks, that you dropped off yesterday afternoon. . . .
>
> I will ask you some questions and I want you to answer specifically what I ask and if I need additional information, I will inquire.
>
> Let me say at the outset, the instructions that we gave you, as I recall them, . . . were as follows: [¶] If you arrived as to a verdict as to a

particular defendant, you were to take those verdict forms and hand them to the bailiff or clerk and we would seal them up.[167]

I don't recall that we asked you specifically to report a deadlock as to a particular defendant. [¶] Was that your understanding, however?

[FOREPERSON]: You are speaking to me?

THE COURT: Yes.

[FOREPERSON]: I didn't know how we were to handle an inability to reach a unanimous decision.

THE COURT: I indicated that you can deliberate in any fashion that you wish or any order that you want as to one defendant or both. [¶] All we asked is if there was a point where the jury arrived at a verdict as to a particular verdict [*sic*] to let us know that and we would seal them up for future reference.

In any event, we will deal with the note that you sent out. [¶] Do not volunteer any information to me at all. [¶] Just answer the following questions: [¶] How many ballots -- when I say "ballots", I mean formal votes -- have there been on Mr. Allen since the jury went out? [¶] And the jury went out Wednesday in the late afternoon, as far as I recall.

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167. On August 27, 1997, the court instructed the jury:

> . . . [Y]ou may deliberate in any order, counts, defendants, however you want to do it. But just keep in mind the following:
>
> There are [two] trials going on here at once. . . . Each defendant is entitled to your individual assessment and opinion. And if and when you arrive at verdicts as to a defendant . . . you are to seal those, . . . give those to the clerk, and the clerk will seal those up, and then you may continue. [¶] So, you may deliberate in any way you see fit, in any order, but keep that in mind. [¶] If you do arrive at verdicts as to one defendant initially, please turn those in. [¶] And if you do not agree as to both but agree on one, then we'll take the one upon which you all do agree unanimously.

(RT 5473.)

[FOREPERSON]: I believe there were [two].

THE COURT: [Two] ballots taken?

[FOREPERSON]: Yes.

THE COURT: When was the first ballot taken?

[FOREPERSON]: The first one was taken the day before yesterday and then yesterday.

THE COURT: Day before yesterday?

[FOREPERSON]: Day before yesterday.

THE COURT: Wednesday?

[FOREPERSON]: 27th.

JUROR NO. 6: It was shortly there before that we got called out and one of our jurors was dismissed. [¶] It was right before that.

THE COURT: Look. I am not interested in what the other jury did. . . . [¶] That is a non-existent entity. [¶] It does not exist anymore. [¶] As you know, the court seated an alternate and instructed the jury to set aside the past deliberations and to begin anew. [¶] There is a new jury.

JUROR NO. 6: Then only one ballot, sir.

[FOREPERSON]: With the new jury, one ballot.

THE COURT: This is the only jury we are dealing with.

[FOREPERSON]: I'm sorry for not understanding.

THE COURT: When was that taken?

[FOREPERSON]: Yesterday afternoon.

THE COURT: Do not tell me which way it was leaning. [¶] Don't tell me how many guilty or not guilty. [¶] I want to know [two] numbers that add up to 12 and give me the biggest number first. . . .

[FOREPERSON]: [Ten] to [two].

THE COURT: What time yesterday?

[FOREPERSON]: Probably before we took our afternoon break. [¶] So it was between 2:00 and 3:00.

THE COURT: . . . Do you feel, Mr. Foreman, that further deliberations would be of assistance and might potentially, as to Mr. Allen, result in a verdict one way or the other?

[FOREPERSON]: I would say probably not.

THE COURT: All right. [¶] Do you believe that further reading of testimony to the jury or clarification of any legal instruction might be of assistance to the jury in arriving at a decision as to Mr. Allen?

[FOREPERSON]: I would like to think it would, but I really can't speak for the other jurors in that regard.

THE COURT: Well, you have been elected to the position to speak at this point and so I am asking you for your estimation. [¶] You have been back there.

[FOREPERSON]: It is just what I answered. [¶] I would like to think that more time could possibly be helpful, but I have doubts about that.

(RT 5480-5486.)

At sidebar, the court asked counsel for "[a]ny comments." Allen's counsel stated that "it is kind of hard for [the foreperson] to answer your question. [¶] I don't know what you want to do." The court responded, "What I intend to do is have [the jurors] deliberate some more." Allen's counsel replied, "All right." (RT 5486.) The court explained that the jurors

> may be in a deadlock, and it may end up that way, but I am not convinced that they are in such a fixed position that potentially further deliberations or instruction or readback may not break the deadlock. [¶] They have been out . . . a little over a day.

(*Ibid.*)

The court asked Johnson's counsel if he had "anything that [he] want[ed] to add." Johnson's counsel responded, "There does not seem to be anything for me to say. [¶] They have not mentioned Mr. Johnson." (RT 5486-5487.)

The court then instructed the jury:

> I will ask you to do the following re Mr. Allen.
>
> The court is not convinced that there is no reasonable possibility of a verdict. [¶] So I will require you to continue deliberations on the case. [¶] And if there is anything that the jury needs or feels might be helpful, do not hesitate to ask. [¶] In the meantime, go back into the jury room and continue your deliberations.

(RT 5488.)

Deliberations resumed at 8:55 a.m. (CT 842.) At 9:05 a.m., the jury requested a readback of Jelks's entire testimony. (CT 842, 846.) The readback commenced at 10:55 a.m. (CT 842.)

At 12 p.m., the jury was excused for the day, because one of the jurors had to leave early for a work-related matter. (CT 838, 842; RT 5488, 5497.) The jury was ordered to return on September 2, 1997.[168] (CT 842; RT 5489, 5497.)

On September 2, 1997, at 8:48 a.m., the readback of Jelks's testimony resumed. At 9:55 a.m., the readback concluded, and the jury resumed deliberations. (CT 925.) At 11:10 a.m., the jury returned verdicts as to Allen. (CT 925-926; RT 5512, 5514.) The jury reached verdicts as to Johnson that afternoon. (CT 925, 927-928; RT 5512, 5514.)

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168. August 29, 1997 was a Friday, and Monday, September 1, 1997 was a court holiday. (See RT 5489.)

B. General Principles

Under section 1140, a trial court is prohibited from discharging the jury without reaching a verdict unless both parties consent, or "unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140; *People v. Neufer* (1994) 30 Cal.App.4th 244, 254.)

In *People v. Breaux* (1991) 1 Cal.4th 281, this Court explained:

> The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]

(*Id.* at p. 319.)

"[T]he question of coercion is necessarily dependent on the facts and circumstances of each case." (*People v. Breaux, supra,* 1 Cal.4th at p. 319.) "The basic question . . . is whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency." (*People v. Carter* (1968) 68 Cal.2d 810, 817.)

C. Appellants Have Waived Any Error

Preliminarily, appellants have waived any error by failing to object to the court's allegedly coercive comments. (See *People v. Wright* (1990) 52 Cal.3d 367, 411 ["there were no timely objections to any of the [court's] complained-of comments such as would have enabled the court to dispel any misunderstanding with appropriate admonitions. [Citations.] Accordingly, any asserted error is waived on appeal"]; *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 ["As a general rule, judicial misconduct claims are not preserved for

appellate review if no objections thereto were made at trial"]; *People v. Neufer, supra,* 30 Cal.App.4th at p. 254 [contention that trial court coerced jury's verdict waived by failure to object].)

D. There Was No Improper Coercion

In any event, appellants' claims of improper coercion are without merit. First, Johnson argues that the court "scolded [the jury] for reporting a deadlock and not reaching a verdict." (JAOB 81; see also JAOB 86 ["the court's stern comments in response to being informed that the jury was deadlocked strongly implied that the jury was required to reach a verdict"].) While, on paper, it appears the court may have been frustrated that the jury had not followed instructions,[169] the court in no way "signaled . . . that a hung jury was inappropriate and that [the jurors] were required to reach a verdict." (JAOB 87.)

Further, the jury previously was instructed that both sides were "entitled to the individual opinion of each juror"; "[e]ach of you must consider the evidence for the purpose of reaching a verdict *if you can do so*"; "[e]ach of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors"; and not to "decide any question in a particular way because a majority of the jurors . . . favor that decision." (CALJIC No. 17.40; CT 907; RT 5094 [italics added].) Following the discharge of Juror No. 11, the court also emphasized that the jury was not to assume from Juror No. 11's removal that the court was "expressing an opinion . . . as to how this case should turn out, or *if it will turn out.*" (RT 5466; italics added.) Thus, while the jury was required to deliberate in an effort to reach a verdict, it was equally clear that a verdict was not required.

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169. The jury had been instructed to notify the court once it reached verdicts as to a particular defendant, not once it deadlocked as to a particular defendant. (See RT 5473, quoted at fn. 167, *ante.*)

Johnson also maintains that the court "essentially instructed the jurors that they were not to contact the court unless and until they had reached a unanimous verdict." (JAOB 81; see also AAOB 668 ["the jurors had been told they were not to contact the court for any . . . reason" other than having reached unanimous verdicts (italics omitted)].) Respondent disagrees. The court merely indicated that the jury had not been asked to report a deadlock as to a particular defendant before the jury completed its deliberations. (See RT 5481-5482.) In addition, the jurors were told not to hesitate contacting the court "if there is anything that the jury needs or feels might be helpful" in its continued deliberations. (RT 5488.)

Next, Johnson asserts that, "[d]espite the foreperson's stated belief that further deliberations would not be fruitful, the court ordered that deliberations should continue." (JAOB 83.) Johnson overstates the foreperson's comments. The foreperson did not express a firm belief that further deliberations would not be fruitful. Rather, he stated, in equivocal fashion, that further deliberations "probably" would not be of assistance; he "would like to think" that the further reading of testimony or clarification of instructions might be of assistance; and he "would like to think that more time could possibly be helpful," but he had "doubts about that." (RT 5485.)

> Next, Johnson argues that the court's actions were coercive because the jurors were already aware due to the earlier proceedings surrounding the dismissal of [Juror No. 11] that the content of deliberations was open to scrutiny and that jurors who held out for acquittal might be subject to a similar fate as the discharged juror.

(JAOB 86.) Allen similarly argues:

> As far as [the two minority] jurors were concerned, it was . . . just a matter of time before another juror would complain, the court would inquire, and one or both minority jurors would also be removed . . . for

"not deliberating" . . . because the trial judge was of the opinion he/she had poor judgment or lacked common sense.

(AAOB 663.) Such arguments are meritless.

The court's comments to the remaining jurors following Juror No. 11's dismissal made it unmistakably clear that Juror No. 11 had not been excused because he did not believe the prosecution had proven its case. The court emphasized that

> [Juror] Number 11 was not excused . . . due to the fact he was voting guilty or not guilty. Whichever way he was going is of absolutely no concern to this court.
>
> Do not assume or infer from the fact that [Juror No.] 11 has been excused that the court is expressing an opinion . . . as to how this case should turn out . . . . Whether it be a guilty verdict or a not guilty verdict is of absolutely no concern to this court. . . .
>
> And do not get the idea that [Juror No.] 11 was excused due to the fact that he was voting a particular way on the case. That's not it at all.
>
> . . .

(RT 5465-5466.)

After seating an alternate, the court further instructed the remaining jurors that "[y]ou must not consider [the fact that a juror has been replaced by an alternate] for any purpose." (RT 5470.)

Johnson next argues that

> the court's request for a numerical division of the jury's vote when it was plainly aware that the majority of jurors favored guilt, followed by an order to deliberate further, put undue pressure on the minority jurors.

(JAOB 86.) Respondent disagrees.

"[T]he practice of inquiring into the jury's numerical division, without finding out how many are for conviction and how many for acquittal, [has been]

expressly approved" by this Court. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 776, citing *People v. Carter, supra,* 68 Cal.2d at p. 815.)[170]

The court here never asked the jury how many votes were for conviction versus acquittal. To the contrary, the court unequivocally stated: "Do not tell me which way [the vote] was leaning. [¶] Don't tell me how many guilty or not guilty" (RT 5484); and, "I don't want to know [which way the vote is leaning] and we are not entitled to know that at this point in time" (RT 5485). That the court might have been able to glean that the 10-to-two vote was in favor of guilt, would not, in itself, have placed any undue pressure on the minority jurors.[171]

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170. Although the procedural rule is otherwise in federal court, that rule is not binding on the states. (*People v. Proctor* (1992) 4 Cal.4th 499, 539; *People v. Rodriguez, supra,* 42 Cal.3d at p. 776, fn. 14.)

171. As this Court explained in *People v. Sheldon* (1989) 48 Cal.3d 935:

> Defendant argues . . . that it is inherently coercive to refuse to discharge a jury after learning of an 11-to-1 vote favoring the death penalty. We disagree. There is always a potential for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror favoring acquittal. In such a case, the judge's remarks to the deadlocked jury regarding the clarity of the evidence, the simplicity of the case, the necessity of reaching a unanimous verdict, or even the threat of being "locked up for the night" might well produce a coerced verdict. [Citation.] But the potential for coercion was not realized by anything said or done by the court in this case.
>
> Here, the deadlock proceeding was heard by an assigned judge whose remarks or actions could not have been interpreted by the holdout juror as an agreement with the position taken by the 11 jurors voting for conviction. [Citation.] Moreover, the court made no remarks either urging that a verdict be reached or indicating possible reprisals for failure to reach agreement.

(*Id.* at pp. 959-960; see also *People v. Neufer, supra,* 30 Cal.App.4th at pp. 253-254 [rejecting contention that court coerced verdict by having jury resume

The court never intimated any preference for a guilty verdict, or suggested that the minority jurors rethink their position given that a majority viewed the case differently.[172] Rather, the court asked the foreperson whether he believed further deliberations "might potentially . . . result in a verdict *one way or the other*." (RT 5485; italics added.) The court also previously stressed that whether the case resulted in a guilty or not guilty verdict was "of absolutely no concern to this court." (RT 5466.)

Allen's argument that the minority jurors were pressured into changing their minds "because of the trial court's response that they were to continue deliberating until they reached verdicts . . . however long that might take," is meritless. (AAOB 661; see also AAOB 665 ["the trial court's statements . . . amounted to a not-so-subtle threat of continued deliberation for an extended and indefinite period of time until a unanimous verdict was reached"].) The court said or implied no such thing. The court simply instructed the jurors to "continue [their] deliberations," because the court was "not convinced that there is no reasonable possibility of a verdict." (RT 5488.)

At the time the newly-constituted jury reported its deadlock, it had deliberated a mere four hours and 46 minutes (see CT 837, 839-840), and taken only one vote (RT 5483), following a two-week, vigorously contested guilt

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deliberations after learning their 11-to-1 vote favored guilt].)

172. In *Allen v. United States* (1896) 164 U.S. 492, the United States Supreme Court found no error in the giving of an instruction that, "if much the larger number [of jurors] were for conviction, a dissenting juror should consider whether his doubt was a reasonable one." (*Id.* at p. 501.) The California Supreme Court has disapproved the use of the so-called *Allen* charge in California, holding it is error to give an instruction which "encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views." (*People v. Gainer, supra,* 19 Cal.3d at p. 852.) Here, nothing the court did could be construed as a de facto *Allen* charge.

phase in a capital murder trial.[173] Under such circumstances, a reasonable juror would have understood the court's instruction as a directive to continue deliberating for a reasonable period of time, not as a veiled threat to reach a verdict or be forced to deliberate indefinitely.[174]

In addition, the jury returned verdicts as to Allen an hour and 15 minutes after the requested readback of Jelks's entire testimony. (See CT 842, 846, 925-926; RT 5512, 5514.) Thus, it is likely that the jury reached a consensus based on a reconsideration of Jelks's testimony, not some supposed threat of indefinite deliberation.

Appellants' complaints that the court failed to reassure the jurors that they "were under no legal obligation to return with unanimous verdicts," and that the court "was not trying to pressure them in any way to reach unanimous verdicts," are unpersuasive. (AAOB 660; JAOB 89.) As discussed above, the court's earlier instructions and comments made it abundantly clear that the jury was not required to reach a verdict if unable to do so, and that no juror should abandon his individual opinion merely to reach agreement.

E. Because The Jury Only Reported A Deadlock As To Allen, Johnson Cannot Establish Prejudice

Assuming, solely for the sake of argument, that the court's comments were unduly coercive, Johnson cannot establish prejudice. The jury reported that it was "unable to reach a unanimous verdict re Mr. Allen." (CT 840.) The jury said nothing about being deadlocked as to Johnson. Thus, there is no indication that the court's comments had any impact whatsoever on the jury's

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173. Opening statements were given on August 5, 1997 (CT 781), and closing arguments concluded on August 20, 1997 (CT 824).

174. As Allen himself states, "One would expect that jurors would deliberate the credibility of [Connor and Jelks] rather extensively . . . ." (RT 671.)

deliberations as to Johnson. Johnson's assertion that "the fact that [the jury] reached its verdict in [his] case so soon after the verdict in [Allen's] case indicates that the deadlock applied to both appellants" (JAOB 90), is mere speculation.

In light of the above, appellants' claims that the court improperly coerced the jury's verdicts are without merit.

PENALTY PHASE CLAIMS

XIII.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR HOPE B.

Johnson claims that the trial court erred in excusing Prospective Juror Hope B. for cause, because the record fails to show that Hope B.'s views on capital punishment would have substantially impaired her performance as a juror. (JAOB 100-114.) Respondent disagrees.

A. Relevant Proceedings Below

Prospective Juror Hope B. filled out her Juror Questionnaire under penalty of perjury on July 24, 1997. (Supp. III CT 2659.) In response to question number 65, which asked, "What are your general feelings about the death penalty?" Hope B. wrote:

> I have mixed feelings about the death penalty. I believe some crimes should be punished by death. But from the religious standpoint I believe no one has the right to take a life but God.

(Supp. III CT 2653.)

Hope B. did not answer question numbers 70 and 71, which asked, "Would it be impossible for you to vote for death under any circumstances?" and, "Would it be impossible for you to vote against death under any circumstances?" (Supp. III CT 2654; underline omitted.) In response to question number 84, she indicated that she did not know if she would automatically vote for life without parole if the trial reached the penalty phase. (Supp. III CT 2657.)

However, when asked, "Some people say they support the death penalty, yet could not personally vote to impose it. Do you feel the same way?" Hope B. answered, "Yes." (Supp. III CT 2654 [question no. 72a].) She indicated that

her religious beliefs "would prevent [her] from imposing the death penalty," as "[t]he bible states thou shall not kill." (Supp. III CT 2654-2655 [question nos. 69c, 74].) Her religion's position on the death penalty was "[t]hat no one has a right to take another[']s life." Asked, "Do you necessarily agree with that position in every case?" Hope B. answered, "Yes." (Supp. III CT 2655 [question nos. 75a, b].) Hope B. used to have a different opinion about the death penalty, but that opinion changed when she started attending church. (Supp. III CT 2653 [question no. 68].)

Hope B. further indicated that she could not "accept the responsibility to decide between death and life without the possibility of parole." She explained, "I do not want to have it on my conscience that I killed someone or help[ed] end his life." (Supp. III CT 2656 [question no. 78].) Hope B. reiterated in response to question number 80 that she did "not want the responsibility" of causing a defendant to be sentenced to death. (Supp. III CT 2657.) She also stated, "I cannot accept the responsibility to take someone[']s life," in response to question number 85, which asked:

> Is there anything which you feel should be brought to the Judge's attention that might affect your ability to be as fair and impartial a juror as you would like to be or any reason why you may not want to serve as a juror in this case?

(*Ibid.*)

During oral voir dire a week later, on July 31, 1997, the court had the following colloquy with Hope B.:

> THE COURT: . . . Do you understand that we could have a second phase in the trial?
>
> PROSPECTIVE JUROR [HOPE B.]: Yes.
>
> THE COURT: You have indicated in your questionnaire that you do not want the responsibility of making that decision and you said that you

could not accept the responsibility that might cause the taking of someone's life. [¶] You do not want it on your conscience, et cetera. [¶] Is that a fair assessment of your position here?

PROSPECTIVE JUROR [HOPE B.]: Yes.

THE COURT: Could you see yourself in any situation rendering a verdict of death in this case?

PROSPECTIVE JUROR [HOPE B.]: I could.

THE COURT: You could?

PROSPECTIVE JUROR [HOPE B.]: I could.

THE COURT: Okay. [¶] Has something changed your mind?

PROSPECTIVE JUROR [HOPE B.]: Yes.

THE COURT: What has changed your mind?

PROSPECTIVE JUROR [HOPE B.]: Well, I kind of thought of it and thought of a situation. [¶] If it was me in the situation of the victims, . . . I could do it. [¶] I thought if it was my family members . . . that was killed, it would be no doubt in my mind . . . [¶] . . . for me to say: [¶] Okay, I think they deserve the death penalty, . . . if they actually just gruesomely murdered somebody in my family.

THE COURT: You understand that your family members thankfully are not the victims in this case. [¶] They are unrelated to you.

PROSPECTIVE JUROR [HOPE B.]: Yes. I was thinking that. [¶] But I was thinking if I could with good conscience say somebody in my family's life was taken away, I in good conscience could do the same and not have that be on my conscience. [¶] I was worried that it would be on my conscience[] . . . [¶] [t]o take somebody else's life.

THE COURT: You are not worried about that now?

PROSPECTIVE JUROR [HOPE B.]: Actually, no. Not anymore.

THE COURT: Did you converse with anybody to come to this change of heart?

PROSPECTIVE JUROR [HOPE B.]: Yes.

THE COURT: Who?

PROSPECTIVE JUROR [HOPE B.]: With a sister of mine. [¶] Actually, something happened to me this weekend and it changed my mind.

THE COURT: What is that?

PROSPECTIVE JUROR [HOPE B.]: I was out late at night at 4:30 in the morning and had a flat tire. [¶] And my sister asked me: [¶] Don't you think that is dangerous? And she is always complaining to me about doing the things that I do. . . .

Well, my tire was flat and I changed my tire and she said: [¶] Aren't you worried about dying? [¶] And I said: [¶] When it is my time to go I am going to go. No matter which way I go, it is time to go. . . . [¶] The circumstances of me dying is not going to stop me from doing the things that I need to do because I am going to die anyway. . . .

Then I thought about it and I was thinking about having that on my conscience, somebody else dying. [¶] And it is like they will die no matter what because, well, I believe everyone's death is predestined. [¶] How you are going to die is how you are going to die. [¶] If I say: [¶] You have the death penalty. You are going to die . . . regardless if I say it or somebody else says it.

THE COURT: You think this thing is preordained what way it is heading but we do not know what it is yet?

PROSPECTIVE JUROR [HOPE B.]: Yeah. . . .

(RT 2937-2942.)

Following a bench conference with counsel regarding "what to make of" Hope B.'s responses (RT 2942-2943), the court inquired further of her:

THE COURT: . . . You say the outcome is probably preordained by some greater power. . . . [¶] But do you know what the outcome will be . . . [?]

[PROSPECTIVE JUROR HOPE B.:] No. . . .

THE COURT: . . . Backing up to your questions here, . . . you were asked a couple that you did not fill out and I do not know why you didn't. [¶] No. 70. [¶] Would it be impossible to vote for death under any circumstance. [¶] Why didn't you give us an answer?

PROSPECTIVE JUROR [HOPE B.]: Because I wasn't for sure of that. . . .

THE COURT: Your religious view is that no person has a right to take another's life. [¶] Am I correct?

PROSPECTIVE JUROR [HOPE B.]: Yes.

THE COURT: Is that a firm belief or something that has changed in the last couple of days?

PROSPECTIVE JUROR [HOPE B.]: No. [¶] I still believe -- [¶] no. It's -- hmmm. [¶] I don't believe that you have the right to take another person's life, but 9 times out of 10 that is how most people die, from somebody taking their life.

THE COURT: That is not true at all. [¶] In fact, not very many people die of that manner. They die of other causes.

PROSPECTIVE JUROR [HOPE B.]: Yeah. Not that much. . . .

THE COURT: You indicated here in no. 78 that: [¶] I do not want to have it on my conscience that I killed someone or help[ed] end his life. [¶] Are you telling me that that is not a concern any longer?

PROSPECTIVE JUROR [HOPE B.]: After I thought about how you are going to die . . . regardless of what way, it is not too much on my conscience anymore. [¶] I don't think it would be on my conscience. . . .

THE COURT: If you get to a penalty phase, would there be any tendency to believe your vote does not matter because whatever is going to happen is going to happen? It is out of your hands, in other words.

PROSPECTIVE JUROR [HOPE B.]: No.

THE COURT: Can you explain to me, ma'am, how you will go about doing your duty if we have a penalty phase. [¶] Do you understand the process that the jury will be asked to go through?

PROSPECTIVE JUROR [HOPE B.]: I understand the process. . . [¶] If the aggravating is substantially higher than the mediating (sic) or whatever it is.

THE COURT: Mitigating.

PROSPECTIVE JUROR [HOPE B.]: Mitigating, then that would be death. [¶] Right?

THE COURT: That would be the choice of each juror. [¶] I can't tell you that you will vote a particular way in the case. [¶] It is only in that situation that you mention where the aggravation is so substantially outweighed that you feel that death is appropriate in a case that you could vote for the death penalty. [¶] Do you understand that?

PROSPECTIVE JUROR [HOPE B.]: I understand that.

THE COURT: Likewise, if you get equal weight --

PROSPECTIVE JUROR [HOPE B.]: Then it is life in prison. . . .

THE COURT: You said before you started to go to church, you had one view about the death penalty and then you went and had another view. [¶] Is that correct or not?

PROSPECTIVE JUROR [HOPE B.]: Correct.

THE COURT: Which view was it initially and what did it change to?

PROSPECTIVE JUROR [HOPE B.]: . . . I was just for the death penalty. [¶] I'm not so much for it now. . . . [¶] I don't know.

THE COURT: Do you know what the word "ambivalent" means?

PROSPECTIVE JUROR [HOPE B.]: I have mixed up feelings. [¶] I believe that I stated that I have mixed up feelings about the death penalty. . . .

THE COURT: Has anything in this questionnaire changed? [¶] Have your views had some sort of great change in the last [four] or [five] days or not? . . .

PROSPECTIVE JUROR [HOPE B.]: I don't think so. [¶] Not really.

(RT 2944-2949.)

The prosecutor challenged Hope B. for cause, arguing:

She indicates that her answers in her questionnaire are how she feels even though she has expressed other responses in court. [¶] In her questionnaire she was opposed to the death penalty and did not want the responsibility. [¶] So I believe her ability to be a fair and impartial juror in a death penalty case is substantially impaired.

(RT 2950.)

Johnson's counsel argued that Hope B.

has responded under oath to the Court's question that she could choose either penalty based on the evidence[;] that she left some answers "I don't know" because she wanted to think about them further. And she has done that since being called in the jury box.

An examination of her beliefs is that . . . previously she was for the death penalty. She has now some ambivalence and has stated that she could render either verdict depending on the weighing of aggravating and mitigating factors . . . .

In large measure, I think she is no different than Prospective Juror Painter that was challenged by the defense who indicated in the questionnaire that [he] could never vote for life without parole because of [his] strong death penalty views.[175]

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175. Prospective Juror Painter stated in his questionnaire that he was "strongly for [the] death penalty," and that the death penalty was "a necessity to deal with violent members of society." (Supp. III CT 273.) When asked, "[C]an you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment . . . instead?" he answered, "No." Painter explained that "for those crimes that death is a possible sentence, I believe the harshest penalty should apply." (Supp. III CT 276.) However, Painter answered "No" to each of the following questions: "Would it be impossible for you to vote against death under any circumstances?" (Supp. III CT 274; underline omitted); "Some people say they would always vote to impose the death penalty regardless of the evidence. Do you feel the same way?" (*Ibid.*); "Would any aspect of your religious, social, or philosophical convictions require you to impose the death penalty?" (Supp. III CT 276; underline omitted); and, "If the trial reached the penalty phase, would you automatically vote for the death penalty?" (Supp. III CT 277).

During oral voir dire, the court noted that Painter's "feelings [were] quite firm in favor . . . of the death penalty law," and he "believe[d] that it should be applied with some regularity." (RT 2725, 2731.) The court then asked Painter:

> Do you believe that your feelings about that are such that it would strongly predispose you to come to a particular decision . . . should we have a penalty determination?

(RT 2731.) Painter responded, "No. I would attempt to follow the law as you give us." (RT 2731-2732.)

> Painter also indicated that he understood the fact that a person is convicted of murder with a special circumstance does not mean that the penalty is of necessity the death penalty. [¶] The other option is equally viable depending on what you find to be the facts and how you weigh those facts[.]

(RT 2732.)

I think this juror may be the other side of that coin, although it appears that at least in the questionnaire[] to some of her responses, it indicates a lack of a completely formulated belief system in terms of capital punishment.

She stated here from the jury box that she could render either verdict and I think that the challenge is without basis.

(RT 2951-2952.) Allen's counsel agreed. (RT 2952.)

The court sustained the challenge for cause, explaining:

The challenge is sustained for the following obvious reason. [¶] The juror is under oath today. [¶] She was also under oath when she filled out the questionnaire. [¶] Her answers, some of them, I will not read all of them, but some are as follows:

No one has a right to take somebody else's life.

Question: Do you necessarily agree with that situation in every case? [¶] Answer: yes.

She goes on to say that she would feel, and I am summarizing, horribly guilty were she to take part in a proceeding that ended a person's life. [¶] I don't want to have it on my conscience that I killed someone or helped end his life. [¶] Can you accept the responsibility to decide between death and life? [¶] No. [¶] Et cetera. . . .

And now she comes up with a situation, and I don't know what to make of it, but an epiphany arose when she had a flat tire that changed her long-standing religious views on the [death] penalty. [¶] I am not convinced that is the case. [¶] I am convinced that, yes, my answers in the questionnaire accurately reflect my position is a correct and truthful one.

Johnson's challenge of Painter for cause was denied. (RT 2733-2737.)

I note that from her fi[d]geting and hesitation and obvious confusion that she was doing the best she could to give answers that I feel would put her in line with those heard by some other jurors in the case that had not been excused.

She is an obviously impaired juror when it comes to making a choice.

Given those lengthy[,] detailed[,] obviously well thought out handwritten answers, the challenge is sustained.

(RT 2952-2954.)

B. Applicable Law

As stated by this Court in *People v. Haley* (2004) 34 Cal.4th 283:

A trial judge may properly exclude a prospective juror in a capital case if the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. [Citation.][176] The determination of a juror's qualifications fall "'within the wide discretion of the trial court, seldom disturbed on appeal.'" [Citation.] There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity.

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176. On the other hand,

> a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service . . . . In *Lockhart v. McCree* (1986) 476 U.S. 162, 176, . . . the high court observed that "[n]ot all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law."

(*People v. Stewart* (2004) 33 Cal.4th 425, 446.)

> [Citation.] Instead, "it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." [Citation.] "On review, if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence." [Citation.]

(*Haley,* 34 Cal.4th at p. 306.)

The erroneous excusal of a prospective juror based on her views on capital punishment does not require reversal of the guilt judgment or finding of special circumstances, but does compel the automatic reversal of the defendant's death sentence. (*People v. Stewart, supra,* 33 Cal.4th at pp. 454-455; *People v. Heard* (2003) 31 Cal.4th 946, 966.) "[T]he error is not subject to a harmless-error rule, regardless whether the prosecutor may have had remaining peremptory challenges and could have excused" the prospective juror in question. (*People v. Heard, supra,* 31 Cal.4th at p. 966.)

C. The Excusal Of Hope B. Was A Proper Exercise Of Discretion

Hope B.'s statements regarding the death penalty were equivocal, conflicting, and revealed an obviously impaired ability to perform her duties in a penalty phase.

In her questionnaire, Hope B. stated that, from a religious standpoint, she believed "no one has the right to take a life but God." (Supp. III CT 2653.) She did not answer the question, "Would it be impossible for you to vote for death under any circumstances?" (Supp. III CT 2654; underline omitted.) Hope B. indicated that she did not know if she would automatically vote for life without parole if the trial reached the penalty phase. (Supp. III CT 2657.) In response to several questions, she indicated that her religious beliefs would prevent her from imposing the death penalty in any case. (Supp. III CT 2654-

2655.) Hope B. also repeatedly indicated that she could not accept the responsibility of deciding whether a defendant should suffer the death penalty, because she did not want it to be on her conscience that she had helped end another's life. (Supp. III CT 2656-2657.)

During oral voir dire a week later, Hope B. reaffirmed that she could not accept the responsibility of making this type of decision. (RT 2937-2938.) In contradictory fashion, she then indicated that a situation did exist in which she could return a verdict of death. (RT 2938.) Hope B. explained that she had thought further about the subject, and decided she could impose the death penalty if the victim was a member of her own family. (RT 2938-2939.) When the court pointed out the obvious, i.e., that the victims in this case were unrelated to her, Hope B. altered her response, indicating that if she could render a death verdict where the victim was a member of her family, she could do so in other cases. (RT 2939.)

Hope B. claimed she was no longer worried that taking another person's life would be on her conscience. (RT 2939-2940.) She explained that something had happened over the weekend which changed her mind, to wit, her changing of a flat tire in the early morning hours, and her sister, concerned that that was dangerous, asking her, "Aren't you worried about dying?" (RT 2940-2941.) Through the following illogical reasoning, Hope B. was then allegedly able to ease her mind about imposing the death penalty:

> Then I thought about it and I was thinking about having that on my conscience, somebody else dying. [¶] And it is like they will die no matter what because . . . I believe everyone's death is predestined. [¶] How you are going to die is how you are going to die. [¶] If I say: [¶] You have the death penalty. You are going to die . . . regardless if I say it or somebody else says it.

(RT 2941; see also RT 2946 ["After I thought about how you are going to die, you are going to die regardless of what way, it is not too much on my conscience anymore"].)

In another effort to reconcile her newly-found ability to impose the death penalty with her religious beliefs, Hope B. made the absurd comment that "9 times out of 10 that is how most people die, from somebody taking their life." (RT 2945-2946.)

While responding to the court's questions, Hope B. appeared hesitant, fidgety, and confused. (RT 2953.)

In the end, Hope B. acknowledged that she had "mixed up feelings about the death penalty," and that the views she had expressed in the questionnaire had not greatly changed. (RT 2949.)

Given the equivocal and conflicting nature of Hope B's statements during oral voir dire, the trial court's credibility determination that Hope B.'s questionnaire responses more accurately reflected her views (RT 2953-2954) should be binding on appeal. (*See People v. Haley, supra,* 34 Cal.4th at p. 306.)

Johnson's contention that the court "unfair[ly] reli[ed]" on Hope B.'s questionnaire (JAOB 109-111) is meritless. After conducting a lengthy oral voir dire of Hope B., and observing her demeanor, the court simply found her questionnaire responses to be more credible. This was well within the trial court's province. (See *Wainwright v. Witt* (1985) 469 U.S. 412, 428 ["a finding [concerning a venireman's state of mind] is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province"]; *People v. Stewart, supra,* 33 Cal.4th at p. 451 [if trial court conducts follow-up examination of prospective juror and thereafter determines, in light of questionnaire responses, oral responses, and its own assessment of demeanor

and credibility, that prospective juror's views would substantially impair performance of her duties, court's determination is entitled to deference].)

In light of the above, the trial court properly exercised its discretion to excuse Hope B.

XIV.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS TO SEVER THEIR PENALTY PHASES

Appellants contend that the trial court abused its discretion by denying appellants' motions to sever their penalty phases. (AAOB 673-691; JAOB 222-233.) Respondent disagrees.

A. Relevant Proceedings Below

Prior to trial, Allen moved to sever his trial from that of Johnson. (CT 470-482.) Regarding severance of the penalty phase, Allen argued that his association with Johnson would prejudice him, because the prosecution would be offering evidence of numerous other crimes committed by Johnson. (See CT 476, 479; RT 591.) The prosecutor disputed Allen's claim of prejudicial association, noting that Allen had previously been convicted of first-degree murder himself. (CT 489; see also RT 592-593.) In denying severance, the trial court cited *People v. Roberts* (1992) 2 Cal.4th 271, and indicated that the court and counsel could "focus the jury" as to each defendant. (RT 593.)

Before the start of the penalty phase, Allen's counsel indicated that Allen was going to call Reverend Robert Douglas as a gang expert. (RT 5629-5630.) Douglas would testify that Allen

> . . . was not the shot caller in this case. Mr. Allen because of his tender years at the time, 18, and because of his troubled childhood, and living in that same area . . . all of his life, . . . became susceptible of doing things that were a result of someone telling him what to do . . . .

(RT 5630-5631.)

Following this offer of proof, Johnson's counsel requested that Johnson's penalty phase be tried before Allen's. (RT 5636-5640.) Johnson's counsel argued:

It is becoming clear to me that what is going to happen in this penalty trial is that Mr. Johnson is going to be prosecuted from both sides of the table here.

If [Allen's counsel] is going to join in as the assistant prosecutor, . . . and take the position that Mr. Johnson is a shot caller and Mr. Johnson is responsible for these crimes, that there is going to be an apparent comparison of his culpability versus that of Mr. Allen, it will be instructed [*sic*] to the jury that the death penalty is appropriate for Mr. Johnson, but not appropriate for Mr. Allen.

The jury will be invited to make these comparisons . . . not by the prosecution simply, but it is going to be echoed by counsel for [Allen].

And we are going to lose the individualized determination by the jury.

(RT 5636-5637.)

The court denied Johnson's request, finding "no good reason" to conduct separate penalty-phase trials. (RT 5640.) The court explained:

I can see an argument that may concern you of that in the relative scheme of things: [¶] [Allen] is not as culpable . . . . [¶] That [Allen] acted under the substantial domination of another . . . .

The problem with your argument is that the jury has heard exactly what role each defendant had. [¶] The only finding they could have made, given the evidence presented, . . . was that Mr. Johnson provided a weapon to Mr. Allen and Mr. Allen utilized it to kill the [two] fellows . . . . [¶] They have heard evidence in the guilt phase to suggest that Mr. Johnson is a . . . shot caller. [¶] His own words came back to haunt him. . . .

Now to say that we need [two] separate, in effect, mini trials in penalty will in no way cause the jury to separate their minds what they know to be the relative role.

. . . [Y]ou're right, each defendant is entitled to an individualized assessment. . . .

Mr. Allen, on the scheme of things, is somewhat more culpable in the sense that he is the actual killer and he is the one with the prior murder conviction. . . . [¶] You may be . . . believing that the jury will see things a certain way when in reality they may not.

It is not so clear to me at all . . . that what [Allen's] attorney intends to do will put you at a great disadvantage. . . .

Any problem that you see may be cured by appropriate instructions to the jury and, if necessary, during the penalty phase, appropriate admonitions as various evidence comes in, and even as various arguments are made.

So I will not honor your request at this point to have the jury decide these matters in a vacuum one at a time. [¶] I think it is more probable [*sic*] that they assess each at the same time because it is the same evidence 90 percent of the way here, the circumstances of this offense and so forth . . . .

(RT 5641-5644.)

Before opening statements in the penalty phase, the court instructed the jury:

Your duty will be as to each defendant to weigh all the evidence that you heard in the first phase and the evidence you will hear now, weigh that evidence individually as to each defendant and give an individualized penalty phase assessment as to each defendant.

(RT 5806.)

During his opening statement, Allen's counsel indicated that, according to Jelks's testimony, Allen went to Johnson's house on August 5, 1991. Johnson was outside with several others, "trying to figure out what to do about the [two] Crips sitting . . . in the Toyota around the corner." Johnson asked who was going to "serve" the two Crips, and Allen said, "I'll do it." Johnson retrieved an Uzi, "gave it to [Allen] and then called [Allen] aside and . . . gave him instructions . . . ." A car arrived, Johnson spoke with the driver, and Allen got in the car. After the shooting, Allen returned to Johnson's house. Johnson took back the Uzi, and gave it to another person. Johnson then arranged for Allen to leave in a car with someone else. (RT 5829-5830.)

Allen's counsel stated that Johnson had "dominated the murder of the [two] men" (RT 5830), Allen "acted under the substantial domination of Mr. Johnson" (RT 5831), and Johnson "dominated activities of the 89 Family Bloods for the rest of 1991 through . . . the beginning of 1993, sometimes from the streets, sometimes incarcerated" (RT 5830).

After Allen's opening statement, Johnson's counsel moved for a mistrial, and renewed his severance motion, arguing that Allen's counsel "appears to have joined forces with the prosecution against Mr. Johnson." (RT 5832-5833.) The court denied these requests, observing that Allen's counsel had simply summarized the guilt-phase evidence, "[r]ecognizing the obvious fact that the jury has now convicted both Mr. Johnson and Mr. Allen." (RT 5833-5834.) The court explained that Allen's counsel was entitled to make the argument that Allen had acted under the substantial domination of another, "insofar as it might be shown by the facts," and noted that there was "already some evidence . . . that would tend to indicate a relative ranking or hierarchy between the [two] defendants." (RT 5834-5835.) The court further explained that "[i]t [was] not inappropriate for either counsel . . . to stress their particular client's relative roles in the case." (RT 5835.)

During his examination of Reverend Douglas, Allen's counsel asked Douglas for the basis of his opinion that Allen had been under the domination of the 89 Family. Douglas responded: "Without being facetious or funny, to synopsize it, Michael Allen is like a Luka Braza in The Godfather, or Tex Watson in Manson." Johnson's counsel objected that that was "a guess on the part of the witness," and moved to strike Douglas's answer. Allen's counsel asked Douglas to "put it a different way, if you can," and the court agreed. (RT 6709.) Douglas then used a different analogy. (RT 6709-6710.)

Johnson's counsel subsequently moved for a mistrial on the ground that Douglas had inferentially compared Johnson to Charles Manson. (RT 6717-6718.)[177] The court denied the motion, finding that Douglas's complained-of testimony

> . . . was meaningless and will be rejected by the jury. It was without substance, without foundation, without tremendous relevance, and it did no more than restate -- where it did make sense at all, . . . what the jury has heard from other witnesses. . . .
>
> I also note that in terms of what the jury has already heard from [Johnson's] own testimony in another case, they heard [Johnson] describe himself in terms not dissimilar from what we've heard from [Douglas], when he draws an analogy, or attempts to[,] in an answer that didn't actually mention [Johnson] at all . . . .

(RT 6718-6720A.)

At the conclusion of the penalty phase, the court instructed the jury that

> [e]vidence has been admitted against one of the defendants, and not admitted against the other. . . .

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177. When the court queried if Johnson's counsel was asking for an admonition to the jury, Johnson's counsel indicated that he was only requesting a mistrial at this point. (RT 6719.)

Do not consider such evidence against the other defendant.

Evidence offered in the penalty phase of other crimes allegedly committed by defendant Johnson may be used only against defendant Johnson. Evidence offered in the penalty phase of any other crime allegedly committed by defendant Allen may be used only against defendant Allen.

(CT 1013; RT 7351-7352.)

The other crimes allegedly committed by appellants were listed separately as to each appellant. (CT 1037, 1039; RT 7374-7376.)

The jury was also instructed:

Evidence has been received in the penalty phase of various statements allegedly made by defendant Johnson and various conversations involving defendant Johnson.

Do not consider the evidence of such statements against defendant Allen.

(CT 1014; RT 7352.)

In addition, the jury was instructed that it "must decide separately the question of the penalty as to each of the defendants." (CT 1067; RT 7408.)

During her penalty-phase closing argument, the prosecutor anticipated that Allen's counsel would "try to force [the jury] to make a comparison" between Allen and Johnson on the issue of whether Allen had acted under the domination of another. (RT 7468.) The prosecutor argued that, while Johnson occupied a position of greater respect in the gang, that, in itself, did not mean Allen had been dominated. Rather, Allen, who the prosecutor described as "a cold blooded killing machine," "made a choice" and "volunteered" to carry out this mission. (RT 7469, 7479.) When Allen pulled the trigger, he was "acting on his own." The prosecutor thus argued that Allen could "not lay this [crime] at the feet of somebody else." (RT 7470.)

Allen's counsel argued to the jury that Allen had acted under the substantial domination of Johnson. (RT 7495, 7499, 7503, 7511.) In support of his assertion that Johnson was a "dominating person," Allen's counsel referred to Detective Barling's testimony that Johnson "called the shots"; Detective Aspinall's testimony that the gang followed Johnson's orders; Keith Williams' statement that others were scared of Johnson because they knew he would "kill you and think nothing of it"; Douglas's testimony that "shotcallers lead gang activities and subordinates respond to the shotcaller's thinking"; the testimony of Shina Parker, Emerald Parker, and TaShanna Sowell that Johnson forced them to perform sexual acts; Marcellus James's testimony that after Mosley was killed, Johnson sent someone to "check out the scene"; statements made by Johnson in his tape-recorded telephone calls and note while incarcerated; and Freddie Jelks's testimony about what occurred on the date of the charged murders. (RT 7495-7499.)

During his closing argument, Johnson's counsel noted Johnson's statement to Detective Aspinall that "[m]y reputation exceeds itself." (RT 7536.) Johnson's counsel then argued that

> the lawyers for Mr. Allen try to capitalize on that, they want to put things at Mr. Johnson's doorstep. [¶] You've heard the evidence, you decide these things. . . . [I]t's pretty hard to say that Mr. Johnson had anything to do with the Chester White killing. [¶] So, it seems a little unfair to me to try to put everything on [Johnson].

(*Ibid.*)

B. The Denial Of Severance Was Not An Abuse Of Discretion, Nor Did It Result In Any "Gross Unfairness"

A trial court has "broad discretion" in deciding whether to sever a codefendant's penalty trial. (*People v. Ervin* (2000) 22 Cal.4th 48, 96; see also *id.* ["in light of the statutory preference for joint trials (see § 1098), severance

remains largely within the trial court's discretion"]; *People v. Roberts, supra,* 2 Cal.4th at p. 328 [referring to the "undisputed statutory preference for a joint penalty trial following a similar trial of guilt (§ 190.4)"].) "In the absence of a showing that the jurors . . . were unable or unwilling to assess independently the respective culpability of each codefendant," no abuse of discretion in failing to sever will be found. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1174.) Further, "[w]hen the trial court's denial of severance . . . is urged as error on appeal . . ., the error is not a basis for reversal . . . in the absence of identifiable prejudice or 'gross unfairness . . . such as to deprive the defendant of a fair trial or due process of law.'" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287.)

Allen's claim that his constitutional rights were violated by the presentation in the penalty phase of "extensive and highly inflammatory evidence relating to . . . Johnson" (AAOB 679-680) is without merit. The jury was instructed before the penalty phase began that it must "weigh [the] evidence individually as to each defendant," and give each an "individualized penalty phase assessment." (RT 5806.) At the end of the penalty phase, the jury was instructed that evidence of other crimes committed by either defendant could only be used against that defendant (CT 1013; RT 7351-7352), evidence of statements made by Johnson could not be considered against Allen (CT 1014; RT 7352), and the jury must "decide separately the question of" each defendant's penalty. (CT 1067; RT 7408.) There is no reason to believe appellants' jury did not follow these instructions. As stated by this Court in *People v. Taylor, supra*:

> [W]e find nothing in the record indicating defendant's jurors failed to assess independently the appropriateness of the death penalty for defendant or [codefendant], or engaged in improper comparative evaluations of these men. The penalty phase jury was instructed to consider the evidence separately as to each defendant, and not consider

as evidence against one defendant any evidence admitted only against another. Moreover, the jury was told to "decide separately the question of the penalty as to each of the defendants[]" . . . . [Citation.] These instructions were adequate to ensure individual consideration of penalty as to each defendant.

(26 Cal.4th at p. 1174.)[178]

Further, the evidence of Johnson's other violent criminal activity obviously was not prejudicial -- but beneficial -- to Allen. Such evidence exemplified why Johnson was feared, and furnished support for Allen's claim that he had acted under Johnson's domination.

Allen's bald assertion that the prosecutor "encouraged the jury to judge and condemn the two defendants as a single entity" (AAOB 680) is meritless. In closing argument, the prosecutor explained why Allen -- who she appropriately described as "a cold blooded killing machine" -- was individually deserving of the death penalty. (See RT 7465, 7467, 7469-7470, 7473-7474, 7477, 7479, 7482.)

Johnson argues that the failure to sever seriously prejudiced him because

> . . . [w]hile [Johnson] did not in any way concede his guilt for the capital offenses, Allen acknowledged that the shootings occurred in the manner portrayed by the prosecution, but attempted to stress that [he] was a mere victim of [Johnson's] domination. This undermined any consideration of lingering doubt . . . .

(JAOB 229.)

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178. As previously discussed at pp. 82-83, *ante*, the incident regarding Alternate Juror No. 2 (AAOB 687) had nothing to do with, much less called into question, the jury's ability to follow the court's limiting instructions.

Johnson further argues that

> [t]he prosecution's case against [him] was significantly bolstered by [Allen's] counsel's acknowledgment . . . that [Johnson] was a feared, violent, shot-caller who dominated others, including [Allen]. Moreover, evidence of [Allen's] background, [Johnson's] alleged culpability for other crimes committed by [Allen], expert testimony regarding [Johnson's] future dangerousness, and comparisons between [Johnson] as leader and [Allen] as follower would never have been permitted if [Johnson] were tried separately.

(JAOB 231-232.) These arguments lack merit.

"That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials." (*People v. Cummings, supra,* 4 Cal.4th at p. 1287; accord *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) In any event, Allen's attempt to shift responsibility to Johnson was unsuccessful, as Allen also received a death verdict.

Reverend Douglas testified that people can be shot-callers from jail or prison. (RT 6706.) He opined that the reason a shot-caller would continue to order missions while incarcerated would be to maintain his "influential power." (RT 6708-6709.) Johnson's claim that this constituted improper expert testimony regarding his future dangerousness (JAOB 226, 229-230, 232) has been waived due to the failure to raise such an objection at trial.

Nor was Douglas's above testimony inadmissible pursuant to *People v. Murtishaw* (1981) 29 Cal.3d 733, upon which Johnson relies on appeal. The *Murtishaw* court stated, "One can imagine few matters more prejudicial at the penalty trial than testimony from an established and credentialed expert that defendant, if sentenced to life without possibility of parole, would be likely to kill again." (29 Cal.3d at p. 773.) Douglas did not purport to predict that Johnson would order additional killings from prison if given a life sentence.

Moreover, Douglas testified to nothing more than what Johnson's tape-recorded telephone calls and note from behind bars had already demonstrated. (See *People v. Harris* (2005) 37 Cal.4th 310, 358 [prosecution may argue future dangerousness if argument is based on the evidence].)

Johnson is also incorrect when he states that Allen's counsel "acknowledged that the shootings occurred in the manner portrayed by the prosecution." (JAOB 229.) Allen's counsel never admitted that Allen, in fact, shot and killed the victims at Johnson's behest. (See RT 7498 ["[L]et's look at what happened on the day of these murders. We have Mr. Johnson, *apparently, based on the testimony* . . . ." (italics added)].) Counsel simply argued, based on the factual circumstances that the jury had found to be true beyond a reasonable doubt, that Allen's appropriate punishment was life without parole.

That Johnson was "a feared, violent, shot-caller" (JAOB 232) was more than amply demonstrated by the evidence, including Johnson's own testimony in another case, and Johnson's tape-recorded and handwritten statements. Allen's counsel's mere reliance on such evidence in his argument to the jury did not, as Johnson asserts, "significantly bolster[]" the prosecution's case. (JAOB 231-232.)

There was no evidence or argument that Johnson had any involvement in Allen's murder of Chester White. While Douglas opined that Allen had been under the gang's domination from 1991 to 1993 (RT 6703, 6709), such, of course, did not implicate Johnson in White's murder. Allen could have formed the idea to kill White on his own, or acted at the direction of someone other than Johnson. As Douglas testified, there could be more than one shot-caller in a gang. (RT 6706.) Detective Barling also testified that, as of August 1991, Johnson had "a lot more respect than *a majority of* the 89 Family." (RT 4303 [italics added]; see also RT 4303-4304 ["There were a couple of other people

[on the street at the time] that had maybe just as much respect as [Johnson] did"].) Moreover, the jury was instructed that "[e]vidence . . . of any other crime allegedly committed by . . . Allen may be used only against . . . Allen." (CT 1013; RT 7352.)

Finally, contrary to Johnson's suggestion, the fact that Johnson was the leader who masterminded the carwash shooting was certainly relevant in Johnson's penalty phase. (See § 190.3, subd. (a) [in determining penalty, trier of fact shall take into account circumstances of crime of which defendant was convicted].)

The court thus did not abuse its discretion in denying appellants' motions to sever their penalty trials, nor did the denial of severance result in any "gross unfairness." Appellants' claims must therefore be rejected.

XV.

EVIDENCE JOHNSON SOLICITED THE MURDERS OF DETECTIVE MATHEW AND NECE JONES WAS PROPERLY ADMITTED

Johnson contends that evidence he solicited the murders of Detective Mathew and Nece Jones was improperly admitted in aggravation, because there was insufficient evidence to establish the crime of solicitation, and such evidence was inflammatory. (JAOB 233-260.) Respondent disagrees.

A. General Principles

"Evidence of other criminal activity involving force or violence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt." (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) "The requisite 'criminal activity' must amount to conduct that violates a penal statute." (*Id.* at p. 672.) "The trial court's decision to admit evidence of prior criminal activity is reviewable for abuse of discretion." (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

Section 653f, subdivision (b), provides:

> Every person who, with the intent that the crime be committed, solicits another to commit or join in the commission of murder, shall be punished by imprisonment in the state prison for three, six, or nine years.

B. Solicitation Of Murder Of Detective Mathew

1. Relevant Proceedings Below

Johnson's counsel moved to prevent the prosecution from introducing evidence that Johnson had solicited the murder of Detective Mathew. (CT 938-942.) Johnson's counsel argued

> [t]here [were] no statements by . . . Johnson which constitute a solicitation or a direction to commit murder. . . . Johnson's statements

may evidence a dislike of Detective Mathew, but his statements do not amount to solicitation under the law . . . .

(CT 941.)

In her offer of proof, the prosecutor quoted Johnson's tape-recorded telephone conversations from Ironwood State Prison on August 23, 1994 and October 7, 1994. (CT 949-951.)[179] In the August 23 conversation, Johnson stated:

. . . I'm down to something like 50 something days . . . . I'm gonna be able to have a scope for old Matthews . . . . And after that motherfucker would be able to kick back . . . .

(Supp. IV CT 443.)

During the October 7 conversation, Johnson said: "I need one of them Barlim Barlims.[180] . . . And put an eye on that motherfucker. . . . [P]ut a . . . glass -- put a pair of binoculars on that mother."[181] (Supp. IV CT 445.) Johnson also stated: "I wanna hook up something . . . for your friend." The other person asked: "Who, Matthews?" Johnson replied: "Yeah, fucking Indian.[182] . . . I don't want him to see me till it[']s too late. (Laughter[.])" The other person added: "When he see you it'll be the last time." (Supp. IV CT 446.) Johnson said: "Yeah, he be talking about 'Why me?' (laughter)

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179. The prosecutor also noted that Detective Mathew had had numerous contacts with Johnson, and had arrested numerous 89 Family and Swan gang members. (CT 949.)

180. A "Barlim" was a disrespectful term used by Bloods to refer to a Crip gang called the Harlem 30's. (RT 6026-6027.) In the context of this conversation, "Barlim Barlim" referred to a "3030" rifle. (RT 6027-6028.)

181. The phrases "put an eye," "put a glass," and "put binoculars" on somebody meant the same thing as putting the scope of a gun on that person. (RT 6027-6028.)

182. Detective Mathew was of East Indian descent. (RT 6011.)

'Why me?' . . . But ah, why don't you price one out for me. Tell David I say get it." (Supp. IV CT 446-447.)

The trial court found Johnson's statements could constitute a solicitation under section 653f. Citing *People v. Bell* (1988) 201 Cal.App.3d 1396, the court explained:

> . . . [I]f the intention of the solicitor is to get help in committing a crime as opposed to the more standard situation where somebody is hired to actually go out and commit the crime . . ., my concern yesterday . . . was the following:
>
> If Mr. A suggests to Mr. B: [¶] I, Mr. A, am going to commit a murder and I will need the following tools. [¶] Can you help me in obtaining those tools, the question then is . . . assuming the requisite state of mind exists . . ., can that constitute a solicitation?
>
> According to *Bell*, the answer is yes. . . .

(RT 5788-5789.)

> The jury may find in this case quite easily that [Johnson] was serious in his decision to . . . kill the officer so far as to ask another person to help him obtain a rifle to do so.
>
> . . . What it amounts to is a solicitation under the statute. . . . [¶] The only issue for the jury is is he serious about it or is he simply bluffing or talking. . . .
>
> . . . [I]f a guy says: [¶] I am going to kill so and so and I want you to help by getting the rifle, that is a solicitation and the jury will hear about it in this case.

(RT 5952-5953.)

In addition to Johnson's tape-recorded conversations, the jury heard evidence that Detective Mathew had been assigned to the Swans gang, of which the 89 Family was a subset. (RT 6009.) Detective Mathew was "aggressive in

his investigation of the Swans." (RT 6011.) Johnson complained to Detective Barling about Detective Mathew on more than one occasion between 1989 and 1993. Johnson was upset that Detective Mathew was always "messing with" him. (RT 6010-6013.)

Detective Mathew also was one of the detectives who interviewed Johnson at Ironwood State Prison on June 8, 1994. (RT 4173, 6040-6041, 6061.) About an hour after that interview, Johnson had a tape-recorded telephone conversation with fellow gang member Reco Wilson, complaining: "The motherfucking homicide police just left from up here sweating a nigger. . . . [¶] . . . This mother fucking Mathews . . . ." (Supp. IV CT 438-439; RT 5991-5996, 6017-6018, 6063-6064.)

2. There Was No Abuse Of Discretion

As Johnson acknowledges, the case of *People v. Bell, supra,* upon which the trial court relied, stands for the proposition that "one who solicits another to aid and abet in the solicitor's commission of the underlying offense is still guilty of solicitation." (JAOB 242; see *People v. Bell, supra,* 201 Cal.App.3d at p. 1399 ["It matters not that appellant did not request [the undercover officer] to engage personally in the commission of" the offense].)

Johnson contends, however, that the person to whom he spoke could not have been an aider and abettor, and thus there was no solicitation (JAOB 241-243), because:

> Even viewing the facts in the most favorable light for the prosecution, the most that can be gleaned from these conversations . . . was that [Johnson], who was in custody, expressed that he would like to get a rifle at some time in the future and shoot the officer, and asked the person he was speaking with to find out how much a rifle would cost.

(JAOB 240; see also JAOB 241 ["At most, [Johnson] asked him to price a rifle"].)

Johnson misstates the facts. Johnson not only asked the person to "price [a rifle] out for me," but also to have someone else named David *obtain* the rifle, stating: "Tell David I say get it." (Supp. IV CT 447.)[183] Had the person to whom Johnson spoke priced a rifle for Johnson, and enlisted David to purchase it, knowing, as he did, that Johnson intended to use this rifle to kill Detective Mathew, that person certainly could have been liable for Detective Mathew's murder as an aider and abettor. (See *People v. Beeman* (1984) 35 Cal.3d 547, 561 ["a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of . . . facilitating the commission of the offense, (3) by act or advice aids . . . the commission of the crime"].)

It is of no moment that "[t]here was no evidence of any efforts made to price or purchase a rifle, and nothing to suggest that any attempt was made on [Detective] Mathew's life." (JAOB 242.) As stated in *People v. Wilson* (2005) 36 Cal.4th 309:

> The crime of solicitation . . . is complete once the verbal request is made with the requisite criminal intent . . . . Thus, solicitation does not require the defendant to undertake any direct, unequivocal act towards committing the target crime; it is completed by the solicitation itself, whether or not the object of the solicitation is ever achieved, [or] any steps are even taken towards accomplishing it . . . .

(*Id.* at p. 328; internal quotation marks omitted.)

Whether Johnson actually intended to murder Detective Mathew, or was engaging in "nothing more than general banter" (JAOB 240), was a question

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183. It is also noteworthy that, according to Johnson on August 23, 1994, he was scheduled to be released from custody in about 50 days. (Supp. IV CT 443.) Presumably, therefore, on October 7, 1994, when he solicited another's assistance to procure a rifle (Supp. IV CT 447), Johnson was scheduled for release in as little as approximately *five days*.

of fact for the jury. (Cf. *People v. Hayes* (1985) 38 Cal.3d 780, 788 [referring to issue of intent to kill as "very much a question of fact" for the jury].)

Finally, Johnson complains that the court refused to exclude under Evidence Code section 352 Johnson's reference to Detective Mathew as a "fucking Indian." (JAOB 243-244; Supp. IV CT 446; RT 5981-5984.) This complaint is without merit. As the prosecutor aptly argued:

> I think it is probative on a couple of counts. [¶] Number one, it identifies accurately by ethnicity or by nationality the only Indian CRASH officer that was out there. There are other officers by the name of Mathew, and . . . by identifying him as an Indian he's being very specific about who it is that he's talking about.
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> In addition, when you listen to the comment in the context in which it's made it is derogatory, it is hostile, and it is evidence . . . of . . . the feeling that Mr. Johnson has about . . . Detective Mathew, which is probative because it goes to motive to solicit the killing of somebody.

(RT 5982.)

In declining to exclude Johnson's derogatory reference to Detective Mathew, the court found such comment was relevant to Johnson's motive and intent, for it "show[ed] a certain degree of animosity toward the person that the People allege was the intended victim." (RT 5983.) The comment also was "relatively mild compared to some of the other facts in the case," and the court did not find "any potential that the jury [would] be emotionally inflamed [by it], or . . . distracted from their fact-finding duties." (RT 5983-5984.) There was no abuse of discretion. (See *People v. Champion, supra,* 9 Cal.4th at p. 913 [trial court has broad discretion under Evidence Code section 352].)

C. Solicitation Of Murder Of Nece Jones

1. There Was Ample Evidence That Johnson Solicited Jones's Murder

Nece Jones was a "smoker" (i.e., a person who frequently smoked cocaine) who lived in the neighborhood. (RT 6016, 6023, 6042.) She would have been considered a neighborhood associate of the 89 Family. (RT 6016-6017.)

In 1993, Willie Bogan was murdered. (RT 6115-6116.) Charles Lafayette, a Swan gang member, was arrested for the murder. (RT 6014, 6116.) Lafayette was one of Johnson's "homeboys." (RT 6015, 6125.)

Jones provided Detective Gary Aspinall with information regarding the Bogan murder, and identified Lafayette as Bogan's killer. (RT 6115-6117.) Jones testified at Lafayette's trial on May 25, 1994. (RT 6118.) On June 6, 1994, the jury hung and a mistrial was declared. The case was rescheduled for trial, and Jones was ordered back as a witness. (RT 6118-6119.)

On June 8, 1994, Johnson was interviewed by detectives at Ironwood State Prison. (RT 6041, 6061.) The detectives left the prison at about 2:30 p.m. (RT 6063-6064.) At about 3:30 p.m., Johnson had a tape-recorded telephone conversation with fellow gang member Reco Wilson. (RT 5991-5996, 6017-6018; Supp. IV CT 438.) Johnson stated: "Hey, this an emergency, dog. The motherfucking homicide police just left from up here sweating a nigger." (Supp. IV CT 438.) Johnson instructed Wilson: "You know what I'm saying, . . . them three smokers out there? . . . [P]ut a leash around their ass, by any means necessary."[184] (Supp. IV CT 440.) Johnson added: "[I]t's . . . up to . . . the streets. If they can't pull no fish up out the water, then they don't eat." (Supp. IV CT 441.) Subsequently, Johnson again

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184. The phrase, "put a leash around" someone, meant to control that person. (RT 6023-6024.)

referred to "[t]hem three smokers. The homies. . . . You know who I'm talking about." (Supp. IV CT 442.)

On June 13, 1994 -- five days after the above conversation -- Wilson shot and killed Jones. (RT 6018, 6041-6042, 6147-6151, 6154, 6119.)[185]

On June 30, 1994, Detective Aspinall conducted a tape-recorded interview of Johnson at Ironwood State Prison. (RT 6120.) At first, Johnson denied knowing anything about Jones's death. (RT 6121.) Later in the conversation, however, Johnson admitted that he knew what had happened. (RT 6121-6122.) "Kill or be killed," Johnson remarked. (RT 6123.)

Johnson added:

> [I]f I run into anybody that has . . . testified or has the power to put one of my homies down[,] . . . [a]nd . . . if I'm gonna expect for him to do the same for me, then that witness is expendable to me. My homie's life becomes more important . . . .

(RT 6124.) Asked if he would "kill that associate," Johnson replied: ". . . I would -- that would be my action." (RT 6124-6125.) Johnson commented, "Snitches die." (RT 6138.) He denied responsibility for Jones's death, however. (RT 6127-6128.)

During a tape-recorded telephone conversation in September 1995, Johnson was told that the police had a tape of him talking to Reco from prison. (RT 6497, 6500; Supp. IV CT 466.) Johnson responded: "I ain't never talked to . . . R[e]co from no pen." (Supp. IV CT 466.) Johnson then acknowledged, "Damn, I probably . . . did. Haaaaaa." (Supp. IV CT 467.) Johnson said to "tell R[e]co, don't even trip, if I did call him or not 'cause . . . all he got to do

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185. Jones had been provided safe housing away from the neighborhood, but in the days preceding her death, Detective Aspinall lost contact with her. (RT 6115-6119.) Jones was killed while with another woman in 89 Family territory. (RT 6119, 6148.)

is subpoena me . . . . And I'll get up on the stand and say, I ain't never talked to that man in my life." (Supp. IV CT 468.)

Johnson's claim that the above evidence was insufficient to establish he solicited Jones's murder (JAOB 253-255) is meritless.

While Johnson did not mention Jones by name (JAOB 254), he twice referred to "[t]hem three smokers. The homies." (Supp. IV CT 442; see also Supp. IV CT 440.) Jones was a "smoker" who lived in the neighborhood, and was one of the neighborhood associates of the gang. (RT 6016-017, 6023, 6042.) She recently had testified against Lafayette, one of Johnson's fellow gang members, in a murder trial. (RT 6015, 6118, 6125.) On June 6, 1994, two days before Johnson's conversation with Wilson, Lafayette's jury hung, the case was reset for trial, and Jones was ordered back as a witness. (RT 6118-6119.) A rational juror thus certainly could have found that when Johnson directed Wilson to "put a leash around" the "three smokers," one of whom was Jones.

Johnson's attempt to distance himself from Lafayette, asserting that Lafayette was "not even a member of [Johnson's] gang" (JAOB 254), fails. As indicated above, Lafayette was a member of the Swans, of which the 89 Family was a subset. (RT 6009, 6014-6015, 6116.) At some point, the 89 Family even changed its name to the 89 Family Swans. (RT 4294.) And the 89 Family and the Swan set to which Lafayette belonged were "[v]ery close. Almost one and the same set." (RT 6125.)

That Wilson may not have harmed Clarissa Weathered, the other "smoker" who apparently was with Jones when Jones was killed (see JAOB 254; RT 5607, 6148), is insignificant. There was no evidence that Weathered was a witness against one of Johnson's fellow gang members.[186]

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186. It is also plausible that Wilson believed killing Jones in front of Weathered would have sent a sufficient message to the other "smokers"

Johnson also argues that "[t]he evidence was . . . equally supportive of a more benign interpretation . . . that [Johnson] was not asking Wilson to kill anyone, but . . . was seeking to ensure that no crimes . . . were committed while the police were investigating the gang." For example, during their conversation, Johnson told Wilson to "clean up," and "lock everything down," because the police were "searching," and "trying to put some shit on us." (JAOB 254; Supp. IV CT 438-440.) This argument lacks merit.

Had Johnson indeed instructed Wilson to suspend criminal activities because the police were focusing on the gang, it does not follow that, just five days later, Wilson would have shot Jones multiple times on the street, in broad daylight, in 89 Family territory. (See RT 6043, 6072-6073, 6075-6077, 6119, 6149-6151.)

Moreover, Johnson's directive to "put a leash around [the three smokers'] ass, by any means necessary" (Supp. IV CT 440), was hardly benign. Nor was Johnson's statement, "[I]t's . . . up to . . . the streets. If they can't pull no fish up out the water, then they don't eat." (Supp. IV CT 441.) Rather, in the words of the trial court, these were "some fairly unmistakable marching orders" (RT 6092) to silence these individuals by any means necessary. Johnson, who expressly was aware that the prison's "phones [were] . . . fucked up" (Supp. IV CT 438), logically would not have solicited Jones's killing in direct terms. As the court observed, Johnson said "[e]verything you could say but: [¶] kill them." (RT 6089.)

Johnson's motive to kill Jones was further evidenced by his statements to Detective Aspinall approximately two weeks after Jones's murder. Johnson told Detective Aspinall that "[s]nitches die" (RT 6138), and if a witness testified against one of his fellow gang members, that witness's life was "expendable" (RT 6124). In addition, Johnson showed a consciousness of guilt

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regarding the consequences of cooperating with the police.

by initially lying to Detective Aspinall that he did not know anything about Jones's death (RT 6121-6122), and by indicating in a subsequent telephone conversation that he would deny having spoken to Wilson (Supp. IV CT 468).

Accordingly, there was ample evidence for a rational juror to find beyond a reasonable doubt that Johnson had solicited Jones's murder.

2. Evidence Of The Jones And Bogan Murders, And Johnson's Statements About Killing Witnesses, Was Properly Admitted

Johnson complains:

> The trial court allowed the prosecutor not only to present evidence that [Johnson] solicited the Jones murder from prison, but also to introduce details of the murder itself, replete with photographs, and eyewitness and autopsy testimony. This evidence was unnecessary to prove the solicitation charge . . . . It was, however, extremely emotional and inflammatory evidence.

(JAOB 255-256.) Respondent disagrees.

That Wilson carried out the murder of Jones days after his conversation with Johnson was clearly relevant to the solicitation charge, for it evidenced the intent behind Johnson's coded language.[187] (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134 ["Under section 190.3, factor (b), the prosecution may introduce evidence to show not only the conduct establishing the criminal violation, but also evidence of any relevant surrounding circumstances"]; *People v. Bolin, supra,* 18 Cal.4th at p. 320 ["In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'"].) The details of Jones's murder were also relevant to show that her killing was in the nature

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187. Indeed, Johnson challenges the evidence of solicitation regarding Detective Mathew on the ground that "[t]here was . . . nothing to suggest that any attempt was made on [Detective] Mathew's life." (JAOB 242.)

of a "hit." Nor would such details have unduly inflamed the jury, which had already been exposed to the grim reality of Johnson's handiwork in connection with the underlying murders.

Johnson also complains that "[t]he jury . . . heard details of the murder of Willie Bogan." (JAOB 256.) Based on respondent's review of the record, however, the jury heard no details of that crime, simply that Bogan had been murdered in 1993 on Manchester and Wadsworth. (RT 6115-6116.) If Johnson's complaint is that the jury should not have learned of Bogan's murder at all, that complaint would also lack merit. Jones's testimony in the Bogan murder trial against Johnson's "homeboy," in the words of the trial court, "certainly [gave] a plausible motive for the killing of this woman which [was] otherwise inexplicable." (RT 6093.) (See *People v. Perez, supra,* 42 Cal.App.3d at p. 767 ["Motive is always relevant in a criminal prosecution"].)

Lastly, Johnson asserts that the "negative characterization [of Johnson] was exacerbated by the evidence that [he] stated as a general matter that witnesses must be killed." (JAOB 256.) Johnson's statements to Detective Aspinall, made about two weeks after Jones's murder, that "[s]nitches die" (RT 6138), and the life of a witness who testified against one of his fellow gang members was "expendable" (RT 6124), were obviously relevant to Johnson's motive and intent to have Jones killed. As the trial court put it:

> Why in the world would Mr. Johnson want a particular person killed? Lo and behold, [she is] a witness against one of his cohorts. [¶] What is [Johnson's] attitude towards those people? [¶] They are expendable. [¶] If I have ever seen motive evidence in the past and recognized it, this is it.

(RT 6101.)

The above claims are thus without merit.

XVI.

THE TRIAL COURT PROPERLY PRECLUDED THIRD-PARTY CULPABILITY EVIDENCE IN CONNECTION WITH THE NECE JONES MURDER

Johnson argues that the trial court erroneously precluded him from introducing third-party culpability evidence that another person, Jesse Pipkin, may have murdered Nece Jones. (JAOB 260-266.) Respondent disagrees.

A. Relevant Proceedings Below

On cross-examination of Detective Tapia, Johnson's counsel asked the detective if, after Jones was killed, he "determine[d] whether or not [Jones] had contacted the police and made a report earlier that morning of some problem that she had." (RT 6065.) The prosecutor objected on the ground of relevance, and a bench conference was held. (RT 6065-6068.)

Johnson's counsel indicated that, on the morning of her death, Jones had had an altercation with a man who was unrelated to the 89 Family. During this altercation, the man hit Jones, and Jones threw a brick at him. Jones reported the incident to the police. This man was later seen in the area of Jones's murder, and was arrested shortly after it occurred wearing a change of clothes. (RT 6066-6067.) The court sustained the prosecutor's objection without prejudice to Johnson making a showing that there was "legally sufficient, admissible evidence" to present a third-party culpability defense. (RT 6067-6068.)

Johnson subsequently filed a motion to admit evidence of third-party culpability. (CT 980-985.) The motion provided the following offer of proof: (1) Jesse Pipkin, by his own admission and through other eyewitness testimony, was in the immediate vicinity of Jones's murder at the time of the murder; (2) Pipkin, by his own admission, physically assaulted Jones the morning of the murder; (3) Jones made a report to the police that Pipkin had beat her that

morning; (4) Pipkin had no alibi for his whereabouts at the time of the murder; and (5) Pipkin, by his own admission, changed his clothes the morning of the murder. (CT 983.)

At the hearing on the motion, the following additional information was elicited: According to the police report, Jones stated that, at about 4:45 a.m., Pipkin approached her and began to yell profanities. Jones had known Pipkin for 15 years. Jones told Pipkin to leave her alone, and he punched her in the cheek. Pipkin then fled. The officer noted a slight redness on Jones's cheek. (RT 7021.)

Jones was murdered at 11:30 a.m. (RT 7015.) Pipkin was seen in the area about a half an hour after the murder. (RT 7010, 7013, 7027.) When he was stopped by the police, Pipkin had a pair of white pants in his possession. (RT 7012-7014, 7021-7022.) Pipkin was given a gunshot residue test. The result of the test was negative. (RT 7021.)

Pipkin was interviewed by the police the day of the murder. (RT 7010, 7016.) He stated that at 4:30 a.m., he had asked Jones where Kim was. Jones would not tell him, so Pipkin hit her in the face. Jones then threw a brick at him. (RT 7011-7012, 7016.)

Johnson's counsel indicated that the defense had not been able to locate Pipkin. Johnson's counsel "tried calling the phone number that's on the police report that was taken in '94," but had not gotten any answer. "Other than that," Johnson's counsel said, "I haven't been able to get to finding him." (RT 7017.)

According to Johnson's counsel, "[t]here was a reference in the murder book that one of the witnesses initially interviewed at the scene said that somebody [named] Pipking . . . did it." When asked by the court, "What witness was that?" Johnson's counsel responded, "I think it was -- actually I don't have the murder book in front of me. It was one of the people that was standing around with . . . Jones at the time that she was murdered." (RT 7014.)

According to the prosecutor, Pipkin was never identified as the murderer. There were merely individuals who said Pipkin was in the neighborhood. (RT 7016.)

After taking the matter under submission (RT 7027), the court denied Johnson's motion, explaining at length:

> . . . [I]t seems to me that what you have is a situation where a . . . victim has been struck in the face by an individual . . . several hours before her being shot. [¶] I don't see anything else at all suggestive of the involvement of that [person] in her homicide.
>
> . . . [U]nless there is some additional evidence that would point to that person as having actually been involved in the homicide, what you have shown is weak evidence of motive, arguably some evidence of ill will between that person and Ms. Jones.
>
> But you have not shown anything whatsoever to suggest that the person was involved in the homicide, not a statement of any witness to that effect, or any available witness . . . .
>
> No physical evidence. [¶] In fact, the physical evidence would seem to indicate the contrary. [¶] The woman was not beaten to death. She was shot.
>
> The description of the person involved, . . . none of those descriptions match that of your witness, as far as the court can see, nor does the clothing. [¶] If the theory is that he had a pair of white pants that he wore earlier and he changed and he had them at the time of the contact with the police after the murder . . ., the murderer of . . . Jones was not wearing white pants according to anybody's statement that I have seen.

So you have a battery committed prior to a homicide and that does not in the court's opinion show sufficient evidence of third party culpability to allow the jury to hear it.

It would simply be misleading especially when we have to do it not based on live testimony but on the report. [¶] We will not have witnesses before the jury so the jury can assess the credibility of the people. [¶] You don't have that. [¶] Weighing that into the mix under [Evidence Code section] 352 as well, the weight of the testimony is slight. [¶] The relevance, therefore, is quite slight.

And the court feels that under 352 that the consumption of any time is too much time given the strength of that evidence and given the very, very, very marginal relevance.

I don't think there has to be any super inflated standard involved. [¶] I agree. In order to give any third party culpability, you need more than a mere suggestion that somebody might have been in a position to commit the crime. [¶] You need more than motive evidence and you need more than some opportunity evidence.

Here the opportunity evidence is . . . the guy is in the neighborhood. [¶] Even combining what I consider motive evidence, the striking, with opportunity evidence, to me it is not sufficient evidence to go to a jury or to raise a reasonable doubt . . . .

All you have is a statement of [Jones][188] coupled with a very minor injury. [¶] . . . [T]here is no physical injury other than a slight reddening, and no one saw the attack to characterize it as a beating or vicious assault which might . . . allow a jury to infer this person was so outraged

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188. The court previously indicated that Jones's statement to the police would qualify for the hearsay exception set forth in Evidence Code section 1370. (RT 7025-7026.)

and . . . beat this woman so severely that perhaps he did harbor an intent to kill her at some later time.

But there is nothing but a simple misdemeanor, [section] 242, . . . involving the same young woman who was out on the streets at a quarter to 5:00 in the morning and coming in contact with another street person and getting involved in an altercation of some sort. [¶] Of course, we don't have him available either to shed any light on it.

So there is no substantial evidence whatsoever of third party culpability, vis-a-vis her murder, so [as] to allow that testimony in. [¶] So that will not come in.

(RT 7055-7058.)

B. There Was No Abuse Of Discretion

As stated by this Court in *People v. Robinson* (2005) 37 Cal.4th 592:

In [*People v.*] *Hall* [(1986) 41 Cal.3d 826], we recognized that third-party culpability evidence is admissible if it is "capable of raising a reasonable doubt of [the] defendant's guilt," but also observed: "[W]e do not require that *any* evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*" [Citation.] As we also explained in *Hall*, in making these assessments "courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible [citation] unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion [citation]." [Citation.]

> In reviewing an assessment made by a trial court under Evidence Code section 352, we shall not disturb the ruling on appeal absent a finding that the trial court abused its discretion. [Citation.]

(37 Cal.4th at p. 625 [fn. omitted; original italics].)

Here, Johnson argues that third-party culpability evidence should have been allowed because Pipkin

> . . . had the motive, opportunity, and ability to kill [Jones]. He was seen in the area of the crime, had a violent confrontation with [Jones] the very morning of her death, and engaged in suspicious behavior (i.e., changing his clothes) after the killing took place.

(JAOB 265.) Johnson's argument is without merit.

As the trial court found, Johnson had shown merely "weak evidence of motive" as a result of Jones's altercation with Pipkin several hours before her being shot to death. (RT 7055.) Jones suffered only a minor injury during that altercation -- a slight redness on her cheek (RT 7019, 7021, 7058) -- and there was no evidence that Pipkin sustained any injury when Jones allegedly threw a brick at him (RT 7012).

Regarding opportunity and ability, the only evidence was that Pipkin -- apparently a street person like Jones who lived in the area (RT 7026, 7058) -- was seen in the neighborhood about a half an hour after the murder. (RT 7010, 7013, 7016, 7027, 7057).

And as for Pipkin's allegedly suspicious behavior in changing his clothes, it is unclear whether Pipkin did so that morning after his altercation with Jones, or after Jones's murder. In any event, the change of clothes hardly seems significant given that, when he was stopped, Pipkin was carrying the pants out of which he apparently had changed. (See RT 7012-7014, 7021-7022.)

Accordingly, there was only weak evidence of motive and opportunity. There was not, as required, "direct or circumstantial evidence linking [Pipkin] to the actual perpetration of" Jones's murder. (See *People v. Robinson, supra,* 37 Cal.4th at p. 625; italics omitted.) The trial court thus did not abuse its discretion in excluding the proffered third-party culpability evidence.[189/]

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189. Johnson's reliance on *United States v. Crosby* (9th Cir. 1996) 75 F.3d 1343 (JAOB 264-265), is misplaced. Aside from the fact that Ninth Circuit decisions are not binding on this Court, *Crosby* is distinguishable. Unlike the instant case, in *Crosby*, there was strong evidence that someone other than the defendant had the motive, opportunity, and ability to commit the crime.

Crosby was convicted of the aggravated assault of Dorothy Benton. (75 F.3d at p. 1345.) The erroneously excluded evidence would have shown that, at the time of the assault, Dorothy lived with Crosby, but was still married to Hoskie Benton. Hoskie resided five miles from the place where Dorothy was assaulted, and was not out of town at the time of the assault. More importantly, about nine months before the charged assault, Hoskie had pled guilty to brutally assaulting Crosby. Hoskie was apparently jealous because Crosby was dating Dorothy. Donald Dale, who was Dorothy's neighbor when she lived with Hoskie, had seen Hoskie beat Dorothy on at least three occasions, had once seen Hoskie chase her with an axe, and had seen Dorothy wear sunglasses to hide blackened eyes caused by Hoskie's beatings. In addition, Dorothy had reported that Hoskie beat her three or four times a month when they lived together, including once after he beat up Crosby. (*Id.* at p. 1346; see also *id.* at p. 1347 ["Most importantly, the excluded evidence showed that Hoskie was angry at his wife for having an intimate relationship with Crosby, and that this had driven him to violence in the past"].)

Here, the evidence of Pipkin's motive, opportunity, and ability to shoot and kill Jones pales to the facts in *Crosby*.

XVII.

THE TRIAL COURT PROPERLY ALLOWED THE COMPLAINED-OF GANG EVIDENCE IN CONNECTION WITH THE CHESTER WHITE MURDER

Allen contends that the trial court violated his right to due process, and Evidence Code section 352, by allowing the following "extremely prejudicial" gang evidence in connection with the murder of Chester White: testimony that victim/witness Roderick Lacy had been threatened in jail, and testimony regarding witness Earl Woods's fear of retaliation. (AAOB 692-706.) Respondent disagrees.

Allen's prior-murder-conviction special circumstance was based on his conviction of the first-degree murder of Chester White. (CT 933.) White and Roderick Lacy were members of the Avalon Garden Crips. (RT 6300-6301, 6395-6396, 6416.) In March 1993, the two were shot as they left a market on 89th and Avalon. (RT 6287-6288, 6301, 6395-6396, 6399.) White, who suffered five gunshot wounds, including a close-range wound to his face, was killed in the shooting. (RT 6296-6297, 6400-6401, 6561-6562.)

A. The Threat To Lacy

On the date of the shooting, the police talked to Lacy in the hospital. (RT 6423, 6473, 6490.) He identified Allen from a six-pack photo display as one of the shooters. (RT 6474, 6476-6480, 6492-6493.)

Lacy testified at Allen's prior-murder trial that he was unable to identify the shooters. (RT 6419.) Later, at the county jail, he heard some Blood gang members say that he had "snitch[ed]," and they were going to "have his head." (RT 6407, 6411-6415.)[190] When Lacy heard these statements, he felt concerned

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190. Lacy was in custody at the time he testified at Allen's trial. (RT 6483.)

for his safety. (RT 6413-6414.) Allen himself never threatened Lacy. (RT 6421.)

At the current trial, Lacy testified that he merely had identified Allen's photograph as being someone he knew. (RT 6402, 6423-6424.) He admitted, however, stating earlier that morning on the way to court that Allen was the person who had shot at White. (RT 6402.) Lacy acknowledged that he was still concerned for his safety: he "look[ed] over [his] shoulders every day." (RT 6415.)

Allen claims that evidence of the "'jailhouse threat'" was "baseless" and "highly prejudicial." (AAOB 696.) Respondent disagrees. Contrary to Allen's assertion (at AAOB 697), the conversation Lacy overheard in the county jail was indeed directed at him. Lacy testified that

> . . . somebody [was] coming down the tier looking for me, *asking my name, my full name* . . . . And somebody asked down the hallway, [¶] What you all want him for? [¶] He snitch on one of my homeboy[s]. We going to have his head . . . .

(RT 6411-6412; italics added.)

Allen is also wrong when he states that the court "allowed the prosecution to pursue this area of inquiry without so much as an offer of proof." (AAOB 696-697.) The prosecutor gave an offer of proof. (RT 6408-6409.) Nor did the court rebuff Allen's counsel's request for an instruction limiting evidence of the threat to Lacy's state of mind. (See AAOB 697-698.) To the contrary, the court told Allen's counsel, "[L]et's hear the balance of [Lacy's] testimony, direct and cross, then if you want to renew your request, *I'll do so*." (RT 6410; italics added.) Allen's counsel apparently did not renew his request. (See RT 6424-6425.)

Allen further argues, "Since the 'jailhouse threat' occurred after Lacy testified at [Allen's] trial for the murder of Chester White, it could not have

been the reason for Lacy refusing to identify [Allen] as the shooter." (AAOB 696.) While that threat may not have formed part of Lacy's original reason for refusing to identify Allen, it was still relevant to help explain why Lacy, on the morning of the present trial, would be willing to implicate Allen privately to law enforcement (RT 6402), yet be unwilling to do so at the trial itself. When asked how he felt about the above comments on the date of his current testimony, Lacy replied that he "look[s] over [his] shoulders every day." (RT 6415.)

Finally, evidence of the jailhouse threat was not unduly prejudicial. The jury was aware that this threat had occurred after Lacy testified at Allen's prior-murder trial, and thus "could not have been the reason for" Lacy's initial refusal to identify Allen. (AAOB 696; RT 6414-6415.) And Lacy testified that Allen himself never threatened him (RT 6421), nor was there any evidence or argument to the jury that Allen had authorized such a threat.[191]

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191. Allen additionally complains that the following testimony by Detective Tizano created the "inference . . . that [Allen] had either threatened Lacy or he had arranged to have him threatened" (AAOB 697):

> Q [BY THE PROSECUTOR]. Did Mr. Lacy's cooperation level change from your initial interview at any point subsequent?
>
> A. Yes, ma'am, it did.
>
> Q. When did that happen?
>
> A. Probably, I'm guessing, maybe -- I believe it was a couple of months after the homicide I talked to him over the phone, and at that time his attitude had changed.
>
> Q. Did he become more cooperative or less cooperative?
>
> A. Less cooperative.
>
> Q. During that period of time did Mr. Lacy, to the best of your recollection, spend some time in county jail during the same period of time when Mr. Allen was incarcerated?
>
> A. Yes, he was.

(RT 6482-6483.)

Allen's complaint regarding this testimony has been waived due to the failure to object at trial. In any event, Detective Tizano obviously was

B. Woods's Fear Of Retaliation

In March 1993, Earl Woods and his son were heading to the market on 89th and Avalon, when they heard shooting. (RT 6426-6428.) Woods saw people running from the market. He also saw White run partway across the street, and then collapse. (RT 6428-6429, 6435.)

Woods talked to the police about a half an hour after the shooting, and told them what he saw. (RT 6429, 6433, 6477, 6490.) Woods indicated that Allen and a person named Marvin, aka "Psycho," had approached the market at the same time White did. (RT 6429-6430, 6433, 6480.) Woods had known Allen and Marvin for about two years. (RT 6433.) Allen was carrying a gun that looked like an Uzi. (RT 6433-6434.) Woods identified Allen's photograph from a six-pack photo display as being one of the people involved in the shooting. (RT 6434, 6477, 6480.) He also signed a written statement. (RT 6431-6432.)

At trial, Woods testified that he had lied to the police, and had not seen Allen. (RT 6429, 6433-6434, 6438.) Woods still lived in the neighborhood, and was concerned for his family's safety. (RT 6438-6439.) He was aware that, by testifying, he was making himself a snitch. (RT 6438.) According to Woods, a snitch had "to be under protective custody, something I don't want to be under." Otherwise, a snitch was "just out there on the street waiting . . . to be a target." (RT 6439.)

On appeal, Allen complains that the prosecutor's questions regarding Woods's fear of retaliation were "carelessly phrased . . . in such a way that they did not address the witness' state of mind," but "called for evidence that members of the 89 Family . . . were extremely violent and would, in fact,

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speculating as to when Lacy's "cooperation level" had changed, and, as indicated above, the prosecutor never argued to the jury that Allen either personally threatened Lacy, or arranged to have him threatened.

retaliate against Woods, his son, and his mother." (AAOB 698; italics omitted.) Such a complaint has been waived because there was no objection to the form of the prosecutor's questions at trial.[192] Nor was a limiting instruction requested.

Allen's complaint also lacks merit. (See *People v. Burgener, supra,* 29 Cal.4th at p. 869 [evidence that a witness fears retaliation for testifying is relevant and admissible to credibility]; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1369 [jury is "entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear"].) The prosecutor's questions obviously went to Woods's state of mind. Allen himself acknowledges that "it could be inferred that the prosecutor's questions dealt with Woods' state of mind." (AAOB 699.)

The above claims must therefore be rejected.

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192. Allen's conclusory assertion that "[t]he defense did not object, because they had learned during the testimony of Connor, Jelks and James that it did no good to object" (AAOB 706), is woefully inadequate to avoid application of the waiver rule. (See *People v. Gionis, supra,* 9 Cal.4th at p. 1214, fn. 11 ["matters are not properly raised" if "perfunctorily asserted"].)

XVIII.

ANY ALLEGED EXCESSIVE USE OF JOHNSON'S MONIKER IN THE PENALTY PHASE WAS WAIVED AND HARMLESS

Johnson complains that the use of his moniker "continued unabated" in the penalty phase, and constituted impermissible "non-statutory aggravation," requiring the reversal of his death sentence. (JAOB 162-163, 168-170.) Respondent disagrees.

Prior to trial, Johnson filed a motion in limine to preclude reference to appellants by their monikers. (CT 637-640.)[193] The trial court ruled that: appellants' monikers had "some relevance" (RT 3214); requiring witnesses who knew Johnson by his moniker to refer to him in court as "Mr. Johnson" would "make[] witnesses testify out of their milieu" (RT 3215); it was inescapable that evidence of the monikers would be received on issues of identification and gang membership (RT 3215-3216); and reference to the monikers would not be overly prejudicial (RT 3216-3217). The court admonished the prosecutor, however, not to use appellants' monikers "where it simply is gratuitous and there is no need." (RT 3218.)

Johnson complains about the continued use of his moniker during the testimony of Marcellus James (citing RT 6195, 6197, 6207-6208, 6221), Keith Williams (citing RT 6321-6322, 6333), and Johnson's mother (citing RT 6761), and during the prosecutor's closing argument (citing RT 7465). (JAOB 162-163.) Initially, there was no objection to any of the complained-of references as being gratuitous or unnecessary, thus waiving any such claim on appeal.

Further, some use of Johnson's moniker when questioning James and Williams was appropriate, if not unavoidable. James knew Johnson as "Evil."

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193. Appellants' guilt-phase claims concerning the use of their monikers are addressed at pp. 138-152, *ante*. Respondent respectfully incorporates that discussion herein by reference.

He did not know Johnson's real name. (RT 4045-4046.) When the prosecutor asked James who was present when the party in 97 East Coast territory was being discussed, James referred to the people by their monikers: "Evil, Jelly Rock, F.M." (RT 6195.) During her examination of Williams, the prosecutor used Johnson's moniker when confronting Williams with statements he had made during his police interview. (RT 6321-6322, 6325.) In that interview, Johnson was referred to only by his moniker. (See Peo. Exh. 84A, attached to respondent's Motion to Augment the Record.) And when cross-examining Johnson's mother with the CD liner of a rap album by Johnson's brother, Johnson was listed therein by his moniker. (RT 6759-6761.)

The prosecutor's comment during her penalty-phase closing argument -- "We are dealing with a man [Johnson] who has a moniker which is amazingly accurate in its descriptiveness" (RT 7465) -- was well within the bounds of proper argument. As stated by this Court in *People v. Hill* (1998) 17 Cal.4th 800:

> . . . [A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence . . . . A prosecutor may . . . use appropriate epithets.

(*Id.* at p. 819 [internal quotation marks omitted]; see also *People v. Gurule* (2002) 28 Cal.4th 557, 659 ["prosecutor's characterization of defendant as 'innately evil' was well within the boundaries of proper argument"].)

There is no reasonable possibility that the alleged excessive use of Johnson's moniker affected the jury's penalty decision. The complained-of references (Johnson cites a total of approximately 10 pages of transcript) formed but a tiny fraction of a lengthy penalty phase.[194/] The jury also was

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194. The penalty phase began on September 11, 1997, and concluded on September 24, 1997. (CT 955, 994.) The opening statements start on page

properly made aware of appellants' monikers in the guilt phase, and, as indicated above, at least some reference to Johnson's moniker was appropriate in the penalty phase.

Finally, Johnson's numerous evil deeds more than earned him the death penalty. His befitting moniker to the same effect was "nothing more than icing on a very rich cake." (See *People v. McDaniels* (1980) 107 Cal.App.3d 898, 905.) In the guilt phase, the jury found appellants guilty of the first-degree murders of two people, in which Allen, at Johnson's instigation and direction, shot the victims repeatedly with an assault weapon provided by Johnson, in broad daylight, as the victims sat helplessly in their car while patronizing a place of business, for nothing more than being on the wrong side of the street. And subsequently, in the penalty phase, the jury was presented with overwhelming other-crimes evidence in aggravation, including Johnson's commission of another ambush-style murder and attempted murders, solicitations of murder of a witness and police officer, robbery, sexual assaults on children, and possession of a stabbing device in custody.

In light of the above, Johnson's attempt to obtain a reversal his death sentence due to the references to his moniker must fail.

5808 of the Reporter's Transcript, and the closing arguments end on page 7544 thereof.

XIX.

THE TRIAL COURT DID NOT RESTRICT JOHNSON'S ABILITY TO PRESENT EVIDENCE THAT WOULD HAVE "HUMANIZED" HIM

Johnson claims that the trial court restricted his ability to present, and have the jury consider, mitigating evidence that would have "humanized" him -- to wit, evidence of his family's belief that, if Johnson's life were spared, he would provide a positive influence on his son. (JAOB 266-273.) This claim is without merit.

A. Relevant Proceedings Below

Johnson's mother testified that Johnson had a three-year-old son. (RT 6747-6748.) A photograph of Johnson and his son, taken when his son was about one year old, was introduced into evidence. (RT 6748-6749, 7163.) Johnson's mother testified that she was concerned about her grandson, and hoped that the jury would give Johnson a life sentence, "so that he could at least help guide his son. . . . [¶] So [the son] won't have the same problem." (RT 6749.)

At this point, the court asked to see counsel at the bench. (RT 6749.) The court stated it was going to instruct the jury that "it is not appropriate for them to base their decision on [Johnson's] son," and the court admonished Johnson's counsel that it was not appropriate to elicit that type of testimony. (RT 6750.) The court then instructed the jury:

> Ladies and gentlemen, as emotional as the testimony gets from time to time, your duty in this case -- however your verdicts come out is of no importance to the court as long as they are arrived at appropriately. [¶] But you may not base your decision . . . either for life in prison or the penalty of death, on either defendant based on the effect that your verdict will have on any other person other than the defendant.

(RT 6750-6751.)

The court later explained to Johnson's counsel:

> [I]t is appropriate . . . to ask a family member what they believe the penalty ought to be . . ., only because circumstantially it might fit into the last factor, i.e., . . . the fact that a family member . . . wants a defendant to get a particular punishment is some circumstantial evidence, perhaps, of some sympathetic aspect of the defendant's character that would cause the relative to feel that way. I don't have a problem with that rationale. Otherwise, however, that sort of testimony is not relevant. . . .
>
> It is not appropriate . . . to ask a jury to come back with a particular result . . . for the benefit of another person, in this case Mr. Johnson's son. . . .

(RT 6771-6772.)

The court further explained:

> What I will allow, and what you can do with any family member, . . . is to elicit their opinion that the defendant shouldn't get the death penalty. . . . [¶] And you can ask any relative . . . how the defendant gets along with his son, whether he approaches his task of being a father in a serious manner, things of that nature. . . .
>
> But, no, at a minimum under [Evidence Code section] 352 . . . when you have a family member turn to this jury and in effect say, please spare Mr. Johnson for the benefit of this poor innocent [three] year old, . . . it's not an appropriate way for the jury to decide the case . . . .

(RT 6773-6774.)

When Johnson's counsel confirmed his understanding that the court was "allowing me to ask the family members if the defendant has a son, if he appears to love his son" (RT 6775), the court responded:

Sure. How they get along, what he does for his son, et cetera, because those all go to the defendant's character, which is what's at issue here, not the effect that a particular penalty would have on anybody else . . . .

(*Ibid.*)

Johnson's father testified that he thought Johnson loved his son. He explained that Johnson's son "was just about a year old when [Johnson] really had contact with him, and what he did, you can see the change, . . . it's something that he cared about." When Johnson and his father talked on the telephone, Johnson would ask about his son. (RT 6783.)

Johnson himself testified:

Q [BY JOHNSON'S COUNSEL]. You have a son who is almost [four] years old?

A. Yes.

Q. Do you have feelings about whether you would like to see him make that same choice that you made about getting involved in gangs . . .?

[THE PROSECUTOR]: Objection, relevance.

THE COURT: No, overruled. [¶] Go ahead. . . .

A. Well, I don't want him to make the same choice. I'd like him to make a different choice.

Q. And do you have any hopes, in terms of whether you can lead him to make a choice against the gang lifestyle and becoming involved in gang activities?

A. I have more than hopes.

THE PROSECUTOR: Objection, relevance.

THE COURT: Overruled. [¶] Go ahead.

THE WITNESS: I have more than hopes. I believe I actually could.

Q. BY [JOHNSON's COUNSEL]: Is that something that you intend to, if you can, . . . accomplish?

A. Yes.

(RT 6897-6898; see also RT 6936.)

On cross-examination, Johnson admitted that, since joining the gang, he himself "never backed off it." (RT 6930.)

Dr. Adrienne Davis, a forensic psychologist who was retained to evaluate Johnson, testified over the prosecutor's relevance objection that Johnson had expressed concern about his son, and hoped his son would make different decisions than he had made. (RT 6969-6971, 6983-6984.)

At the conclusion of the penalty phase, the jury was instructed that, in determining which penalty to impose, it could consider

> . . . any sympathetic . . . aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(CALJIC No. 8.85; CT 1056; RT 7397-7398.) However, the jurors' decision

> [could not] be arrived at based upon speculation about the effect [their] decision may have on any person not a defendant in this case, or in an attempt to cause or prevent any such effect.

(CT 1053; RT 7393.)[195]

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195. With respect to the latter instruction, the court explained to Johnson's counsel:

> . . . [T]he defendant's desire to raise his son is something that you want to talk about. [¶] This instruction does not take away your ability to do that at all.
>
> What you are entitled to do under the law . . . is to deal with any aspect of the defendant's character . . . that the jury might utilize as a justification for a verdict less than death. [¶] That certainly . . . includes the defendant's . . . testimony that his desire is . . . to raise his child to be gang free . . . .
>
> What you cannot argue . . . is:

During her penalty-phase closing argument, the prosecutor argued:

> [Johnson] says that he wants to raise his son and lead him away from the gangs, but this is coming from a man who has never ever backed away from the gang. [¶] You should believe the truth of his allegiance to his gang because it is corroborated across the board by evidence, by his own statements and by his actions.

(RT 7475.)

In his closing argument, Johnson's counsel argued that Johnson

> got involved in gang activity, and as Dr. Davis said, and as you know, he fully embraced it. And as he said, he never backed away from it.
>
> But things have changed. [¶] Mr. Johnson has a young son, and one picture of him with his arms around his son (indicating).
>
> And Mr. Johnson acknowledged that he's made a lot of wrong choices. . . . And he . . . knows from firsthand experience how somebody can wind up sitting here . . . in the defendant's chair, where 12 people have convicted him of [two] counts of murder, . . . and now they are going to make a decision as to whether he lives or dies. And he doesn't want that to happen to his son. And he believes that he can guide his son, and advise him away from that. . . .

(RT 7541-7542.)

> Ladies and gentleman, think of the effect that your verdict would have on that poor child.
>
> That is all this instruction is designed to and does prevent . . . . [¶] It is not precluding you from arguing . . . Mr. Johnson's . . . closeness to his son and his desires vis-a-vis the son being raised in an appropriate way . . . .

(RT 7325-7326.)

B. There Was No Error, Prejudicial Or Otherwise

In *People v. Ochoa* (1998) 19 Cal.4th 353, this Court held that

> . . . sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character.

(*Id.* at p. 456.) The *Ochoa* court explained:

> . . . [W]hat is ultimately relevant is a defendant's background and character-not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed.
>
> For example, a jury may take into account testimony from the defendant's mother that she loves her son if it believes that he must possess redeeming qualities to have earned his mother's love. But the jury may not spare the defendant's life because the jury feels sorry for the defendant's mother, or believes that the impact of the execution would be devastating to other members of the defendant's family.

(*Ibid.*)

Johnson argues that he was erroneously precluded from presenting evidence of "his family's belief that he would benefit his son if he were spared," which "would have demonstrated that [Johnson] did not care only about himself but was concerned about the future of his son and hoped to have a positive impact on his son's life." (JAOB 273.) Johnson is incorrect. Consistent with this Court's decision in *Ochoa*, the trial court merely prevented

Johnson's counsel from attempting to persuade the jury to spare Johnson's life for the benefit of his son -- which is precisely what Johnson's mother asked the jury to do. (See RT 6749-6751.)

Johnson's counsel was allowed to, and did, elicit testimony from Johnson's father that Johnson loved and cared for his son, and would ask about his son when the two talked on the telephone. (RT 6783.) Dr. Davis testified, over the prosecutor's relevance objection, that Johnson had expressed concern about his son, and hoped his son would make different decisions than he had made. (RT 6983-6984.) Johnson himself testified, over relevance objections, that he did not want his son to make the same choice he had made to get involved in gangs, and that he not only hoped, but intended to, and believed he could, lead his son to make a choice against the gang lifestyle. (RT 6897-6898, 6936.) The overruling of the prosecutor's relevance objections clearly signaled to the jury that this was appropriate testimony for it to consider. And in closing argument, Johnson's counsel argued that Johnson did not want his son to end up in this situation, and that he "believe[d] that he [could] guide his son . . . away from that." (RT 7542.)

The court's instructions did nothing more than prevent the jury from basing its penalty decision out of sympathy for Johnson's son. There was no error, prejudicial or otherwise.

XX.

APPELLANTS' CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE AND STANDARD PENALTY PHASE INSTRUCTIONS ARE WITHOUT MERIT

Appellants raise numerous challenges to California's death penalty statute and standard penalty phase jury instructions:

(a) the failure to provide intercase proportionality review violates appellants' constitutional rights (JAOB 274-277; AAOB 748-751);

(b) section 190.2 fails to meaningfully narrow the pool of murderers eligible for the death penalty (AAOB 712-716);

(c) the statute and instructions unconstitutionally fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty (JAOB 278-301; AAOB 722-732, 738-742);

(d) if proof beyond a reasonable doubt is not constitutionally required for the above findings, proof by a preponderance of the evidence is (AAOB 742-743);

(e) the failure to instruct regarding the applicable burden of proof, or that there is no burden of proof, is reversible per se (JAOB 297-301; AAOB 744);

(f) the failure to require juror unanimity regarding aggravating factors violated appellants' constitutional rights (JAOB 301-307, 333-336; AAOB 732-738, 751-752);

(g) the instructions unconstitutionally fail to inform the jury that a defendant bears no burden of proof, and there is no need for juror unanimity, as to mitigating factors (JAOB 307-309);[196]

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196. In related claims, Johnson argues that the trial court erroneously refused his proposed instructions that the jury need not be unanimous to consider mitigating evidence (JAOB 350-352), and that a mitigating factor need

(h) the instructions unconstitutionally fail to instruct on the presumption of life without parole as the appropriate sentence (JAOB 309-310);

(i) CALJIC No. 8.88's use of the phrase, "so substantial," is impermissibly vague (JAOB 311-315);

(j) CALJIC No. 8.88 unconstitutionally fails to inform jurors that the central issue is not whether the death penalty is "warranted," but whether it is "appropriate" (JAOB 315-318);

(k) CALJIC No. 8.88 improperly implies that death is the only available sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances" (JAOB 317);

(l) CALJIC No. 8.88 unconstitutionally fails to inform jurors that if they determine the mitigating factors outweigh those in aggravation, they must return a verdict of life without parole (JAOB 318-322);

(m) sentencing factor (a) of section 190.3 (circumstances of the crime) is unconstitutionally broad (JAOB 323-328; AAOB 716-721);

(n) the admission of previously unadjudicated criminal conduct under section 190.3, factor (b) (criminal activity involving force or violence) violated appellants' constitutional rights (JAOB 328-333; AAOB 751);

(o) the failure to delete inapplicable sentencing factors from CALJIC No. 8.85 violated appellants' constitutional rights (JAOB 336-337);

(p) the failure to instruct that statutory mitigating factors are relevant solely as mitigators violated appellants' constitutional rights (JAOB 337-339; AAOB 752-754);

(q) the use of restrictive adjectives in the list of potential mitigating factors impermissibly impeded the jurors' consideration of mitigation (JAOB 339; AAOB 752);

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not be proved beyond a reasonable doubt (JAOB 352, 354-355).

(r) the failure to require that the jury make written findings regarding aggravating factors violated appellants' constitutional rights (JAOB 340-343; AAOB 744-747);

(s) the denial of procedural safeguards to capital defendants that are afforded to noncapital defendants violates equal protection (AAOB 754-761; JAOB 343-348);

(t) the trial court erroneously refused proposed instructions informing jurors that they could reject the death penalty based on sympathy or compassion alone (JAOB 352-355);

(u) the court erroneously refused the proposed instruction that a single mitigating factor could outweigh a number of aggravating factors (JAOB 355-356); and

(v) California's use of the death penalty violates international law and the Eighth Amendment (AAOB 761-764; JAOB 357-362).

Such claims lack merit, and have previously been rejected by this Court:

Regarding claim (a), see *People v. Jablonski* (2006) 37 Cal.4th 774, 837 (intercase proportionality review not required);

regarding claim (b), see *People v. Jablonski, supra,* 37 Cal.4th at p. 837 (section 190.2 adequately narrows class of death-eligible offenders);

regarding claims (c) through (f), see *People v. Manriquez* (2005) 37 Cal.4th 547, 589 (sentencing function in capital case not susceptible to burden-of-proof quantification); *People v. Samuels* (2005) 36 Cal.4th 96, 137 (there is no requirement that jury be instructed concerning burden of proof -- whether beyond reasonable doubt or by preponderance of evidence -- as to existence of aggravating circumstances (other than other-crimes evidence), greater weight of aggravating circumstances over mitigating circumstances, or appropriateness of death sentence, and no requirement that jury achieve

unanimity as to aggravating circumstances);[197] *People v. Cornwell* (2005) 37 Cal.4th 50, 104 (no basis for claim that jury must be instructed on absence of burden of proof);[198]

regarding claim (g), see *People v. Panah, supra,* 35 Cal.4th at p. 499 (neither failure to instruct that reasonable doubt standard does not apply to mitigating factors, nor that jury need not unanimously agree on such factors, violated defendant's constitutional rights);

regarding claim (h), see *People v. Maury* (2003) 30 Cal.4th 342, 440 (no presumption exists in favor of life or death in determining penalty);[199]

regarding claims (i) through (l), see *People v. Smith* (2005) 35 Cal.4th 334, 369-370 (rejecting challenges to CALJIC No. 8.88);

regarding claim (m), see *People v. Hillhouse* (2002) 27 Cal.4th 469, 510 (section 190.3, factor (a), not impermissibly vague);

regarding claim (n), see *People v. Maury, supra,* 30 Cal.4th at p. 439 (introduction of evidence of unadjudicated criminal activity under section 190.3, factor (b), does not offend federal Constitution);[200]

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197. Appellants' jury was instructed that the People had the burden of proving the alleged other crimes beyond a reasonable doubt. (CALJIC Nos. 2.90 [as modified], 8.87; CT 1034, 1037-1039.)

198. Here, the jury *was* instructed that there is no burden of proof in the determination of penalty. (CT 1054.)

199. The defense, indeed, requested an instruction that the law expresses no preference as to the appropriate penalty (CT 1071), and such an instruction was given in a modified form (CT 1054).

200. Allen was previously convicted of the murder of Chester White and attempted murder of Roderick Lacy. (See CT 933; Request for Judicial Notice filed concurrently herewith.) Thus, no unadjudicated criminal activity was offered against Allen in the penalty phase.

regarding claim (o), see *People v. Samuels, supra,* 36 Cal.4th at p. 137 (trial court not required to delete inapplicable factors from penalty phase instructions);

regarding claim (p), see *People v. Hinton* (2006) 37 Cal.4th 839, 912 (rejecting complaint regarding trial court's refusal to instruct that "[t]he absence of a statutory mitigating factor does not constitute an aggravating factor"); *People v. Kraft* (2000) 23 Cal.4th 978, 1078 (trial court not required to inform jury that certain sentencing factors are relevant only in mitigation);

regarding claim (q), see *People v. Elliot* (2005) 37 Cal.4th 453, 488 (section 190.3's use of adjectives such as "extreme" and "substantial" in describing mitigating circumstances does not impermissibly limit consideration of these factors);

regarding claim (r), see *People v. Cornwell, supra,* 37 Cal.4th at p. 105 (written findings concerning aggravating factors used as basis for imposing death sentence not required);

regarding claim (s), see *People v. Smith, supra,* 35 Cal.4th at p. 374 (death penalty law does not deny capital defendants equal protection because it provides different method of determining sentence than is used in noncapital cases);

regarding claim (t), see *People v. Smith, supra,* 35 Cal.4th at p. 371 (CALJIC No. 8.88 adequately informed jurors that they could consider sympathy, mercy, and compassion in deciding whether death was appropriate penalty); *People v. Hinton, supra,* 37 Cal.4th at p. 911 (finding no error in denial of requested special instruction: "If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty");

regarding claim (u), see *People v. Prieto* (2003) 30 Cal.4th 226, 263-264 (trial court properly refused special instruction that "[a]ny mitigating circumstance presented to you may outweigh all the aggravating factors"); and

regarding claim (v), see *People v. Hillhouse, supra,* 27 Cal.4th at p. 511 (international law does not prohibit sentence of death rendered in accordance with state and federal constitutional and statutory requirements); *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 (death penalty not cruel and unusual punishment in violation of Eighth Amendment).

Accordingly, appellants' challenges to California's death penalty statute, and standard penalty phase instructions, should similarly be rejected.

ALLEGED CUMULATIVE ERROR

XXI.

REVERSAL IS NOT WARRANTED BASED ON THE ASSERTED CUMULATIVE EFFECT OF THE ALLEGED ERRORS

Lastly, appellants contend that the cumulative effect of the alleged errors warrants the reversal of their convictions and death sentences. (JAOB 362-364; AAOB 706-710.) Respondent disagrees. For the reasons previously discussed, any errors committed, whether viewed singly or in combination, did not deprive appellants of a fair trial.

CONCLUSION

Based on the foregoing, respondent respectfully requests that appellants' convictions and death sentences be affirmed.

Dated: March 21, 2006

Respectfully submitted,

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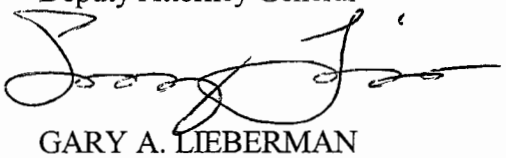

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CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 14(c))

I certify that the attached Respondent's Brief uses a 13-point Times New Roman font and contains 100,723 words.

Dated: March 21, 2006

Respectfully submitted,

BILL LOCKYER
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Michael Allen and Cleamon Johnson***
No.: **S066939**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **March 21, 2006**, I served the attached **RESPONDENT'S BRIEF (Capital Case)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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For Delivery to: Hon. Charles E. Horan, Judge

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 21, 2006**, at Los Angeles, California.

Consuelo Esparza
Declarant

Signature

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