No. S087533

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ASWAD POPS and BYRON WILSON,

Defendants and Appellants.

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE CURTIS B. RAPPE, JUDGE

MICHAEL J. HERSEK
State Public Defender

JOSEPH E. CHABOT
Bar No. 104810
Supervising Deputy State Public Defender

1111 Broadway, Tenth Floor
Oakland, California 94607
Telephone: (510) 267-3300

Attorneys for Appellant
BYRON WILSON

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

CONSTITUTIONS

STATUTES

TABLE OF AUTHORITIES

Pages

COURT RULES

TABLE OF AUTHORITIES

Pages

JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

Michael J. Hersek
State Public Defender
Joseph E. Chabot
Bar No. 104810
Supervising Deputy State Public Defender
1111 Broadway, Tenth Floor
Oakland, California 94607
Telephone: (510) 267-3300

Attorneys for Appellant
Byron Wilson

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ASWAD POPS and BYRON WILSON, Defendants and Appellants.	No. S087533 (Los Angeles County Superior Court No. BA164899)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment of death. (Pen. Code, § 1239, subd. (b).)[1]

STATEMENT OF THE CASE

The Los Angeles County District Attorney filed an information

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

against defendants Aswad A. Pops and Byron Wilson on July 9, 1998, amended it on May 26, 1999, and June 28, 1999, and alleged in counts 1 through 4 that the defendants murdered Charles Hurd, Michael Hoard, Shawn Potter, and Jessie Dunn, respectively, on January 25, 1998. (2CT 384; 4CT 906, 1025, 1028, 1030; § 187, subd. (a).)[2]

Each of the four counts also alleged that a principal was armed with a firearm (§ 12022, subd. (a)(1)) and that each defendant personally used a firearm (§ 12022.53, subd. (b)), intentionally discharged a firearm (§ 12022.53, subd. (c)), and caused each victim great bodily injury (§ 12022.53, subd. (d)). (4CT 1033-1036.)

The June 28, 1999 amended information further alleged multiple-murder, burglary-murder, and robbery-murder special circumstances with respect to each of counts 1 through 4. (4CT 1036-1037; §§ 190, subd. (a)(3), 190.2, subd. (a)(17).)

Counts 5 through 8 alleged that each defendant committed the second degree robbery of Hurd, Hoard, Potter, and Dunn, respectively, while a principal was armed and each defendant personally used and discharged a firearm, causing each victim great bodily injury. (4CT 1037-1040; §§ 12022, subd. (a)(1), 12022.53, subds. (b), (c), (d).) The court later reduced counts 6 and 7 to attempted robbery with respect to Hoard and Potter. (4CT 1027.)

Count 9 alleged that also on January 25, 1998, each defendant committed the second degree commercial burglary of "Wheels N' Stuff," while a principal was armed and each defendant personally used a firearm.

---

[2] "CT" means the Clerk's Transcript. "CTSupp" means the Supplemental Clerk's Transcript. "RT" means the Reporter's Transcript.

(4CT 1041; §§ 459, 12022, subd. (a)(1).)

Count 10 alleged that on February 6, 1998, Pops committed the attempted murder of Jane Hernandez, while personally using a firearm, discharging it, and causing Hernandez great bodily injury. (4CT 1041-1042; §§ 664/187a, 12022.53, subds. (b), (c) (d).)[3]

The amended information alleged with respect to counts 1 through 10, that Pops had two prior felony convictions (§ 211; Health & Saf. Code, § 11352, subd. (a)), and with respect to counts 1 through 9, that Wilson had one prior felony conviction (§ 211). (4CT 1042-1043; §§ 667, subds. (a)(1), (b)-(i).)

Each count alleged that each respective offense was a serious felony. (4CT 1033-1042; § 1192.7, subd. (c).)[4]

Trial began before Judge Curtis Rappe with jury selection on May 26, 1999. (9CT 966.)

On July 15, 1999, guilty verdicts were returned against both defendants on: counts 1 through 4 (Hurd, Hoard, Potter, Dunn, respectively) for first degree murder (4CT 1096-1099; 5CT 1140-1143); counts 5 (Hurd) and 8 (Dunn) for second degree robbery (4CT 1088, 1095;

---

[3] Counts 10 and 11 of the original information alleged that Wilson was involved in, respectively, the Hernandez shooting and a burglary of her home. (2CT 393-395.) The court granted Wilson's motion to dismiss counts 10 and 11. (9RT 946; 4CT 991.) Pops also obtained a dismissal of count 11. (4CT 990.)

[4] Counts 12 and 13 of the original information alleged that on January 25, 1998, defendant Aziz Harris committed, respectively, the arson of Dunn's property (§ 451, subd. (d)) and the crime of receiving stolen property (§ 496, subd. (a)). (2CT 395-396.) As a result of a plea agreement, Harris pled guilty on September 15, 1998, to receiving stolen property, and the arson charge was dismissed. (1CTSupp 63-64.)

5CT 1137, 1144); and count 9 ("Wheels N' Stuff") for second degree commercial burglary (4CT 1089; 5CT 1138). The jury found the defendants not guilty on counts 6 (Hoard) and 7 (Potter) for attempted robbery. (5CT 1127, 1128, 1145, 1146.) Pops was found guilty on count 10 (Hernandez) for attempted murder. (4CT 1090.) The jury found true all special allegations (4CT 1082-1099; 5CT 1129-1136, 1139; 21CT 5695), except for the firearm-discharge and great-bodily-injury allegations against Pops in counts 1 through 3 and 5 (4CT 1095-1098) and against Wilson in counts 4 and 8 (5CT 1137, 1143). At a later proceeding, the court found true the prior-felony allegation against Wilson. (5CT 1314.)

The penalty phase began on July 16, 1999. (5CT 1314.) After deliberating for approximately four full days and noting twice that it was deadlocked, the jury finally returned death verdicts against Pops and Wilson on August 2, 1999. (5CT 1343, 1349, 1363, 1372-1373; 6CT 1378, 1380.)

On April 7, 2000, the court denied each defendant's motion to modify the verdict and for a new trial, sentenced each to death, ordered restitution, and imposed sentences on the non-capital verdicts, findings, and enhancements. (7CT 1681-1692 [Pops], 1693-1699 [Wilson]; 40RT 6442-6449 [Pops], 6483-6490 [Wilson].)

STATEMENT OF FACTS[5]

Guilt Phase

Introduction

This case involves a shooting at a business in Compton on Super

---

[5] The Statement of Facts does not separate the prosecution's case from the defendants' case.

Bowl Sunday 1998. No witness testified to seeing the shooting itself. Christopher Williams was present at the business on the morning of the shooting but left just minutes before it occurred. (13RT 1699-1701.) Randy Bowie ran from the crime scene as the shooting unfolded. (12RT 1595.) And Anthony Brown drove up to the scene as the suspects drove away. (19RT 2986, 2990.)

The Shooting

On Sunday, January 25, 1998, Charles Hurd, Michael Hoard, Shawn Potter, and Jessie Dunn were shot inside a building at a business known as Wheels 'N Stuff, located at 1400 Sportsman Drive, Compton. (12RT 1508 [date, business]; 1514-1516 [victims]; 1533 [shots]; 1652, 1699 [address].) All four victims died of gunshot wounds – Hurd, Potter, and Hoard from .40 caliber Smith & Wesson bullets, and Dunn from 9mm caliber bullets. (14RT 1996 [Hurd]; 2006-2007 [Potter]; 2012 [Hoard]; 2078-2089 [Dunn]; 19RT 2860-2869 [bullets identified].)

Christopher Williams

On the morning of the shooting, Christopher Williams drove in his truck to Wheels 'N Stuff to obtain some marijuana from Michael Hoard, who like Williams, sold "dope" out of Wheels 'N Stuff. (13RT 1699, 1704, 1747, 1796.) Williams was a felon and on probation at the time of the shooting. He had been convicted of possession of stolen property and felony possession of marijuana with the intent to sell. (13RT 1708-1709, 1748.) Williams violated a condition of his probation by selling drugs at Wheels 'N Stuff. (13RT 1748.)

Williams was one of the owners of Wheels 'N Stuff, which Williams said was a carwash. (13RT 1700, 1750, 1837.) Wheels 'N Stuff had no particular hours. Williams kept no financial records. He did not charge

customers for washing cars, though he testified he would accept donations. He made no profit from washing cars. He had no employees. Anyone who washed cars was a volunteer. (12RT 1508; 13RT 1750, 1752, 1756, 1782, 1809.) According to Williams, on occasion he saw both customers and people who washed cars at Wheels 'N Stuff with a lot of cash in their pockets. (13RT 1742.)

On his arrival at Wheels 'N Stuff on Super Bowl Sunday 1998, Williams parked and got out of his truck. As he walked towards the building that housed the business, Williams saw two men, a driver and a passenger, "slouched down" in a dark-colored Honda parked next to the building. Williams went inside the building for 10 to 15 minutes. As Williams walked out of Wheels 'N Stuff, he saw that the men were still there. (13RT 1703-1707.) Williams testified: "[W]e were selling weed, so on my way out I asked them what are you guys doing, what do you need." (13RT 1712.) The passenger answered that they were looking for some sounds. The driver repeated what the passenger said. Williams told the men that they had the wrong shop. He then told them about a car stereo shop. (13RT 1707, 1712-1714.)

Williams identified defendant Aswad Pops as the passenger and Byron Wilson as the driver. (13RT 1706.)

When initially asked by the prosecutor at trial whether he was "positive" of his identification of the driver, Williams responded: "From a glance, yeah." (13RT 1712.) The prosecutor inquired if Williams was "positive" of his identifications when he identified Pops and Wilson at the preliminary hearing. Williams answered yes. Then the prosecutor asked Williams if he told the judge at the preliminary hearing that there was "no doubt" in his mind of his identifications. Williams responded: "No doubt."

(13RT 1726.)

On cross-examination Williams admitted to the jury that he told multiple lies to the judge during his preliminary hearing testimony. (13RT 1745-1746.)

At trial Williams also admitted that he told the police that he really did not get a good look at the driver. (13RT 1774.) When Williams saw him, the driver was "kind of like slumped down in the front seat[]." (13RT 1703.) In addition, the driver sat behind a steering wheel and tinted glass. (19RT 3026-3027.)

Williams reiterated that he did not actually look inside the car, but merely glanced at it: "I wasn't looking inside. I would glance over at it and I would look back. I've got a habit of not staring at people I don't know so, yeah, I looked over towards them and mind my own business, then I would maybe look again." (13RT 1811.) Williams explained to the police that he does not look at young males "because when you stare at young guys these days they take it as an affront or a challenge." (17RT 2650.)

Williams testified that the driver had a medium complexion. Wilson has a light complexion. Both Wilson and Williams are African American. (13RT 1811-1813, 1826; 3CTSuppII 716 [defense exh. AAA1]; exh. 50 (photo 2).)

Eighteen days after the shooting, Williams twice identified Gerron Malone, a police suspect in the shooting, as the driver from a sixpack photo lineup. (17RT 2610, 2643; 18RT 2682-2683, 2730-2732; 20RT 3131-3133; exh. 47 [photo 1].) As shown below, Anthony Brown also identified Malone as having been at the scene of the shooting. (19RT 3058-3061; 25RT 4109; exh. 47 [photo 1], exh. 53.)

And 11 days after that, Williams saw a photo of Wilson and said that

Wilson was *not* the driver. (13RT 1772-1774; 17RT 2611-2612, 2649; exh. 50.) It was not until a live lineup, 135 days after the shooting, that Williams identified Wilson. (13RT 1725.)

At trial Williams was unsure whether Wilson, appearing in the courtroom with Pops as a defendant, was the driver *or* the passenger because Wilson and Pops "almost look similar." (13RT 1761.) Pops is considerably taller and darker and has a much narrower face than Wilson. Pops is also six years older than Wilson. (9RT 959; 17RT 2709; 31RT 5156; 34RT 5768; compare exhs. 66 [Pops] and 67 [Wilson].)

Williams left Wheels 'N Stuff before the shooting. As Williams testified, when he got home, he received a call from a "friend" who said, "hey, man, as soon as you left the people you talked to went straight in there and killed everybody." Williams said he could not remember the friend's name. When defense counsel assumed in a question that the caller was a male, Williams responded, "I said a friend of mine. I didn't say he." Williams declined again to identify the caller. (13RT 1790-1792.)

Randy Bowie

Randy Bowie was a career criminal with eight felony convictions including battering the mother of his child, robbery, and two burglaries. (12RT 1521, 1627-1628, 1681.) He arrived at Wheels 'N Stuff just as Williams was leaving. (12RT 1508-1511.)

Bowie was impeached repeatedly in his attempts to maintain the pretense of Wheels 'N Stuff as a legitimate business. For example, Bowie told the jury that Williams paid him $300 weekly to wash cars at Wheels 'N Stuff (though Bowie admitted he paid no income tax), whereas Williams denied paying Bowie. (12RT 1511, 1671-1672, 1682; 13RT 1788-1789.) Bowie testified that he never saw any marijuana sold at Wheels 'N Stuff,

while crime scene photographs taken immediately after the shooting show marijuana and drug paraphernalia out in the open. (12RT 1623-1626; 13RT 1805, 1835, 1837, 1848, 1854-1855, 1859-1860.) Williams testified, moreover, that enough marijuana was sold to pay the rent needed for Wheels 'N Stuff. (13RT 1756, 1802.)

Bowie was impeached on other matters as well. When asked whether he had ever been affiliated with a gang, Bowie said no. The sheriff's database for tracking gang members showed that Bowie admitted his membership in the Nutty Block Gang, the same gang to which defendant Pops belonged. (12RT 1620; 16RT 2434; 17RT 2508, 2511; 27RT 4419.)

On direct examination Bowie said that he did not have an armed robbery conviction. On cross-examination he admitted the conviction. (12RT 1672, 1681.)

On direct examination Bowie said he had never testified before a jury until that day. On cross-examination Bowie was presented with a minute order from his own trial showing that he had testified. (12RT 1562-1563, 1630-1631.)

According to Bowie, just before the shooting he was on a pay telephone at the front of Wheels 'N Stuff when he saw a car parked on the side of the carwash building. Bowie faced the passenger side of the front of the car when he first saw the driver. The driver was sitting approximately six feet away in the car behind the steering wheel. (12RT 1511, 1513, 1515, 1526.)

While Bowie was on the phone, the passenger in the car raised a gun, pointed it at Bowie, and told him not to move or try to warn anyone. Although Bowie testified he was no gun expert, at that point he was able to

tell that the gun was a "Tech Nine." (12RT 1515, 1579.) According to Bowie, when the passenger pointed the gun at him, Bowie did not move. (12RT 1515.) The passenger got out of the car first, and then the driver followed. (12RT 1516.) The passenger grabbed Bowie in the back of his collar, put his gun under Bowie's arm, and used Bowie as a shield. Then the driver put his gun, "approximately a nine-millimeter or a Glock," in Bowie's back, and they marched him inside. Once inside, the passenger and driver told everyone inside to get down on the ground and not move. Bowie complied. (12RT 1516-1517.)[6]

According to Bowie, "[t]hey said where is the money and where is the shit." (12RT 1516-1517.) Also lying on the ground inside Wheels 'N Stuff were Charles Hurd, Michael Hoard, Shawn Potter, and Jessie Dunn. (12RT 1514-1518.) While Bowie was on the ground, the driver was inside a car searching it. Bowie was then able to get up and escape. As he ran to safety, Bowie heard several shots. (12RT 1651-1653.)[7]

Bowie believed his friends had been shot, but he did not return to help them. Nor did he call the police. Because his brother and his brother's

---

[6] Bowie's testimony at the hearing on the suggestiveness of the prosecution's identification procedures underscores that Bowie never saw the driver's face with any clarity. The jury did not hear this testimony. At the hearing Bowie more plainly testified that after his back was turned to the driver, the driver got out of the car and stuck a gun in Bowie's back. With Bowie in front, the passenger and driver shoved Bowie inside Wheels 'N Stuff and told everyone there to get down on the ground. Bowie complied. (1CT 139, 229, 232.)

[7] Clarence Collins, a fingerprint consultant for the Los Angeles County Sheriff's Department for 31 years, testified that Wilson did not contribute any of the latent prints found at the crime scene. He further testified that a door handle of a car is a good surface to lift a print from because it is chrome. (20RT 3147, 3150, 3156.)

wife wanted to, later that day Bowie drove with them by Wheels 'N Stuff. Bowie saw police officers there, but he did not say anything to them. (12RT 1533-1537, 1560-1561, 1654-1655.)

At trial Bowie identified Wilson as the driver and Pops as the passenger. (12RT 1518-1519.)

The morning after the shooting, Bowie described the driver's face to police detectives as lighter skinned and smaller than the passenger's. Bowie said that the driver was 25 to 30 years old. (12RT 1597-1599.) Wilson was 20 years old. (13RT 1725; 34RT 5768; exh. 67.)

At trial Bowie was asked whether he told Detective Chavers, when she interviewed him the day after the shooting, that he knew what the driver looked like from the shape of his mouth. At first Bowie said he did not recall. When asked whether his memory would be refreshed if he looked at a report of the interview, Bowie testified that he told the officers that he recognized the driver "from that smirky grin on his face." Defense counsel again offered Chavers's report to Bowie to refresh his memory as to whether he told Chavers about remembering the shape of the driver's mouth. Bowie testified: "I said that I recognized him from that smirky grin on his face. That, I remember." Defense counsel pressed further. "So on January 26th, 1998, you did not tell Detective Chavers that you could recall the shape of the driver's mouth?" Bowie replied: "I don't recall." (12RT 1648.) Chavers did not testify and confirm Bowie's account.

A week and a half after the shooting, police graphic artist John Shannon was unable to draw any sketch of the driver based on Bowie's description. Shannon recalled Bowie's mentioning a receding hairline or tight eyes or "something like that," but nothing more. (17RT 2556.) Wilson does not have a receding hairline or tight eyes. (Exh. 60.) Shannon

also testified that in his experience, when a witness remembers something very unusual about a suspect, the witness is able to describe it to him, but Bowie did not mention to Shannon anything about the suspect's having a smirk on his mouth. (17RT 2556.) Although Bowie mentioned a receding hairline, he did not mention the distinctive cap with white writing on it that Anthony Brown and Christopher Williams saw on the driver. (13RT 1765; 19RT 3071.)

On February 23, 1998, Bowie selected Wilson as the driver from a photographic lineup based on, according to Bowie, "the smirky grin on his face." (12RT 1548-1549, 1647.) Bowie did not testify that he saw a smirky grin on Wilson's face when Wilson sat in front of him in the courtroom. No one testified at trial that Wilson had a smirky look to his face. (12RT 1519.)

Despite Bowie's testimony identifying Wilson, during its deliberations the jury asked for a read-back of Williams's testimony where he identified Wilson. (30RT 4833, 4842-4843.)

Anthony Brown

Anthony Brown's June 24, 1998 preliminary hearing testimony was read to the jury because he was absent from trial.

Brown had felony convictions for two counts of conspiracy and two counts of fraud. (19RT 3009-3010; 2CTSupp 339.)

Brown went to Wheels 'N Stuff in the late morning on January 25, 1998. He saw a man drive away in Jessie Dunn's El Camino, knocking over a gate on his way out of the property. The El Camino had IROC wheels from a Camaro and also an Alpine stereo. (13RT 1727; 16RT 2250-2261; 19RT 2986, 2989-2990, 3026.)

Brown testified that he could "[not] positively identify" the driver of

the El Camino. Referring to Wilson, Brown stated, "the light complected guy would probably best fit the description but I only seen him from the rear view and glanced at the front view." (19RT 2991.) Brown further explained: "I only saw his shoulders. I only seen him from the shoulders. From the hood of the El Camino you could only see like from the shoulders to the head." (19RT 3056.) Brown eventually conceded that he was "uncertain" whether Wilson was the driver of the El Camino. (19RT 3082.)

At Wheels 'N Stuff, Brown saw a second man, whom he identified as Pops, get into a two-door Honda Accord with tinted windows, front, rear and side. The man sat in the car and then pointed a Tech Nine out the window in Brown's direction. Without firing it, the man fondled the gun as if it had jammed. The Honda pulled away in the same direction as the El Camino. (19RT 2993-2997, 3026-3027.)

Brown did not go into the building. He saw a man, identified by Brown as "E.T.," walking towards him. E.T. said, "[t]hey shot everybody. I don't know why they didn't kill me." Brown and E.T. left the scene in Brown's car. (19RT 2998-3001.)

To the extent Brown even identified Wilson, it was at odds with his earlier photo identification of the driver of the El Camino. On February 12, 1998, Detective Reynolds presented Brown with the same sixpack of photos that Reynolds had shown Williams on the same day. Brown identified Gerron Malone as the driver of the El Camino, the same man Williams identified as the driver of the Honda when the Honda was parked next to the carwash building. (19RT 3058-3061; 25RT 4109; exh. 47 [photo 1], exh. 53.)

On February 24, 1998, Detective Reynolds showed Brown a sixpack

photo lineup (exh. 50) with Wilson's picture in position no. 2. Brown told Reynolds that he could not identify anyone, but that the person in photo no. 2 had the same complexion as the driver. Brown explained that he could not say for sure that photo no. 2 was a picture of the driver because, "I really didn't get a good look at him." (24RT 3971, 3976-3977.)

The prosecution presented no additional evidence regarding Gerron Malone, identified by both Williams and Brown as the driver of the El Camino.

The Burning of the El Camino

At about 5:00 p.m. on the day of the shooting, Larry Barnes went to a barbeque at the home of a relative of Pops. Wilson was there. Aziz Harris, Pops's brother, asked Barnes for help in burning a stolen car. Pops's girlfriend drove Barnes and Harris about a half mile in a new, dark blue Honda to an alley where they incinerated Jessie Dunn's El Camino, which did not have its IROC rims at that time. There was no evidence that Wilson had any role in burning the El Camino. (13RT 1873, 1876-1877, 1879-1884.)

A Lorcin 9mm gun was found later inside the car's carburetor. The tires were in poor condition and there was no radio. (18RT 2769.)

The February 12 Traffic Stop

On February 12, 1998, Pops was stopped by police while driving a Camaro with what appeared to be similar chrome rims as the IROC rims that were put on Jessie Dunn's El Camino a few months before he died. The officer who stopped the Camaro noticed the rims were star-shaped but did not see "IROC" on them. Wilson, Harris, and Barnes were in the car. (14RT 1946, 1948; 15RT 2118-2120, 2125-2127, 2150; 16RT 2249-2261; 17RT 2579-2584; exh. 42.)

The Young Mafia Organization and the Gang's Hangout

Pops, Harris, Wilson and Barnes were members of a group known as the Young Mafia Organization ("Y.M.O."). Barnes identified a list of 22 aliases found in a looseleaf binder in Wilson's apartment with the numbers 1, 2, 3, and 18, respectively, next to the names "Nut," whom Barnes said was Pops, "Scrap" (Harris), "Bird" (Wilson), and "Smurf" (Barnes). The binder also contained some drawings and a reference to the Y.M.O. (Exhs. 34A-D, 68-B; 13RT 1865-1868; 14RT 1898-1899, 1956-1962, 1985; 15RT 2170.) There was no evidence of Wilson's fingerprints on the binder, no evidence that Wilson made the drawings, and no evidence that Wilson composed the list.[8]

The trial court admitted the list of 22 purported gang members and the drawings as evidence of Pops's association with Wilson and Pops's connection to Wilson's apartment because it was "a gang location." (12RT 1464-1465; see also 14RT 1899; 8RT 717 [prosecutor arguing to court Wilson's apartment "was more of a gang hangout, crash pad type of location, rather than a residence where Mr. Wilson just lived"].) Also, the court offered that the items found in the hangout could be seen as "glorifying" certain aspects of gang culture. (8RT 827.) The prosecutor eventually argued to the jury that the roster of 22 names was a "gang list." (28RT 4510.)

Also found in the looseleaf binder were drawings of Pops, including

---

[8] Although the person who wrote the list of 22 members and made the drawings was not identified for the jury, Pops's counsel informed the court during a pretrial hearing that Everett Rivers made at least one drawing and some part of the lists; Rivers's name appears on one page of the binder. (8RT 714-715.)

one entitled "Nut and the Monster Beefy," which Barnes described as a sketch of Pops with his Camaro and IROC rims. (14RT 1950, 1956-1957; 15RT 2170-2174.) In the drawing Pops has the look of a cartoon super hero with an inflated chest. (Exh. 34-A.)

The guns used in the shooting were not recovered. (8RT 2716.) But according to Deputy Sheriff Jeff Walley, a firearms expert, only two guns were fired: (1) a Glock that shot a .40 caliber bullet, and (2) a Llama, Star, Bryco, SWD, or Intratec Tech-9 that shot a 9mm bullet. (19RT 2823, 2872, 2874, 2880.)

Barnes identified drawings from the binder that depict Pops with two guns, a Glock and a Tech-9. One drawing, entitled "Nut – Loco," shows Pops holding a Glock in his left hand. Another drawing is of a Tech-9 attached to a right arm with a tattoo showing the letters "Y.M.O." The parties stipulated that Pops had tattooed forearms with those same initials. The Tech-9 is pictured shooting flames and bullets, while ejecting several casings. (14RT 1956, 1961-1962; exhs. 34-B, 68-C, 68-E.)

There was no evidence of any drawings of Wilson in the binder and no evidence that Wilson had a Y.M.O. tattoo. (8RT 713 [Pops's counsel pointing out that none of the drawings depicts Wilson].)

Underneath a couch cushion in the hangout, police found a bullet that had been ejected from the 9mm gun used in the shooting. (14RT 2164-2165.) A Tech-9 fires a 9mm bullet similar to the 9mm bullet found in the hangout. Deputy Sheriff Walley agreed that the bullet could have been dropped in the couch before or after the Wheels 'N Stuff shooting. (19RT 2872, 2880-2885, 2889, 2930-2931.) There was no evidence of Wilson's fingerprints on the fully preserved bullet and casing.

Police retrieved a gun shop business card from a wallet under the

couch cushion. The wallet also contained a video rental card and a calling card, both in Wilson's name. (14RT 2174-2175.) On the back of the gun shop card were prices for .26 and .30 caliber Glock firearms, but not for a .40 caliber Glock, the gun used in the shooting. (16RT 2247.)

A January 26, 1998 Long Beach newspaper was discovered in a photo album in the hangout. The front page of the newspaper included an article on the Wheels 'N Stuff shooting from the preceding day. (15RT 2167.) There was no evidence of Wilson's fingerprints on the photo album or the newspaper.

Penalty Phase

Prosecution Case

Charmaine Hurd, Charles Hurd's sister, testified that his death took a toll on his family, including his five children. (31RT 5077-5081.)

The court admitted a stipulation that Wilson had a robbery conviction resulting from a guilty plea. The parties stipulated that on September 1, 1995, Wilson's accomplice robbed a 53-year-old woman of cash from her AFDC check by threatening to kill her companion. Wilson, who was 18 at the time, drove the getaway car and received three years of felony probation. He was also ordered to serve 120 days in the county jail. (31RT 5083-5084; 34RT 5768.)

Defense Case

Byron Wilson's parents and a friend since childhood testified of their love for Byron, then age 22, their loss if he were to die, and their appreciation for his inner strength. They spoke of his responsible and caring nature, particularly towards his own son and his mother when she was bedridden from a car accident and cancer. Byron, his parents' only child, would change his mother's bedpan, bathe her, and help his father.

Growing up, Byron was loving, energetic, always smiling and laughing, and lovable. Byron was an inspiration to his mother; he gave her hope when she had none. He so encouraged his friend that she would not be the person she is without him. (33RT 5538-5546, 5554, 5561, 5567; 34RT 5733-5742, 5754, 5758, 5765, 5770, 5784-5785.)

An expert in attention deficit hyperactivity disorder opined that in elementary and high school, Byron had the disorder. Byron's special education teacher in grade school confirmed Byron's hyperactivity, and that Byron was very easily distracted by the slightest thing. Nevertheless, when Byron was taught individually, he learned well. Byron was always smiling at school, and he appeared happy, especially when Byron's teacher worked with him. (31RT 4971, 4985-4986, 4990; 32RT 5319-5320, 5331.)

//

//

1.

THE TRIAL COURT DENIED WILSON DUE PROCESS WHEN IT ADMITTED UNRELIABLE TESTIMONY IDENTIFYING HIM AS THE DRIVER.

A. Introduction

"Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country." (*State v. Henderson* (2011) 208 N.J. 208, 231 [27 A.3d 872] [citation and quotation marks omitted].) And according to the International Association of Chiefs of Police, "'[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work.'" (*Ibid.*, quoting Int'l Ass'n of Chiefs of Police, Training Key No. 600 (2006) Eyewitness Identification 5.) The Second and Ninth Circuits have acknowledged as well that eyewitness identification of a stranger is highly suspect, calling it the "least reliable" kind of evidence. (*United States v. Jernigan* (9th Cir. 2007) 492 F.3d 1050, 1054, citing *Jackson v. Fogg* (2d Cir. 1978) 589 F.2d 108, 112.)

This is a case of misidentification.

Randy Bowie, a career felon who lied repeatedly to the jury, testified that he was absolutely certain with no doubt whatsoever that appellant Byron Wilson was the driver involved in the shooting in this case. But Bowie's own testimony demonstrates that he never got a good look at the driver's face. Moreover, Bowie's almost complete inability to describe the driver's face to a sketch artist shortly after the shooting shows that he did not have a clear view of the driver's face. And even the slight description

Bowie provided to the sketch artist did not match Wilson. Bowie's powers of observation were so poor, he did not even notice that the driver wore a cap with white writing on it, which two other witnesses testified to seeing. Consequently, Bowie's expressed degree of certainty in identifying Wilson is unwarranted and raises the specter of an improper motive.

Bowie's extreme confidence stands in sharp contrast to eyewitness Anthony Brown's reasonable characterization of his identification. Brown testified that he quickly glanced at the driver's face. He therefore acknowledged that he could not positively identify the driver and was uncertain whether Wilson was the driver. But he also ambiguously testified that Wilson "would probably best fit the description," in that Wilson and the driver each had a light complexion, and Wilson was the only person in the live lineup presented to Brown who had a light complexion. From there the prosecutor was able to argue to the jury that Brown "picks" Wilson, though Brown did not positively identify him.

Thus, this case is largely built on a highly suspicious, unreliable identification by a dishonest felon, who exaggerated the certainty of his identification, and a second "identification" by a witness who provided ambiguous testimony that the prosecutor exploited to full effect. In this regard, it should not be overlooked that the prosecutor was able to exploit Brown's ambiguous testimony because Brown did not testify at trial. Instead the prosecutor merely read to the jury Brown's scarcely cross-examined and unclarified preliminary hearing testimony.

As shown below, the court should not have allowed the jury to hear these harmful identifications. The police used unduly suggestive identification procedures with both witnesses. Bowie told the police that the driver had an unusual facial feature, akin to a scar or tattoo, but

Wilson's was the only photo that pictured this feature. Predictably, Bowie picked Wilson. Brown saw Wilson appear in court as a defendant in this case. Predictably, Brown picked Wilson at the live lineup that followed. Moreover, both identifications were unreliable. Neither witness had an unobstructed view of the driver, who was able to keep his face from clear sight. As such, both identifications should have been suppressed, and Wilson would not have been convicted. Reversal is warranted.

B. Procedural Background

Byron Wilson joined a motion by co-defendant Aswad Pops to determine the admissibility under Evidence Code section 402 of the eyewitness identifications by Randy Bowie and Anthony Brown. The motion maintained that the procedures used by the police to identify the suspects in this case were impermissibly suggestive, and that any subsequent identifications would be tainted and would not derive from a source independent of the suggestive procedures. (3CT 712; 7RT 622.)[9]

After a hearing on defendants' motion, at which Bowie testified but Brown did not, the trial court ruled that the Bowie identification procedures were not unduly suggestive and any resulting identifications were admissible. The court made no factual findings and merely explained its ruling by stating, "I can well imagine situations where the manner in which

---

[9] Wilson joins in and adopts by reference Argument V of the opening brief filed in this appeal by co-defendant Aswad A. Pops. (*People v. Bisogni* (1971) 4 Cal.3d 582, 586 ["whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when, as here, such evidence effectively destroys the defense offered by the defendant, he has standing to challenge the fairness of the identification procedures of the alleged coparticipant"]; Cal. Rules of Court, rules 8.200(a)(5), 8.630(a).)

this is done could emphasize to the witness this is what the officer believed or wanted him to pick out or whatever but there was absolutely no testimony to that effect here." (7RT 653; 3CT 812.)

The prosecutor took on the responsibility of securing Brown's attendance at the hearing, but he was unsuccessful. The prosecutor expressed his belief that ultimately he would produce Brown. After some discussion about what would happen next if Brown did not appear, the court stated: "All I'm trying to do is get a notion for what potential problems loom out there. So the short answer is if we don't get [Brown], there is no issue. If you get [Brown], then we can do it in a short time in the last moments?" The prosecutor responded: "That is correct." (7RT 656-657.) The court repeated: "All I'm trying to determine is is there any problem with putting off the motion regarding the I.D.'s of these witnesses until and if [the prosecutor] finds [Brown]." Pops's counsel responded, no. The court then advised all counsel that if Brown was found, they should schedule a hearing immediately rather than wait for trial. (7RT 658.) The court deferred the hearing on the Brown identification procedures "until and unless we find the witness." (7RT 666-667.) Brown never appeared. Therefore, the court did not hold a hearing and did not expressly rule on the Brown identification procedures. (19RT 2940-2955.)

At trial the court admitted evidence of Bowie's pretrial and in-court identifications of Wilson. (12RT 1519.) It also admitted Brown's pretrial and preliminary hearing identifications, thereby impliedly finding against Wilson on his 402 motion with respect to Brown. (12RT 1612; *People v. Ratliff* (1986) 41 Cal.3d 675, 689.) Even if the trial court did not impliedly rule against Wilson on Brown's identification, this Court should consider Wilson's claim on the merits in this capital case, especially since as shown

below any ruling suppressing Brown's identification is subject to independent review. (*Kyles v. Whitley* (1995) 514 U.S. 419, 422 ["'duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case'"]; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court generally may choose to address forfeited issue]; *People v. Lewis* (1990) 50 Cal.3d 262, 282 [Court will consider contention on the merits to forestall ineffectiveness of counsel claim]; *People v. Stanworth* (1969) 71 Cal.2d 820, 833 [in capital appeal, subdivision (b) of Penal Code "section 1239 imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial'"].)

C. Facts

1. Randy Bowie Identifies Wilson as the Driver from a Sixpack Lineup Based on the Unusual Feature that Bowie Sees on Wilson's Face in His Photo, which Bowie Describes as a "Smirky Grin."

On March 19, 1999, the court held a "suggestiveness" hearing on defendants' motion, and Randy Bowie testified. (7RT 579.) He told the court that on Super Bowl Sunday, January 25, 1998, he walked towards the carwash where he worked and observed a car with two men sitting in it. As one faces the carwash building, the car was parked on the right side of the building, with the front of the car facing towards Bowie on his right. Attached to the front of the building was a payphone. As Bowie picked up the phone to make a call, the passenger held a gun, identified by Bowie as a "Tech Nine or something," and pointed it at Bowie, telling him "not to move and to freeze, not to say nothing." (7RT 579-581.) Bowie had an opportunity while he was on the phone to see the car and the men. He did

not recall how long he was on the phone. He simply remembered picking up the phone to make a call. (7RT 583.)

While the passenger and driver, both Black men, stood behind Bowie, also Black, they marched him into the carwash where they told him to lie down. Bowie complied. The driver also had a gun, identified by Bowie as "possibly" a 9mm Glock. Michael Hoard, Shawn Potter, Jessie Dunn, and Charles "Spanky" Hurd were also inside the carwash. At some point Bowie got up and ran out of the building. As he ran, Bowie heard shots. (7RT 581-584, 588-589, 638-639.)

Sitting in the courtroom while Bowie testified were Pops and Wilson. Bowie identified the defendants as the men who sat in the car. He identified Pops as the passenger, with "no doubt whatsoever." (7RT 580.) And he was "positive" that Wilson was the driver. (7RT 580-581.)

On January 26, 1998, the day after the carwash shooting, Bowie went to the police station where he spoke with Detective Chavers. At the suggestiveness hearing, Bowie did not recall whether he provided Chavers with a description of the driver. (7RT 587, 607-608.) Bowie did recall, however, that he did *not* tell Chavers that he "would be able to identify the driver by the smirk on his mouth." (7RT 627-628.)

In late January 1998, Bowie was taken to the Graphics Arts Section of the Sheriff's Department to assist in the creation of a composite sketch of each suspect. Although Bowie told the sketch artists that he could identify the suspects if he saw them again, he also informed the artists that he "couldn't really help them in trying to draw their sketch." Bowie just "couldn't do it." Consequently, no sketch was drawn of the driver. (7RT 609-610, 629.)

Bowie also testified at the suggestiveness hearing that on February

23, 1998, he was at the Compton Police Department when Detectives Reynolds and Chavers showed him a sixpack photo lineup. Bowie chose a picture of Wilson from the sixpack and told the police: "He was the one with the Nine. It looks like the gun you have, indicating Detective Reynolds' gun, which is a Glock. I know for sure that's him. I know the shape of his mouth. That's the motherfucker. He was the driver." (7RT 595-597, 637, 649; Prelim. Hrg. Exh. 13; Trial Exh. 50.)

Testifying after Bowie at the hearing, Detective Reynolds contradicted him about where the photo lineup took place. Reynolds told the court that he and Chavers showed the sixpack with Wilson's photo to Bowie at Bowie's "residence." Reynolds expressly denied that he showed the sixpack to Bowie at the police station. Consistent with Bowie's testimony, however, Reynolds testified that he only showed Bowie the one sixpack of photos. Reynolds and Chavers did not tape record the identification procedure. (7RT 649-650.)

According to Bowie, he identified Wilson from the photograph "because of the smirk on his mouth." Bowie also testified, "I knew the moment I saw the photograph that was the defendant right there. That was the person." Bowie initially testified that he only glanced at the other five photographs in the lineup before he decided that Wilson was the driver. When pressed, however, Bowie admitted that he did not look at the other five photographs at all. (7RT 627.)

None of the other five photographs displayed to Bowie shows a man with a distinctive smirk-like feature on his mouth. Nor do the other men look like Wilson, with one appearing to be a woman and another Asian.

Photograph number 1 shows a dark-skinned African American man, perhaps in his 30s, with short hair, perhaps a thin mustache, and his head

cocked back. Photograph number 2, in the top center position, is a picture of Wilson, a light-skinned young African American man, with a smirk on his mouth, longish hair, short beard growth on his cheeks, and stubble above his upper lip and perhaps on his chin.

Photograph number 3 appears to be a young, very light-skinned African American female with light eyebrows, short hair, no facial hair, and a large head cropped in the photograph so that her left ear cannot be seen. Photograph number 4 reveals a dark-skinned African American man in his 30s with very short hair, no facial hair, and an open mouth showing teeth.

Photograph number 5 appears to be a medium-complected, young Asian man with curly hair and a light mustache. Photograph number 6 is a medium-complected, African American teen with short hair, hair on his chin, distinctive teapot ears, and an open mouth showing teeth.

Thus, Wilson, in the top center position, was the only African American male with a smirk on his mouth, a light complexion, beard hair on his cheeks, and longish head hair.

At Wilson's trial, held three months after the suggestiveness hearing, Bowie testified with Wilson sitting before him at the defense table. In contrast to the suggestiveness hearing, where Bowie testified that he did not recall describing the driver to Detective Chavers the day after the shooting (7RT 587, 607-608), Bowie recalled that he did describe the driver to Chavers on January 26. Bowie recalled telling Chavers that the driver was a short Black male with a light complexion, lighter than the passenger, and had a "funny shaped mouth." Bowie testified that he had also ventured a guess to Chavers that the driver was between 25 and 30 years old. Bowie did not estimate the driver's height for Chavers, however.

(12RT 1598-1599.) Chavers did not testify.

During his testimony and without any prompting, Bowie volunteered that he chose Wilson's photo because of Wilson's "smirky grin." (12RT 1647.) He was next asked if he told Chavers that he knew what the driver looked like because of the shape of his mouth. Bowie did not recall. Defense counsel then asked if looking at a report by Chavers would refresh his memory. Bowie responded: "Like I said, I told the officers that I recognized the gun, that's the person and from that smirky grin on his face." Bowie further insisted: "I said that I recognized him from that smirky grin on his face. That, I remember." (12RT 1648.)

Shortly thereafter Bowie was examined about Wilson's photo lineup and his identification of Wilson from his photo. Bowie was asked, "What was it that made you identify that one?" Bowie answered without adornment, "That smirky grin." (12RT 1660-1661.)

2. Anthony Brown Testifies at the Preliminary Hearing.

Anthony Brown's June 24, 1998 preliminary hearing testimony was read to the jury because he was absent from trial.

Brown testified that he drove to the carwash on Sportsman Drive in Compton on January 25, 1998, between 11:20 and 11:30 in the morning. (19RT 2986.) He saw a man drive away in Jessie Dunn's El Camino, knocking over a gate on his way out of the carwash. (19RT 2990.) He saw another man get into a two-door Honda Accord with tinted windows, front, rear and side. (19RT 2996-2997, 3026-3027, 3081.) Brown had "[n]o doubt" that Pops was the man in the Honda. (19RT 3081.)

When asked whether he could identify the driver of the El Camino and whether he saw that person in court, Brown answered: "I can't

positively identify the person today." Next Brown was asked, "Do you believe he is in court or is there somebody that looks familiar to you?" Referring to Wilson, Brown responded, "The light complected guy would probably best fit the description but I only seen him from the rear view and glanced at the front view." (19RT 2991.) Brown further explained: "All I could see was the facial complexion once he backed out." And all Brown could say about the driver and Wilson is that they had the same complexion. (19RT 3074.) That was the only time Brown saw the driver of the El Camino. (19RT 3073.) Brown noted that the driver of the El Camino wore a stocking cap with white writing on it. (19RT 3071.)

Eventually Brown conceded that he was "uncertain" whether Wilson was the driver of the El Camino. (19RT 3082.)

On February 11, 1998, Brown examined a booklet of photos, exhibits 9-A through 9-E (trial exhibit 51), which did *not* include a picture of Wilson, and indicated that the person in photo number 4 of exhibit 9-E had the closest complexion to the driver's. He also indicated that the person in photo number 1 of exhibit 9-A was closest to the size of the driver. (19RT 3055-3058; 25RT 4109.)

On February 12, 1998, Brown was shown a lineup of six photographs, exhibit 10 (trial exhibit 47), and said, "I think number one was the driver of the El Camino." (19RT 3058-3061; 25RT 4109.) Number 1 also is not a picture of Wilson. Detective Reynolds testified at trial that on February 24, 1998, he showed Brown a sixpack photo lineup (trial exhibit 50) with Wilson's picture in position number 2. Brown told Reynolds that he could not identify anyone, but that the person in photo number 2 had the same complexion as the driver. Brown explained that he could not say for sure that photo number 2 was a picture of the driver

because he really did not get a good look at him. (24RT 3971, 3976-3977.)

Brown testified that in May 1998 (before the upcoming June 9, 1998 live lineup), he was in the courtroom for about 10 minutes in response to a subpoena from the district attorney, and he saw the defendants appear in court. Brown testified specifically that he saw the defendants in court "prior meaning before" the lineup. (19RT 3077-3078, 3087-3088.) Detective Reynolds confirmed that Brown was present when Wilson was brought into the courtroom before the scheduled preliminary hearing. (18RT 2679-2680.) Municipal Court minutes show the date as May 20, 1998, the date originally set for the preliminary hearing. (2CT 535.)

The same day that Brown saw Wilson in the courtroom, the prosecutor orally moved for a live lineup. The court granted the motion, overruling Wilson's objection to his participation in the lineup if it involved any witnesses, like Brown and Bowie, who had previously seen a photograph of Wilson. (1CT 62-63; 2CT 535.) The live lineup, which included Wilson, was held on June 9, 1998, 14 days before the preliminary hearing. (13RT 1725; 18RT 2679.)

According to Brown's testimony at the preliminary hearing, he selected Wilson at the live lineup only because Wilson had the same complexion as the driver. (19RT 3074-3076.) Indeed, Brown testified that at the live lineup he said, "due to his complexion, [Wilson] is the *only one* in that lineup that I can pick out." (19RT 3008, italics added.)

The live lineup included six African-American males. As Brown confirmed, only Wilson (in position number 3) had a light complexion. Four of the lineup participants (numbers 1, 2, 5, and 6) had dark to very dark complexions. The male in position 4 had a medium complexion. (Exh. 67, lineup number 6.)

Christopher Williams was also a witness at the live lineup. He testified at trial that Wilson had the lightest skin of the participants in the live lineup. In fact, according to Williams, Wilson's skin was "the brightest." (13RT 1819 ["he's lighter than all the rest of these guys I see. [H]e is the brightest"].)

D. The Bowie and Brown Identification Procedures Were Unduly Suggestive, and the Resulting Identifications Were Constitutionally Unreliable.

Due process requires the exclusion of identification testimony if the identification procedures were unnecessarily suggestive and the resulting identification was unreliable. Due process is violated if – "wittingly or unwittingly" – the state initiates the unduly suggestive procedure. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1251; *People v. Ochoa* (1998) 19 Cal.4th 353, 413; *United States v. Wade* (1967) 388 U.S. 218, 229 [suggestive identification procedures "can be created . . . unintentionally in many subtle ways"]; *Raheem v. Kelly* (2d Cir. 2001) 257 F.3d 122, 137 [that suggestive lineup was unintentional is immaterial because "purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of misidentification"].) The defendant bears the burden of demonstrating that the identification procedures were unduly suggestive. (*People v. Avila*, *supra*, 46 Cal.4th at p. 700; compare *People v. Caruso* (1968) 68 Cal.2d 183, 189, citing *United States v. Wade*, *supra*, 388 U.S. at p. 240 [if defendant sustains that burden, burden then shifts to prosecution to prove by clear and convincing evidence that identification was nevertheless reliable under totality of circumstances].)

The first question is whether anything caused the defendant to

"stand out" from the other photo lineup participants in a way that would suggest the eyewitness should select the defendant. (*People v. Avila* (2009) 46 Cal.4th 680, 698.) If so, then the court considers whether the identification itself "was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Kennedy* (2005) 36 Cal.4th 595, 608, citation and quotation marks omitted.)

This Court reviews independently a lower court's determination that a pretrial identification procedure was not unduly suggestive. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.) In deciding whether the identification evidence was admissible as reliable under the totality of circumstances, a reviewing court is not limited to the evidence presented at the suggestiveness hearing, but consistent with independent review, the court may consider other evidence in the record, including trial testimony. (*Id.* at p. 611.)

1. The Bowie Identification Procedures Were Unduly Suggestive.

Time and again Bowie's own testimony demonstrated just how suggestive the identification procedures were to *him*. Bowie repeatedly testified that he chose Wilson's photo because it stood out to Bowie. According to Bowie, a smirk appeared on Wilson's mouth in the photo, and that is why he chose Wilson as a suspect.

Bowie testified at the suggestiveness hearing as follows:

Q And when you identified Mr. Wilson in this photograph . . ., you told the police you could identify him for what reason?

A Because of the smirk on his mouth.

Q The smirk on his mouth?

A Yeah.

(7RT 627.) Bowie further testified that when he identified Wilson from the sixpack photo, he told the police in part: "I know for sure that's him. I know the shape of his mouth. That's the motherfucker. He was the driver." (7RT 597.) Of the six photos presented to Bowie, only Wilson's had a "smirk on his mouth." (7RT 627; prelim. hrg. exh. 13; trial exh. 50.) Wilson's photo stood out to Bowie to such an extreme that Bowie either did not look at the other photos, or he merely "glanced at them." (7RT 627.)

At trial Bowie testified that he identified Wilson because of Wilson's "funny shaped mouth" (12RT 1598); "the smirky grin on his face" (12RT 1647); "that smirky grin on his face," and once again, "that smirky grin on his face" (12RT 1648). Finally, Bowie was asked at trial: "And what was it that made you identify that one?" Bowie answered: "That smirky grin." (12RT 1660-1661.)

The United States Supreme Court recommends that a photo lineup include "so far as practicable . . . a reasonable number of persons similar to any person then suspected whose likeness is included in the array." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 117; see *People v. Carter* (2005) 36 Cal.4th 1114, 1163 [approving array of six photographs depicting middle-aged or somewhat younger adult males with mustaches and dark hair; "expressions exhibited by the individuals are roughly

comparable"]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [defendant's photograph did not stand out where all "photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other"]; *United States v. Holliday* (1st Cir. 2006) 457 F.3d 121, 126 [photo array's suggestiveness evaluated by determining whether it "so far as practicable include[d] a reasonable number of persons similar to any person then suspected whose likeness is included in the array," quoting ALI, Model Code of Pre-Arraignment Procedure (1975) § 160.2(2)]; compare *People v. Cook* (2007) 40 Cal.4th 1334, 1355 ["the case law does not require that a [live] lineup contain persons resembling the defendant in appearance"].)

The April 13, 2006 Report and Recommendations Regarding Eyewitness Identification Procedures, issued by the California Commission on the Fair Administration of Justice, urges that lineup participants "should resemble the description of the suspect given at the time of the initial interview of the witness unless this method would result in an unreliable or suggestive presentation." (Recommended Procedure no. 7 at pp. 5-6.)[10] The United States Department of Justice's October 1999 Eyewitness Evidence: A Guide for Law Enforcement similarly instructs, and adds: "When there is a limited/inadequate description of the perpetrator provided by the witness . . . *fillers should resemble the suspect in significant features*." (*Id.* at p. 29, italics added.) The Justice Department's Guide further directs: "In composing a *photo* lineup, the investigator should . . .

---

[10] The eyewitness identification report of the California Commission on the Fair Administration of Justice is available at http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf

[c]reate a consistent appearance between the suspect and fillers with respect to any *unique or unusual feature* (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature." (*Id.* at p. 30, italics added.)

From the very beginning, the police were aware that a "unique or unusual feature (e.g., scars, tattoos)" was important to Bowie in his ability to identify a suspect. According to Bowie, he told Detective Chavers the day after the shooting that the driver had a "funny shaped mouth." (12RT 1598.) A funny shaped mouth could mean, for example, a mouth distorted by a scar or from a stroke.

Bowie's testimony revealed that the peculiar feature of the driver's mouth looked like a smirk to Bowie. As the Justice Department directs, the police should have included in Wilson's sixpack, fillers with a similar feature, or the police should have artificially added or concealed that feature. There was no testimony that the police made any effort to do so, thus virtually guaranteeing that Bowie would choose a photo of a Black male with a distinctive-looking mouth. And that is precisely what Bowie did. He testified that he did not look at the other photos, or he merely glanced at them, before he chose Wilson's photo due to Wilson's distinctive facial feature. (7RT 627.)

Contrary to the constitutional prohibition against an unduly suggestive lineup, the police in this case provided Bowie with fillers who did not resemble Wilson in his significant features. Instead, the police presented Bowie with a distinctive photograph of Wilson – a young African American male with a complexion lighter than the other males, beard hair on his cheeks that no one else had, head hair longer than the others, and most especially, the unusual feature that was like a scar or tattoo

– the smirk on Wilson's mouth that Bowie relied on almost exclusively to select Wilson. Thus, Wilson – in the top center position where a viewer's eye might be naturally drawn – stood out from the other lineup participants.

Wilson's singular appearance not only suggested that Bowie should pick Wilson as the driver, Wilson's smirk compelled Bowie to pick him. As Bowie explained over and over, the reason he chose Wilson was the smirk on Wilson's mouth. At the suggestiveness hearing, Bowie was asked by defense counsel: "And when you identified Mr. Wilson in this photograph that was marked people's 13, you told the police *you could identify him for what reason*?" (Italics added.) Bowie answered: "Because of the smirk on his mouth." Defense counsel then asked: "The smirk on his mouth?" And Bowie replied: "Yeah." (7RT 627.) Bowie could have given the police any reason to explain why he identified Wilson, and Bowie provided the police with only one, Wilson's smirk.

At trial Bowie continued to insist that what "made" him identify Wilson was Wilson's "smirky grin." (12RT 1660-1661; see also 12RT 1598, 1647, 1648). That Wilson's photo may not have provoked a similar response in another viewer is irrelevant. What matters is how Bowie viewed the photo. (*Raheem v. Kelly*, *supra*, 257 F.3d at p. 134 ["lineup may be suggestive to one viewer even though it is not to another"].) Thus, Wilson stood out to Bowie and the identification procedure was unduly suggestive.[11]

---

[11] *Simmons v. United States* (1968) 390 U.S. 377, 383 [danger of incorrect identification increases if police display to witness pictures of several persons, including photo of individual who generally resembles person witness saw, and photo is in some way emphasized]; *People v. Carlos* (2006) 138 Cal. App. 4th 907, 912 [pretrial photographic

(continued...)

2. Bowie's Identification of Wilson Was Unreliable.

Furthermore, Bowie's identification of Wilson was not reliable under the totality of the circumstances. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.)

a. Bowie did not have a good opportunity to view the driver's face.

The first factor to take into account in determining whether an identification was reliable, though the identification procedures were unduly suggestive, is the opportunity of the witness to view the suspect at the time of the offense. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.)

---

[11](...continued)
identification procedure unduly suggestive as only defendant's photo in six-pack had identifying number and name directly below it, making his photograph stand out from others]; see *Commonwealth v. Thornley* (1989) 406 Mass. 96, 100-101 [546 N.E.2d 350, 353] [photo array, in which defendant was only subject pictured wearing glasses, impermissibly suggestive where *witnesses said that glasses were significant factor in selecting defendant's photo*]; *People v. Tatum* (1985) 129 Misc.2d 196, 204 [492 N.Y.S.2d 999, 1005] [defendant's distinguishing characteristic, *a glass eye*, set him apart from other lineup participants, making lineup unduly suggestive]; *People v. Moore* (1985) 143 A.D.2d 1056, 1056 [533 N.Y.S.2d 602, 602] [lineup unduly suggestive because of defendant's distinguishing *hair braids*]; *State v. Bush* (1977) 29 Or.App. 315, 319 [563 P.2d 747, 748] [identification procedure impermissibly suggestive where witness described assailant as having *mustache* and was shown six photos of men, but only defendant's portrayed man with mustache]; *United States v. Fernandez* (2d Cir. 1972) 456 F.2d 638, 642 [photo array impermissibly suggestive where surveillance photographs showed man with Afro haircut and extremely light skin and defendant's picture was only one showing light-skinned African American with Afro haircut]; cf. *People v. Gonzalez* (2006) 38 Cal.4th 932, 943 [no impermissible suggestiveness where defendant argued he stood out in photographic lineup because he was only participant pictured with "droopy eye," but no witness described eye as distinctive and eye was not significantly distinctive in any event].

Bowie testified three times, at the June 23, 1998 preliminary hearing (1CT 118), at the March 19, 1999 suggestiveness hearing (7RT 579), and at the June 7, 1999 trial (12RT 1508). His testimony and other evidence demonstrate that his opportunity to view the driver's face at the time of the offense was significantly hindered by several factors.

As Bowie faced the payphone at the right front of the carwash building, he saw a car parked parallel to the right side of the building about four to six feet from the payphone, with the nose of the car level with the phone booth. The passenger's seat was on the near side of Bowie, while the driver's seat was on the far side. When Bowie picked up the phone and dialed it, he did not look at the car. (7RT 623.) When he was on the phone, he was not "looking right at the car," but "noticed" two people in the car, one in the passenger's seat and one in the driver's seat. (1CT 120-124, 127-128, 220-224.) Thus, Bowie spent no time looking at the driver's face. And because the driver was sitting behind a tinted windshield, a dashboard, and a steering wheel approximately eight feet from Bowie (19RT 3026-3027), it is doubtful that Bowie ever saw the driver's face, as Bowie's later ineffectual descriptions of the driver's face to a sketch artist would show.

When Bowie hung up the phone, the passenger door was open, the passenger's window was rolled down, and the passenger's leg was outside the car with one foot on the ground. (1CT 125; 12RT 1642.) Anthony Brown described the passenger as tall and stocky with a waist size as large as 42 inches. (19RT 3028-3021, 3026.) Given the angle that Bowie had of the driver from his position in front of the payphone, Bowie's opportunity to see the driver's face would have been obstructed by both the size of the passenger and the tinted windshield. (19RT 3026.)

Eventually, the passenger got out of the car with his gun on Bowie and grabbed Bowie by the collar. According to Bowie, the driver then got out of the car, walked around the back of the car, "came around behind" Bowie, and stuck a gun in Bowie's back. With Bowie in front, the passenger and driver shoved Bowie inside the carwash and told everyone there to get down on the ground. Bowie complied. (1CT 139, 229, 232.)

The driver, with his back turned to Bowie, searched inside a car in the carwash. Bowie got up and ran to safety. (1CT 141-142, 208.) Thus, notwithstanding Bowie's claim that he recognized the driver due to the smirk on Wilson's mouth, at no time did Bowie have a clear view of the driver's face.

b. Bowie's attention was on the passenger's gun, and not on the driver's face.

The second factor to take into account in determining whether the prosecution proves that an identification was reliable is the witness's degree of attention at the time of the offense. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.) Before getting out of the car, the passenger held a Tech-9 gun in his left or right hand and pointed it directly at Bowie. The gun was inside the car but high above the right door window. According to Bowie, the passenger "raised up a gun and told me, 'don't move, don't say nothing, try to warn nobody.'" (1CT 132.) "From that point on, I just froze." (1CT 133; see 1CT 125, 128-134, 225-226; 12RT 1642; see also 12RT 1528 [Bowie: "Everything stopped, the whole world, everything. So at that point I was lost"].) A Tech-9 is a semi-automatic weapon. (19RT 2882-2883.)

Bowie's understandable paralysis strongly suggests that his eyes were not on anyone's face, let alone on the driver's face, but were fixed on

the passenger's *gun*. Bowie was so focused on the gun that he was able to identify it as a Tech-9, basely solely on his exposure to the Tech-9 from watching television. (1CT 204.) As Bowie confirmed at trial, he was no gun "expert." (12RT 1579.) Bowie's motionless response is consistent with the scientific research on "weapon focus" – where a witness assaulted with a weapon concentrates on the weapon rather than on the features of the assailant. (See *People v. Earle* (2009) 172 Cal.App.4th 372, 405-406 [acknowledging that "weapon focus" could well cast doubt on a victim's identification of her assailant]; *State v. Henderson*, *supra*, 208 N.J. at p. 263 ["when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness's description of the perpetrator"].)[12]

Furthermore, with a gun pointed straight at him, Bowie was no doubt under tremendous stress, making his identification of the driver less reliable. As the Court of Appeal has noted, dangers inherent in eyewitness identification include the effects of stress on human memory. (*People v. Jimenez* (2008) 165 Cal.App.4th 75, 82; see *State v. Henderson*, *supra*, 208 N.J. at p. 244 ["studies have shown consistently that high degrees of stress actually impair the ability to remember"]; *id.* at p. 262 ["high levels of

---

[12] See also *Raheem v. Kelly*, *supra*, 257 F.3d at p. 138 ["it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it"]; *State v. Wright* (Idaho App. 2009) 206 P.3d 856, 860 ["Studies indicate that . . . 'weapon focus[]' occurs because witnesses fixate their vision on the weapon"]; *People v. Banks* (N.Y.Co.Ct. 2007) 16 Misc.3d 929, 943 [842 N.Y.S.2d 313] [finding "that the relevant scientific community generally accepts as reliable the proposition that the phenomenon of 'weapons focus' impairs the ability of a witness to make a subsequent identification of the perpetrator"].

stress are likely to affect the reliability of eyewitness identifications"].) Bowie's degree of attention on the driver's face was negligible.

c. Bowie's prior description of the driver's face was so inadequate that no police sketch could be made of the driver and Bowie failed to estimate the driver's height and to notice his cap.

The third factor to take into account is the accuracy of the eyewitness's prior description of the suspect. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.) A witness's "ordinarily thorough" description of a suspect – before an identification is made – supports a finding of reliability. (*Neil v. Biggers* (1972) 409 U.S. 188, 200.) But Bowie never did provide the police with a thorough description of the driver and his face, probably because Bowie's view of the driver was obstructed and his attention was focused on the passenger's Tech-9 semiautomatic gun.

At the June 23, 1998 preliminary hearing, Bowie testified that he told Detective Chavers the day after the shooting that the driver, a Black male, was 25 to 30 years old, had a light complexion, lighter than the passenger, was shorter than the passenger, had a thin build, and wore dark clothing. (1CT 182-183.) Bowie provided Chavers no height estimate for the passenger or for the driver. (1CT 182: 12RT 1599.)

But Wilson was 20 years old on the date of the incident and had a muscular build as of June 9, 1998, suggesting that Bowie had the wrong man. (13RT 1725; 34RT 5768; exh. 67.)

Importantly, Bowie never provided an estimate of the driver's height. (12RT 1598.) If the driver had appeared in Bowie's field of vision while the driver was standing, then Bowie should have been able to provide an estimate of the driver's height in relationship to his own. Bowie's

inability to provide any estimate of the driver's height is compelling evidence that Bowie never saw the driver standing, and never saw the driver face-to-face.

Although Bowie testified on three occasions, and was interviewed by Detective Chavers the day after the shooting and a week and a half later by a police graphic artist, Bowie never once mentioned that the driver wore a cap. The other two eyewitnesses in this case who testified, Anthony Brown and Christopher Williams, both told the jury that the driver wore a cap, Williams describing it as a "black designer wave cap" with writing, and Brown describing it as a stocking cap with white writing on it. (13RT 1765; 19RT 3071.) Bowie's failure to notice the driver's cap is powerful evidence that Bowie never saw the driver's face with any clarity. In addition, it raises the question, how was Bowie able to notice the driver's smirk or "funny shaped mouth," given the lack of any evidence that Bowie saw the driver's face close enough to have a clear picture of the driver's mouth.

In addition to Bowie's own testimony, Bowie's description of the driver to graphic artist John Shannon is some of the strongest evidence that Bowie did not get an unobstructed view of the driver's face. On February 5, 1998, merely 11 days after the shooting, Bowie could not provide a usable description of the driver's face. Indeed Bowie's description was so inadequate that the sketch artist was unable to create any sketch at all of the driver's face. (1CT 145, 188, 246.) At trial, Shannon testified that in his experience, when a witness remembers something very unusual about a suspect, the witness is able to describe it to him, but Bowie did not mention to Shannon anything about the suspect's having a smirk on his mouth. (17RT 2556.) Shannon recalled Bowie saying something to the effect that

the driver had a receding hairline, tight eyes or "something like that," but nothing more. (17RT 2556.) Wilson did not have a receding hairline or tight eyes, and no one testified that he did, more evidence that Bowie had the wrong person. (Prelim. hrg. exh. 13; trial exh. 60.) Furthermore, it is not likely that Bowie noticed that the driver even had a receding hairline, given that according to Brown and Williams, the driver wore a cap. (13RT 1765; 19RT 3071.)

If a witness's ordinarily thorough description of a suspect supports a finding of reliability when it is made before the witness's identification can be tainted (*Neil v. Biggers*, *supra*, 409 U.S. at p. 200), then a witness's inability before identification to describe the suspect in any meaningful manner must weigh against reliability. (*Dickerson v. Fogg* (2d Cir. 1982) 692 F.2d 238, 245-246 [witness's "inability to provide a minimally detailed description when he talked with the police plainly devalues his description as a factor demonstrating the reliability of his identification"].) Here, then, Bowie's failure to provide a meaningful description of the driver's face weighs against finding that his identification was reliable.

d. Bowie's certainty in his identification was unwarranted.

The fourth factor is the level of certainty demonstrated at the time of the identification. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.) A witness's sincere certainty in identifying a suspect may reflect an accurate and reliable identification in some circumstances. But elementary human psychology instructs that Bowie's extreme confidence in his February 23, 1998 identification suggests that he was overcompensating – for surviving the shooting or for his inability to provide the police with a usable description of the driver, it is impossible to say. But one thing is more than

possible, Bowie was unjustified in his over-the-top certainty, as his own testimony demonstrates.

The New Jersey Supreme Court has observed, "some mistaken eyewitnesses . . . exude supreme confidence in their identifications." (*State v. Henderson*, *supra*, 208 N.J. at p. 244.) The court's observation applies to Bowie. Although Bowie failed to describe the driver's face in a sufficient manner to allow the graphic artist to draw a single sketch 11 days after the shooting, Bowie could not have been more adamant that Wilson was the driver when shown his picture due, according to Bowie, to the smirk on Wilson's mouth. (7RT 627, 597; 12RT 1660-1661.) At the preliminary hearing, Bowie was "positively sure" that Wilson was the driver. (1CT 252.) Early during his testimony at the suggestiveness hearing, Bowie was "positive" Wilson was the driver. (7RT 581.) A few minutes later, Bowie's certainty level had progressed even higher. Asked if he had any doubt about his identification of Wilson, Bowie replied, "None whatsoever." (7RT 603.) At trial Bowie continued to insist that he had no doubt in his mind that Wilson was the driver. Indeed he was "absolutely positive." (12RT 1519-1520, 1669.)

Recent cases and new social science research demonstrate that a witness's certainty in making an identification "is no guarantor of, and indeed, appears to be uncorrelated to accuracy." (*United States v. Brownlee* (3rd Cir. 2006) 454 F.3d 131, 143, fn. 9 [citing studies showing no meaningful correlation between confidence and accuracy]; *People v. Jimenez*, *supra*, 165 Cal.App.4th at p. 82 [social scientists have found witness's confidence in identifying suspect does not correlate with accuracy, citing Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach* (2007) 12 Berkeley J.Crim. L. 1, 18-19];

People v. Woolcock (N.Y.Sup. 2005) 7 Misc.3d 203, 206 [792 N.Y.S.2d 804, 807]; *State v. Romero* (2007) 191 N.J. 59, 76 [revising model jury instruction to include caution that "witness's level of confidence, standing alone, may not be an indication of the reliability of the identification"].).)

The Sixth Circuit has also noted that "empirical evidence on eyewitness identification undercuts the hypothesis that there is a strong correlation between certainty and accuracy." (*Haliym v. Mitchell* (6th Cir. 2007) 492 F.3d 680, 706, citing Stein, *The Admissibility of Eyewitness Testimony About Cognitive Science Research on Eyewitness Identification* (2003) 2 L., Probability & Risk 295, 296 and Loftus & Doyle (1997) *Eyewitness Testimony: Civil and Criminal* 67.) A survey of eyewitness experts confirms this view – 73 percent of them agreed that confidence is not a good predictor of identification accuracy. (Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration* (2002) 8 J. Experimental Psychol. 44.)[13]

On a spectrum of certainty, Bowie was on the most extreme end. Had Bowie testified to circumstances showing that he had a clear, extended view of the driver, his level of certainty might have been warranted. But Bowie's own testimony shows that he was not entitled to his expressed

---

[13] See also Bradfield, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy* (2002) 87 J. Applied Psychol. 112, 112 ["Confirming feedback inflated retrospective certainty more for inaccurate eyewitnesses than it did for accurate eyewitnesses thereby reducing the certainty-accuracy relation"]; Mandery, *Due Process Considerations of In-court Identifications* (1996) 60 Alb. L.Rev. 389, 418 [citing research studies indicating the lack of correlation between the certainty and accuracy of eyewitness identifications].

certainty. His view of the driver was first obstructed by the position of the driver, sitting behind tinted glass, a dashboard, and a steering wheel. The view was also obstructed by the large passenger. Then Bowie's focus was on the passenger's semiautomatic weapon, which caused Bowie to freeze and lose contact with reality, as he described it. Then he was turned around by the passenger before the driver got out of the car. Bowie was marched into the carwash and told to lie down, which he did. The driver was searching the white Chevrolet when Bowie jumped to his feet and ran. Bowie's view of the driver did not allow him to provide even a rough estimate of the driver's height, indicating he never saw the driver face-to-face. Eleven days later, the graphic artist was not able to make a single sketch based on Bowie's description of the driver.

Bowie never described any circumstances that would have allowed him to see the driver's face where Bowie would have been even slightly confident in his identification. That Bowie was supremely confident is therefore highly suspect. On this record it is impossible to know why Bowie insisted on a level of certainty that permitted no room for doubt *whatsoever*. But at the very least, like Bowie's other lies during his trial testimony, it was not to be trusted. Bowie's level of certainty does not weigh in favor of a reliable identification.

e. The one-month interval between the offense and the identification was long enough for Bowie's poor memory to fade considerably.

The fifth and final factor to take into account in determining whether an identification was reliable, though the identification procedures were unduly suggestive, is the lapse of time between the offense and the identification. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.) The day

after the January 25, 1998 shooting at the carwash, Bowie provided minimal details of the driver's face to police – he said that the driver's face had a lighter complexion than the passenger's and had a funny shaped mouth. (1CT 183; 1CT 246-247; 12RT 1597-1599.) A week and a half after the shooting, Bowie's description of the driver had degraded further. Bowie could only tell graphic artist John Shannon that the driver had a receding hairline or tight eyes or "something like that," with no mention of a lighter complexion. (17RT 2556.) Bowie's memory had so deteriorated, he failed to even mention to Shannon anything about the suspect's having a funny shaped mouth, though he purportedly told Detective Chavers just that 10 days before. (17RT 2556.) Shannon found Bowie's description of the driver so unavailing that he could not draw a single picture of the driver's face. (17RT 2544-2545, 2548, 2556.) Bowie's inability to describe the driver's face demonstrates either a poor memory or the fact that he never got a good look at the driver's face.

As Bowie's poor memory shows, the time between the shooting and Bowie's identification – about a month – was not immediate enough for him to have an accurate recollection of the driver. "[I]t appears that the accuracy of most peoples' memories declines sharply shortly after an event, but then declines very little over an extended period of time." (Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal* (1991) 79 Ky. L.J. 259, 291, citing Loftus, Eyewitness Testimony (1979) p. 53 and Shepherd et al., *Identification Evidence: a Psychological Evaluation* (1982) pp. 80-86; Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt* (1987) 16 J. Legal Stud. 395, 399.) Furthermore, faded memories decay irreversibly and never improve. "As a result, delays between the

commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute." (*State v. Henderson*, *supra*, 208 N.J. at p. 267, citing Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation* (2008) 14 J. Experimental Psychol.: Applied 139, 142; Krafka & Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification* (1985) 49 J. Personality & Soc. Psychol. 58, 65 [finding substantial increase in misidentification rate in target-absent arrays from two to twenty-four hours after event].)

Assuming for the sake of argument that Bowie saw the driver's face, Bowie's minimally detailed description of the driver's face the day after the shooting, along with his forgetting 10 days later that the driver had a funny shaped mouth and a lighter-complected face, show that any memory Bowie had of the driver's face dissipated rapidly. Thus, this factor weighs against a finding of reliability.

f. Conclusion

Bowie's identification of Wilson was not reliable because (1) Bowie did not get a good opportunity to view the driver, he could not even estimate the driver's height, and he did not get a good opportunity to view the driver's face – Bowie's view was obstructed by the car's tinted windows, the passenger's body was in the way, Bowie's back was turned to the driver when Bowie was marched into the carwash, and the driver's back was turned to Bowie when the driver searched a car inside the carwash; (2) Bowie's own testimony demonstrates that his paralyzed attention was on the passenger's gun, and not on the driver's face; (3) Bowie's prior description of the driver's face was so inadequate that it could not support a sketch; (4) Bowie's level of certainty, a factor of

dubious import in any event, was negated by his inability to describe the driver's face in any meaningful way, one day and eleven days after the shooting; and (5) the one-month interval between the offense and the identification was long enough for Bowie's poor memory to fade even further. Hence, Bowie's identification of Wilson was unreliable under the totality of the circumstances, and the court should have excluded it from the evidence. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 608.)

3. The Brown Identification Procedures Were Unduly Suggestive.

Over 40 years ago, the United States Supreme Court acknowledged that "showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." (*Stovall v. Denno* (1967) 388 U.S. 293, 302.) Thus, the United States Department of Justice has acknowledged the inherent suggestiveness of a single person showup. (U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999) § IV-A at p. 27.) Moreover, the federal circuit courts and highest state courts generally hold that a showup is inherently suggestive.[14]

---

[14] See, e.g., *Brisco v. Ercole* (2d Cir. 2009) 565 F.3d 80, 88; *United States v. Hawkins* (7th Cir. 2007) 499 F.3d 703, 707; *Pace v. City of Des Moines* (8th Cir. 2000) 201 F.3d 1050, 1057; *United States v. Singleton* (D.C. Cir. 1985) 759 F.2d 176, 179; *Summitt v. Bordenkircher* (6th Cir. 1979) 608 F.2d 247, 252; *Allen v. Estelle* (5th Cir. 1978) 568 F.2d 1108, 1112; *Brooks v. State* (2007) 281 Ga. 514, 519 [640 S.E.2d 280, 286]; *Merriweather v. Com.* (Ky. 2003) 99 S.W.3d 448, 451; *Com. v. Silva-Santiago* (2009) 453 Mass. 782, 797 [906 N.E.2d 299, 311]; *State v. Herrera* (2006) 187 N.J. 493, 504 [902 A.2d 177]; *Patterson v. LeMaster* (2001) 130 N.M. 179, 184 [21 P.3d 1032, 1037]; *People v. Duuvon* (1991) 77 N.Y.2d 541, 543 [569 N.Y.S.2d 346, 571 N.E.2d 654]; *State v. Oliver*

(continued...)

This Court has concluded that a single person showup is not "inherently unfair," while defining an unfair identification procedure as one that "'suggests in advance of identification by the witness the identity of the person suspected by the police.'" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413, quoting *People v. Slutts* (1968) 259 Cal.App.2d 886, 891.) On the other hand, the Court has cautioned that a single person showup should not be used without a "compelling reason." (*In re Hill* (1969) 71 Cal.2d 997, 1005-1006 ["By exhibiting petitioners alone to [the witness] while in a jail cell with no compelling reason for doing so the police used methods which were unnecessarily suggestive under the circumstances"]; *People v. Bisogni*, *supra*, 4 Cal.3d at pp. 586-587 ["there was no emergency present requiring a single person showup"].)

As will be shown, when Brown saw Wilson in court in Wilson's role as a defendant – before Brown identified Wilson in a live lineup – the showup suggested to Brown that Wilson was a suspect at the very least. Moreover, there was no compelling reason for the prosecutor to have Brown present in the courtroom to view Wilson in his capacity as a defendant. Accordingly, Brown's later identifications of Wilson at the live lineup, preliminary hearing and trial were tainted by – among other things –

---

[14](...continued)
(1981) 302 N.C. 28, 44 [274 S.E.2d 183, 194]; *State v. Dubose* (2005) 285 Wis.2d 143, 165-166 [699 N.W.2d 582, 593-594]; see also Note, 36 Colum.Hum.Rts.L.Rev. 755, 798 (2005) [discussing showups and concluding: "Suspects should not be allowed to participate in non-exigent show-ups because they derogate the fair trial right and jeopardize the institutional integrity of the criminal justice system"].

Brown's exposure to Wilson's appearance in court as a defendant in this case.

On February 11, 1998, Brown examined a booklet of photos, exhibits 9-A through 9-E (trial exhibit 51), which did *not* include a picture of Wilson, and indicated that the person in photo number 4 of exhibit 9-E had the closest complexion to the driver's. He also indicated that the person in photo number 1 of exhibit 9-A was closest to the size of the driver. (19RT 3055-3058; 25RT 4109.)

On February 12, 1998, Brown was shown a lineup of six photographs, exhibit 10 (trial exh. 47), and said, "I think number one was the driver of the El Camino." (19RT 3058-3061; 25RT 4109.) Brown then selected number 1 as one of the carwash suspects, Detective Reynolds circled the photograph for Brown, and Brown initialed it. (Trial exh. 54; 19RT 3055-3062; 25RT 4110.) Prosecution witness Christopher Williams identified the same man as the driver. (17RT 2610; 18RT 2730-2732, 3133, 3136.) The man identified by both Brown and Williams is *not* Wilson. (Compare exhibits 47, 54, and HH, all photographs of the man identified by Brown and Williams, to exhibit 50, containing a picture of Wilson in position number 2.)

Twelve days later on February 24, 1998, Detective Reynolds showed Brown different photographs, thereby suggesting to Brown that he had previously failed to correctly identify the person the police wanted Brown to identify. This time the photographs shown to Brown contained a picture of Wilson, but Brown did not identify Wilson as a suspect. Concentrating on Wilson's photograph, Brown said that Wilson had the same light-skinned complexion as one of the perpetrators, but Brown conceded that he really did not get a good look at the perpetrator. (24RT

3971-3972, 3976-3977; trial exh. 50.)

On May 20, 1998, Brown was in the courtroom for about 10 minutes, likely for the entire hearing on a motion to continue the preliminary hearing. Brown testified at the June 24, 1998 preliminary hearing that he saw the defendants in court at a continuance hearing the prior month. (19RT 3077-3078, 3087-3088; 1CT 53-67 [May 20, 1998 hearing transcript]; 2CT 535 [Minute Order for May 20, 1998 hearing].) Detective Reynolds confirmed in his trial testimony that Brown and the defendants were in the courtroom at the same time at a hearing held before the June 9, 1998 live lineup. (18RT 2679-2680.)

At the May 20, 1998 hearing, Wilson was identified on the record as a defendant and spoke to personally waive time for the preliminary hearing. (1CT 61.) During the hearing, the prosecutor argued for a live lineup, which the court granted, although Wilson's counsel objected on the record to "Mr. Wilson being asked to stand in a lineup which involves any witnesses which have previously been shown photographs of Mr. Wilson. I think that would be highly prejudicial, unnecessary, and unusual." (1CT 63.) As stated in the preceding paragraph, Brown was one of the witnesses previously shown photographs in this case. Under these circumstances, a fair conclusion is that Brown not only saw Wilson appear in court as a defendant in this case, as Brown testified, he also paid attention to Wilson, particularly when Wilson spoke on the record and his lawyer objected about witnesses that included Brown.

Similar to *Moore v. Illinois* (1977) 434 U.S. 220, where the victim identified her alleged assailant for the first time at the preliminary hearing, "[i]t is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed

in this case." (*Id.* at p. 229; *People v. Fairley* (1982) 135 Cal.App. 3d 182, 187 [discouraging in-court showups because they cannot be conducted within any reasonable limits of control; circumstances could clearly indicate to any reasonable person who the defendant is]; 2 LaFave et al., Crim. Proc. (3d ed. 2007) § 7.4(g), p. 963 ["a confrontation in court 'is the most suggestive situation of all,'" citation omitted].)

Defense counsel was not aware that Brown was present because the prosecutor had refused to reveal Brown's identity to the defense. (2SuppCT II 321-322.) Given that defense counsel objected to Wilson's participation in the lineup because Brown had seen a photograph of Wilson, it is beyond doubt that, had defense counsel been aware of Brown's presence, defense counsel would have objected to Brown's lineup identification as unduly suggestive on the additional ground that Brown had seen Wilson in the courtroom as a defendant.

The live lineup, which included Wilson, was held on June 9, 1998, 14 days before the preliminary hearing. (13RT 1725; 18RT 2679.) Brown testified at the preliminary hearing that he picked Wilson at the live lineup because Wilson had the same complexion as the driver. (19RT 2991, 3074-3076.) In fact, according to Brown, "due to [Wilson's] complexion, he is the *only one* in the lineup that I can pick out." (19RT 3008, italics added.)

The live lineup included six African-American males. As Brown confirmed, only Wilson (in position number 3, standing near center underneath the lineup number) had a light complexion. Four of the lineup participants (numbers 1, 2, 5, and 6) had dark to very dark complexions. The male in position 4 had a medium complexion. (Exh. 67, lineup number 6.) Christopher Williams agreed with Brown's view of the lineup,

testifying that Wilson had the lightest and brightest skin of the participants in the live lineup. (13RT 1819.)[15]

Brown testified further at the preliminary hearing that he could not positively identify the driver because he only saw the man from behind, from his shoulders to his head, and merely glanced at the front. (19RT 2991, 3056.) Brown consequently admitted that he was uncertain whether Wilson was the driver of the El Camino. (19RT 3082.)

In sum, Brown "picked" Wilson at the live lineup – and then in preliminary hearing testimony that was later read to the trial jury – *after* Brown identified someone else as the driver, *after* Brown closely examined Wilson's photograph and rejected Wilson as the driver, and *after* he saw Wilson appear and speak as a defendant in court. Furthermore, at the lineup, Brown picked Wilson because Wilson was the only participant who had light skin. Under these circumstances, the identification procedures employed by the state were unduly suggestive.

4. Brown's Identification of Wilson Was Unreliable.

Based on Brown's opportunity to view the driver at the time of the offense, Brown's degree of attention at the time of the offense, the accuracy of his prior description of the driver, Brown's level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification, Brown's identification of Wilson was unreliable.

Brown saw a man drive away in Jessie's El Camino, knocking over

---

[15] Detective Reynolds admitted that three of the lineup participants did not have light skin. But contrary to Brown's and Williams's testimony and what exhibit 67 reveals, Reynolds opined that the participants in positions 4 and 5 had fair skin like Wilson. (18RT 2709-2710.)

a gate on his way out of the carwash. (19RT 2990.) Brown only saw the driver from behind, from his shoulders to his head, and merely glanced at the front. (19RT 2991, 3056.) Brown conceded to Detective Reynolds that he really did not get a good look at the driver. (24RT 3977.)

Two-and-half weeks after the shooting, Brown identified a male other than Wilson as the driver. (19RT 3058-3061; 25RT 4109; prelim. hrg. exh. 10; trial exh. 47.) Brown also rejected Wilson as the driver when Brown was shown a picture of Wilson. (24RT 3971, 3976-3977.)

At the preliminary hearing, Brown could not positively identify Wilson as the driver. (19RT 2991.) Brown also admitted that he was uncertain whether Wilson was the driver. (19RT 3082.)

The lapse of time between the offense and Brown's selection of Wilson at the live lineup was four-and-a-half months, from January 25, 1998 until June 9, 1998 (19RT 3077-3078, 3087-3088), a factor that weighs against reliability. (*State v. Henderson*, *supra*, 208 N.J. at p. 267 [the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken; memory decay "is irreversible"].) Furthermore, that Brown identified a different man as the driver from a photo array 18 days after the shooting undermines the reliability of Brown's selection of Wilson 135 days after the shooting. (See *Raheem v. Kelly*, *supra*, 257 F.3d at p. 139 [making wrong identification from photo array less than one week after the incident undermines reliability of identification made from live lineup three weeks after incident].)

Hence, Brown's identification of Wilson was unreliable. It should have been excluded.

E. The Erroneous Admissions of Bowie's and Brown's Highly Suggestive and Unreliable Identifications of Wilson Were Not Harmless Beyond a Reasonable Doubt, Especially in Light of the Inherent Power of Eyewitness Testimony and the Superficial Evidence Tying Wilson to the Shooting.

The admission of identification testimony that violates a defendant's federal constitutional right to due process is reviewed for reversible error under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1119, fn. 22.) The focus under *Chapman* is not on what effect the error might be expected to have on a reasonable jury, but rather the effect the error had on the jury in this case. Thus, the appropriate inquiry is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, original italics.) Because Bowie's and Brown's eyewitness identifications were vitally important to the prosecutor's case, and the other evidence against Wilson was – on close examination – quite shallow, the state will not be able to carry its heavy burden of proving that the erroneous admissions of Bowie's and Brown's identifications were harmless beyond a reasonable doubt, that is, that the verdicts were surely unattributable to the identifications made by Bowie and Brown.

1. Together, Bowie's and Brown's identification testimony was critical to the prosecution's case.

Eyewitness identification evidence has a powerful impact on juries, and a jury likely would convict if presented with a confident eyewitness whose trial testimony was clear and unwavering. (See *Barker v. Fleming* (9th Cir. 2005) 423 F.3d 1085, 1100; *Moss v. Hofbauer* (6th Cir. 2002) 286 F.3d 851, 874 ["jurisprudence and legal scholarship have well established

that . . . eyewitness testimony has a profound impact on juries"].) "To a jury, 'there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says[,] "That's the one!"' *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (emphasis in original)." (*United States v. Brownlee* (3d Cir. 2006) 454 F.3d 131, 142.)

Thus, because eyewitness identifications are often "considered direct evidence of guilt" and accorded great importance by juries (MacLin & Malpass, *The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making* (2001) 7 Psychol. Pub. Pol'y & L. 98), the jury did not have to consider closely the deficiencies in the remaining evidence against Wilson. Given Bowie's clear and unwavering identification, reinforced by Brown's testimony, nothing else would be needed to convince the jurors that Wilson was guilty. Surely it cannot be said that Bowie's and Brown's identifications did not contribute to the jury's verdicts against Wilson.

Obviously Bowie was the prosecution's star witness against Wilson, and the prosecutor treated him as such. The deputy district attorney covered 17 pages of transcript in his opening statement to outline the case against Wilson. (12RT 1475-1491.) Although 18 witnesses testified for the state in its case-in-chief, the prosecutor devoted five full pages of his opening statement solely to the expected testimony of a single witness – Randy Bowie. (12RT 1477-1481; 12RT 1508; 13RT 1698, 1835, 1864; 14RT 1992, 2022; 15RT 2116, 2160, 2185; 16RT 2245, 2249, 2297; 17RT 2544, 2578, 2592; 18RT 2761, 2764, 2805.) In fact, in his opening statement the prosecutor relied *only* on Bowie to identify Wilson as the driver. Thus, the prosecutor maintained that Bowie "will tell you *positively*

without any doubt in his mind that . . . Byron Wilson was the driver of that vehicle." (12RT 1478, italics added.) From the get go, the prosecutor signaled to the jury that his case against Wilson would rise or fall on the testimony of Randy Bowie.

Consistent with the prosecutor's view that Bowie's testimony would have great impact, the state called Bowie as its first witness. (12RT 1508.) In doing so, the prosecutor honored the conventional wisdom of trial lawyering that because jurors remember best what they hear first and last, a prosecutor should examine the most crucial witness at the outset, especially one packing an emotional punch. (Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination* (2001) 76 Notre Dame L. Rev. 423, 437 ["primacy effect reveals that information presented first is more effectively recalled"]; Voss, *The Science of Persuasion: an Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom* (2005) 29 Law & Psychol. Rev. 301, 312 ["[e]motional evidence should be put on first to get the primacy effect"].) And just as the prosecutor promised, Bowie testified that he had no doubt and was absolutely positive that Wilson was the driver. (12RT 1519-1520.)

The prosecutor's argument to the jury again reflected his view that Bowie's identification of Wilson was unimpeachable – as if the driver's face had been captured on camera. Thus, the prosecutor repeated his mantra concerning Bowie's identification: "he says he's absolutely positive, there is no doubt in his mind." (28RT 4506.) Bowie's eyewitness identification had a powerful impact on the jury, and the jury likely convicted Wilson because it was presented with a confident eyewitness whose trial testimony was clear and unwavering. (*Barker v. Fleming*,

supra, 423 F.3d at p. 1100.)

Anthony Brown's testimony, too, was significant to the prosecution's case, not only because it supported Bowie's identification by describing the driver as light-skinned like Wilson, but also because it gave the prosecutor an opportunity to argue that another witness had picked Wilson as the driver.

The prosecutor argued to the jury as follows: "And when you look at [Brown's] I.D. form from the live lineup . . ., what does he put on it? [¶] *He picks no. 3, Mr. Wilson*, but he adds I only viewed from behind and a quick view of the face but best fits the description of lineup no. 6." (28RT 4498, italics added.) Later the prosecution read to the jury that Brown had testified as follows: "I can't positively identify that person today. He then points [at Wilson]. The light complected guy would probably best fit the description but I only seen him from the rear view and glanced at the front view." (28RT 4500.) The prosecutor concluded: "So, again, the evidence clearly shows that . . . Anthony Brown had an opportunity to see what [he told you he] saw." (28RT 4501.)

In sum, Bowie delivered in his role as the prosecution's star witness and pointed the finger at Wilson without hesitation, however unwarranted. Brown's testimony allowed the prosecutor to argue that Brown as well picked Wilson. Thus, the admission of the identification testimony by both Bowie and Brown had a profound effect on Wilson's jury, substantially contributing to the verdicts against Wilson in the process. Under *Chapman*, this conclusion alone requires reversal of the judgment against Wilson.

2. On close examination, the remaining evidence against Wilson was slight.

The balance of the evidence against Wilson tying him to the shooting was not strong. It amounted to first, a weak and conflicting identification by Christopher Williams, and second, guilt by association, specifically Wilson's association with co-defendant Aswad Pops, their group (the Young Mafia Organization), and the group's hangout. The evidence shows that, but for the erroneously admitted and dubious identifications of Wilson by Bowie and Brown, any other light-skinned, rank-and-file member of the Young Mafia Organization could have been convicted of the carwash shooting in Wilson's stead.

a. Williams's selection of Wilson 135 days after the shooting was unreliable.

(1) Williams, a felon, repeatedly lied under oath.

At the time of the carwash shooting, Williams, a convicted felon, was on probation for receiving stolen property (a gun) and possession of marijuana with intent to sell. Williams used and sold marijuana at the carwash even though a condition of his probation was that he would not associate with known drug users or sellers. As Williams was forced to admit at trial, he committed perjury at the preliminary hearing by lying under oath that marijuana was not sold at his carwash. (13RT 1700, 1708-1709, 1746-1748, 1796, 1799; 28RT 4577.)

Williams also repeatedly lied to the jury, particularly about whether the carwash was an actual carwash and not a front for his marijuana business. At the outset, Williams insisted that Wheels 'N Stuff, the name of the operation, was a "fresh carwash." (12RT 1508; 13RT 1750.) Then he unwittingly gave testimony establishing that the carwash was no

legitimate business, but merely a means to deal marijuana. Williams acknowledged that the carwash had no particular hours when it was open and he did not keep any records of the amount of money that came into or out of the carwash. (13RT 1750 [Williams: "for me to keep records would have been very tedious"].) In fact, as he testified, he did not charge for washing cars – car washers were not even supposed to ask customers for money. Instead, according to Williams, he accepted "donations." (13RT 1752.) Williams testified that he had *no* carwash employees; those who washed cars were merely "volunteers." (13RT 1782, 1809.) At the preliminary hearing, Williams testified that he could not always cover the rent for the carwash. At trial he contradicted himself and testified that he could cover his rent. (13RT 1756-1757.) Proving once and for all that the carwash was merely a pretext for his drug operation, Williams had to concede that with no profits from car washing, he paid rent for the "Wheels 'N Stuff" property out of his marijuana sales proceeds. (12RT 1508; 13RT 1756.)

In addition, Williams was impeached time and again with his prior testimony. At one point, Williams told the jury that he paid workers for washing cars at his carwash. But at the preliminary hearing, he testified that he never paid workers any money to wash cars. (13RT 1751-1752.)

At the preliminary hearing, Williams testified that "a lot of the car washing that was going on was just practice." At trial he denied that there was any practice in car washing. (13RT 1754-1755.)

More important, Williams lied when he testified he was "certain" that he did not identify someone other than Wilson as the Honda driver. Williams testified as follows:

Q Let me repeat my question. Did you tell the police that

the person in spot No. 1 [photograph No. 1 of exhibit 47], he is the person who was driving the Honda?

A No, I didn't tell them that.

Q And you're certain of that?

A I'm certain of that.

(13RT 1765.) Williams then testified that the person pictured in photograph No. 1 was not in the courtroom. (*Ibid.*)

Two police officers flatly contradicted Williams's important testimony. Reading from a report, Detective Reynolds testified that when Williams examined exhibit 47, a photo array that does not contain a picture of Wilson, Williams told Reynolds: "The subject in photograph No. 1 looks like the person who was wearing a black designer wave cap with the white writing on his head. *He's the person that was driving the black Honda.*" (18RT 2732, italics added.) A second officer, Sergeant Swanson, also confirmed that Williams said the person pictured in photograph number 1 of exhibit 47 "was driving the black Honda." (20RT 3133.)

At trial Williams could not even tell the jury the truth about his application for the Wheels 'N Stuff business license. Defense counsel showed Williams the application, and Williams identified his signature. (13RT 1776; exh. CC.) Later Williams was questioned about his earlier trial testimony that marijuana was stored in a soda machine at the carwash. When defense counsel brought to Williams's attention that he had testified at the preliminary hearing that he knew no such thing about the soda machine, Williams explained that he lied at the preliminary hearing because he was still on probation and his friends' reputations were at stake. Williams apologized for lying. Specifically, he said: "I lied at the preliminary hearing. I lied. I'm sorry. You know, I didn't have people

who I felt like I could express myself to." (13RT 1821-1822.)

Defense counsel then pressed Williams on whether he included in his business license application an intention to put a soda machine in his shop. Counsel showed Williams the business application, and though he had just apologized for lying at the preliminary hearing, Williams testified that the signature on the business application was not his. (13RT 1822.) Either Williams was again lying, or he lied earlier in the day when he said that the signature on the business application was his. (13RT 1776.) In any event Williams proved that he was not to be trusted and was an unrepentant liar.

Thus, Wilson's jury could readily reject Williams's identification testimony altogether because of his commitment to mendacity. (See *Garceau v. Woodford* (9th Cir. 275 F.3d 769, 7770 [in conducting harmless error analysis, evidentiary weight of testimony by witnesses who lie significantly undermines argument that evidence of guilt was overwhelming].)

(2) Williams admitted he did not get a good view of the driver when, through a tinted windshield, Williams glanced at the driver slumped down in the front seat behind a dashboard and steering wheel.

Williams's opportunity to observe the driver also leads to a rejection of his identification of Wilson. Williams testified that the driver was slumped down in the car and that he told the police, "I really did not get a good look at him." (13RT 1703, 1707, 1774.) Although Williams nonetheless said he was positive that Wilson was the driver, he also conceded that he only got a "glance" of the driver. (13RT 1712.) Williams

further testified: "I wasn't looking inside [the car]. I would glance over at it and I would look back. I've got a habit of not staring at people I don't know so, yeah, I looked over towards them and mind my own business, then I would maybe look again." (13RT 1811; see also 13RT 1711 ["I was in the habit of not staring at people, you know, so I looked inside *just momentarily*," italics added].) Williams also admitted to Detective Reynolds that he paid more attention to the car than to the driver because staring at young males is received as an insult or a challenge. (17RT 2650.)

Finally, Anthony Brown testified that the car windows were tinted (19RT 3026-3027), making it even harder for Williams to identify someone who was slumped down behind a steering wheel and dashboard and at whom Williams only glanced. Williams's obstructed and fleeting view of the driver proves that Williams wildly overstated the certainty of his identification. (*People v. Jimenez*, *supra*, 165 Cal.App.4th at p. 82 [social scientists have found witness's confidence in identifying suspect does not correlate with accuracy].)

(3) As a result, Williams could only provide an unavailing description of the driver.

Williams's inability to provide an adequate description of the alleged perpetrator also demonstrates that Williams did not have a good view of the driver. The only description of the driver by Williams was that the driver had skin lighter than the passenger's and wore a black designer wave cap with white writing on it. (17RT 2612; 18RT 2732.) This description of the driver's *face* must have matched untold thousands in the Los Angles area alone.

(4). Williams's identified another man as the driver 18 days after the shooting.

As noted, while viewing a photo array 18 days after the shooting, Williams identified a person other than Wilson as the driver. (18RT 2730, 2732.) Given this selection and the facial attributes of the person Williams identified, Williams implicitly described the driver as a young African-American male with a nose and bridge flatter and wider than Wilson's, a forehead considerably larger than Wilson's, hair shorter than Wilson's, lips larger and fuller than Wilson's, skin darker than Wilson's, and a block-shaped head compared to Wilson's oval-shaped one, in other words, someone who does not look like Wilson. (Compare exhibits 47, 54, and HH, all photographs of the man identified by Williams as the driver, to exhibit 50, containing a picture of Wilson in position number 2.) Thus, Williams did not see Wilson; he glanced at someone else. Moreover, Williams's identification of another as the driver means that his powers of observation and identification are either good – because he was right that time, or bad – because he identified the wrong person that time. In either case, Williams's prior identification greatly undermines his selection of Wilson.

(5) Williams viewed a photo of Wilson 29 days after the shooting and said Wilson did not look like the driver.

On February 23, 1998, 29 days after the shooting, Williams examined a mug shot of Wilson in a photo array (exhibit 50); Williams rejected Wilson as the driver. (13RT 1772-1774; 17RT 2611-2612, 2649; 18RT 2703.) Williams said that even though Wilson's picture showed he had light skin like the driver, Wilson did not look like the driver. Specifically, Williams stated, "no, I don't think these – none of these guys

look like that, no." He also told the police that he did not think that the driver was pictured in exhibit 50, though Wilson's photo was actually in position number 2. (13RT 1773-1774.) Williams was correct. Wilson did not look like the driver because Wilson was *not* the driver.

(6) Having identified someone else as the driver *18 days* after the shooting and having said that Wilson did not look like the driver *29 days* after the shooting, Williams could not and did not accurately identify the driver when he selected Wilson *135 days* after the shooting.

The trial court instructed that the time between the alleged criminal act and the witness's identification was a factor for the jury to consider in determining the accuracy of Williams's identification. (29RT 4763; *People v. Wright* (1988) 45 Cal.3d 1126, 1141 [approving instruction].) The shooting occurred on January 25, 1998; four-and-a-half months later on June 9, 1998, Williams selected Wilson as the driver at a live lineup. (13RT 1817.) By charging Wilson, the prosecutor must have believed that Williams had a poor memory of the driver just 18 days after the shooting, when Williams chose a male other than Wilson as the driver. On top of that, 29 days after the shooting Williams closely examined Wilson's photo and said that Wilson did not look like the driver. Thus, it strains credulity to suggest that Williams had an accurate memory of the driver *135 days* after the shooting when he selected Wilson. As proven by Williams himself, four-and-a-half months was far too long for Williams to have retained an accurate memory, if he ever had one, of someone whom Williams only "glanced" at and who was slumped down in a seat behind a tinted window, dashboard, and steering wheel. (13RT 1712, 1811; 19RT

3026-3027; Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, *supra*, 79 Ky. L.J. at p. 291 ["memories decline[] sharply shortly after an event"].)

(7) Because he had the lightest and brightest skin in the live lineup, Wilson stood out to Williams.

When Williams first talked to the police, he said that the driver was light-skinned. (13RT 1812-1813.) Williams told the jury that Wilson was lighter than the others in the live lineup and had "the brightest" skin. (13RT 1819.) Anthony Brown was also at the live lineup and testified that Wilson had a light complexion. (19RT 2991.) Brown added, "due to his complexion, he is the *only one* in that lineup that I can pick out." (19RT 3008, italics added.) Thus, with skin lighter and brighter than the other live lineup participants, Wilson stood out in a way that suggested to Williams that he should select Wilson as the driver. (*People v. Avila*, *supra*, 46 Cal.4th at p. 698 [to determine due process violation, first question is whether anything caused the defendant to "stand out" from the other lineup participants in a way that would suggest the eyewitness should select the defendant].)

(8) Williams identified Wilson also because he had previously seen Wilson in a suggestive mug shot.

As permitted by the court's instruction, the jury rightly could have concluded that Williams's identification was not the product of his own recollection. (29RT 4763-4764.) Before he identified Wilson at the live lineup, Williams saw a photograph of Wilson attached to a folder entitled all in capital letters, "'MUG SHOW-UP FOLDER," which necessarily implied Wilson had been previously arrested and perhaps convicted. (Exh.

50; 17RT 2611; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 384 [mug shots "carry the inevitable implication that appellant suffered previous arrests and perhaps convictions"]; U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement, *supra*, at p. 30 [photo lineup should contain no visible information concerning previous arrest].) Williams would have naturally believed that the police showed him the sixpack because the police believed it depicted a suspect. (*People v. Carpenter* (1997) 15 Cal.4th 312, 368 ["Anyone asked to view a lineup would naturally assume the police had a suspect"].) Wilson, moreover, was the only one in the live lineup who also appeared in the sixpack examined by Williams. (Compare exhibits 50 and 67.) Consequently, Williams identified Wilson at the live lineup, not because he glanced at Wilson slumped down in a car behind a tinted window, dashboard, and steering wheel, but in part because he had more recently examined a suggestive mug shot of Wilson. (*Simmons v. United States*, supra, 390 U.S. at pp. 383-384 [when witness views photograph of individual, "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification"].)

(9) Williams's trial identification of Wilson was tainted and confused.

Williams's live lineup identification of Wilson was unreliable and tainted his in-court identification. But even apart from the taint, Williams's trial identification was unconvincing.

Williams testified that he was unsure whether Wilson, present in the courtroom as the defendant, was the driver *or* the passenger. Williams specifically testified as follows: "I'm confused about who was in the

confused about; otherwise, those are the two people in the car. [¶] Now, right now, they almost look similar so for me to know which one was driving and which one was in the passenger seat is hard for me but I do know those are the two people in the car, yes." (13RT 1761.) In other words, because Wilson and Pops looked almost similar to one another in Williams's eyes, which is how participants in a lineup are supposed to look, Williams was unable to identify Wilson as the driver.

More important, Wilson and Pops do not even look similar. Pops is considerably taller and darker and has a much narrower face than Wilson and apparently had a three-inch pony tail at trial. (9RT 959; 17RT 2709 [Detective Reynolds describing Wilson as fair skinned]; compare exhs. 66 [Pops] and 67 [Wilson].) Thus, when Williams said Wilson and Pops looked almost similar, though they clearly do not, he was showing that his powers of observation and identification were highly suspect.

In sum, Williams's selection of Wilson 135 days after the shooting was unreliable because (1) Williams, a felon, repeatedly lied at the preliminary hearing and trial; (2) Williams admitted that he did not get a good look at the driver because Williams only quickly glanced at him through tinted glass, while the driver was slumped down in his seat behind a dashboard and steering wheel; (3) Williams identified another man as the driver 18 days after the shooting; (4) Williams said Wilson did not look like the driver 29 days after the shooting; and (5) at trial, Williams could not tell the difference between Wilson and Pops, who look quite different.

b. Wilson's connection to the shooting was no closer than any other light-skinned member of the Y.M.O.

The balance of the evidence against Wilson tying him to the shooting was no more than guilt by association, that is, Wilson's association with Pops, their group (known as the Y.M.O), and the group's hangout (Wilson's apartment). As noted, Williams described the driver as light-skinned, like Wilson. (13RT 1812-1813, 1819.) And as an examination of Wilson's photograph suggests, it is not likely that Wilson was the only member of the Y.M.O. with light skin. (Exh. 50, photo 2.) The evidence thus shows that any light-skinned member of the Y.M.O. could have been convicted of the carwash shooting as the driver.

Larry Barnes, Pops's close friend, testified for the prosecution. (14RT 1983.) Barnes told the jury that he, Pops, Harris, and Wilson were members of the Young Mafia Organization ("Y.M.O."), which Barnes said was a group of friends but was not a gang. Barnes identified a list of 22 aliases found in a looseleaf binder in Wilson's apartment that numbered Pops (known as "Nut"), Harris ("Scrap"), Wilson ("Bird") and Barnes ("Smurf") as 1, 2, 3, and 18, respectively. The binder also contained some drawings and a reference to the Y.M.O. (Exhs. 34A-D, 68-B; 13RT 1865-1868; 14RT 1898-1899, 1956-1962, 1985; 15RT 2170.)[16]

Before opening statements, the trial court ruled that the list of 22 "gang" members and the drawings would be admitted for the limited

---

[16] Although the person who wrote the list of 22 names and made the drawings was not identified for the jury, Pops's counsel informed the court during a pretrial hearing that Everett Rivers made at least one drawing and some part of the lists; Rivers's name appears on one page of the binder. (8RT 714-715.)

purpose of associating Pops with Wilson and connecting Pops to Wilson's apartment because it was "a gang location." (12RT 1464-1465; see also 14RT 1899; 8RT 717 [prosecutor arguing to court Wilson's apartment "was more of a gang hangout, crash pad type of location, rather than a residence where Mr. Wilson just lived"].) Most important, the court offered that the items found in the hangout could be seen as "glorifying" certain aspects of gang culture. (8RT 827.)

The prosecutor argued to the jury that the roster of 22 names was a "gang list." The prosecutor emphasized that Pops was in "position" number 1 and Wilson was in "position" number 3. (28RT 4510.) These were virtually the last points argued by the prosecutor concerning the carwash shooting. Thus, the prosecutor, likely mindful of the recency principle – that a jury tends to remember what it hears last – must have hoped that his final message would resonate with the jury. (See *Whiteplume v. State* (Wyo. 1992) 841 P.2d 1332, 1340 [acknowledging universal trial lawyer practice of adhering to primacy and recency theory, that jurors tend to remember what they hear first and last].) The deputy sheriff was the prosecution's first witness. The practicing trial bar is familiar with the theories of primacy and recency. The former theory holds that the jury tends to remember that which it hears first; the latter theory holds that the jury also tends to remember that which it hears last.And the message that the jury carried with it into deliberations was that Pops was the leader of a 22-member gang and the younger Wilson was his subordinate. (27RT 4446.)[17]

---

[17] See also 8RT 740 [Pops's counsel representing to court in jury's absence that Pops is age 27 and "has been in prison the better part of his (continued...)

Although early on, the trial court prohibited the prosecutor from arguing to the jury that Pops was "the leader or the number one person" if the prosecutor's argument was based solely on the list, defense counsel did not object to the prosecutor's argument that the 22 names constituted a gang list or to the prosecutor's obvious suggestion that Pops was the leader of the gang. (14RT 1906; 28RT 4510.) And despite the court's prompting of defense counsel to draft an instruction limiting the jury's use of the drawings and the list, counsel declined to do so. (8RT 827-828; 12RT 1464; 14RT 1907; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 887-888 [when evidence is admissible for one purpose and is inadmissible for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly].) Hence, the jury was not limited in its consideration of this evidence and could have reasonably accepted the prosecutor's unrebutted argument that the Young Mafia Organization had 22 members and Pops was the gang's leader.

Consistent with the court's view that the items found in the gang's hangout (Wilson's apartment) could be seen as "glorifying" certain aspects of gang culture (8RT 827), and consistent with the prosecutor's argument that the Y.M.O. was a 22-member gang (28RT 4510), almost all the evidence argued by the prosecutor as connected to the shooting, which was found in the gang's hangout, could reasonably be seen by Wilson's jury as

---

[17](...continued)
adult life," while Wilson is 21 and a "relative neophyte"]; 40RT 6466 [trial court acknowledging at hearing on motion to modify sentence that Wilson was 20 at time of shooting].) Pops was a former member of the Nutty Block Crips, a gang from the central area of Compton. (16RT 2418, 2434; 17RT 2511.) There was no evidence that Wilson was ever a member of the Nutty Block Crips or any group other than the Young Mafia Organization.

related to the gang as a whole, but not related to Wilson individually, or at least no more individually than any other member of the 22-member gang. This includes the looseleaf binder with the list and names of the gang members; the drawings of Pops with his Camaro and IROC rims (14RT 1950, 1956-1957; 15RT 2170-2174), argued by the prosecutor as showing that "Pops was proud of those rims" (27RT 4460); a second drawing, entitled "Nut – Loco," that showed Pops holding a Glock in his left hand; and another drawing of a Tech-9 attached to a right arm with a tattoo showing the letters, Y.M.O. (14RT 1956, 1961-1962; exhs. 34-B, 68-C, 68-E), argued by the prosecutor as similar to the tattoo that Pops had on his arm in the same location (28RT 4509).

Evidence found in the hangout also included a bullet that had been ejected from the 9mm gun used in the shooting (14RT 2164-2165), which Deputy Sheriff Walley agreed could have been dropped in the couch where the bullet was found, before or after the carwash shooting. (19RT 2872, 2880-2885, 2889, 2930-2931.) A January 26, 1998 Long Beach newspaper was discovered in a photo album in the apartment. The front page of the newspaper included an article on the carwash shooting from the preceding day. (15RT 2167.) This last piece of evidence was most consistent with the court's view, that it was collected to glorify the gang, and thus not Wilson specifically.

Police also retrieved a gun shop business card from a wallet under a couch cushion in the apartment. The wallet also contained a video rental card and a calling card, both in Wilson's name. (14RT 2174-2175.) On the back of the gun shop card were prices for .26 and .30 caliber Glock firearms, but not for a .40 caliber Glock, the gun used in the shooting. (16RT 2247.)

There was no evidence of Wilson's fingerprints on the binder, no evidence that Wilson made the drawings, and no evidence that Wilson composed the list. There was no evidence of any drawings of Wilson in the binder and no evidence that Wilson had a Y.M.O. tattoo. There was no evidence of Wilson's fingerprints on the fully preserved bullet and casing. And there was no evidence of Wilson's fingerprints on the photo album or the newspaper.

Except for the wallet, all of the materials could have been left by any members of the gang using Wilson's apartment as a hangout. And none of these materials was identified as belonging to or made by Wilson. In sum, the jury very likely relied heavily on Bowie's identification, bolstered by Brown's "pick" of Wilson, as emphasized by the prosecutor. Williams's identification of Wilson was not credible, as plentiful evidence in the record proves. The items meant to glorify the gang that were found in the gang's hangout – including the 9mm bullet – could have been left by any member of the gang, including Pops as the shooter of the 9mm gun. Hence, consistent with Williams's description, any light-skinned Y.M.O. member, instead of Wilson, could have been convicted with Pops, based on the same scant evidence. Beyond question, therefore, the trial court's error in failing to exclude Bowie's and Brown's identifications of Wilson contributed to the verdicts against Wilson. More precisely, the state will not be able to carry its heavy burden of proving beyond a reasonable doubt that the verdicts were surely unattributable to the erroneously admitted identifications. The judgment against Wilson must be reversed.

//

//

2.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM WHEN IT ADMITTED THE PRELIMINARY HEARING TESTIMONY OF ABSENT EYEWITNESS ANTHONY BROWN

A. Introduction

Anthony Brown testified for the prosecution at appellant's preliminary hearing, but failed to respond to a subpoena at the time of trial. The trial court held a hearing and determined that the prosecution had exercised due diligence in attempting to obtain Mr. Brown's presence for trial; thus, it permitted the introduction of his preliminary hearing transcript into evidence. This was error.

The trial court's ruling was fundamentally flawed in a constitutional sense. The facts present here, regardless of whether the prosecution exercised due diligence or not, are not the type of facts that bring this case within the formulation set forth by the United States Supreme Court for allowing a jury to consider prior testimonial evidence of a witness absent the production of the witness. In other words, Mr. Brown was not "unavailable" in the constitutional sense, and his preliminary hearing testimony should not have been read to the jury.

The trial court's ruling was also flawed in the sense that the facts do not show that the prosecution actually used due diligence, regardless of the constitutional requisites at issue. Consequently, even under an "availability" test that would otherwise permit the prosecution to read Mr. Brown's prior testimony to the jury, the prosecution did not meet the burden of showing that Mr. Brown was unavailable. Therefore, the trial court's ruling was lacking on this basis as well.

B. Anthony Brown's Preliminary Hearing Testimony Should Not Have Been Admitted at Trial Because He Was Not "Unavailable," as that Term Was Meant by the Framers at the Time the Sixth Amendment Was Adopted

1. The Right of Confrontation Contemplates an Opportunity to Cross-Examine a Witness Before the Trier of Fact

The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) This includes not only the right to cross-examination, but the right to face-to-face confrontation. "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.) The inclusion of the confrontation clause in the Bill of Rights reflected the Framers' conviction that a defendant must not be denied the opportunity to challenge his accusers in a direct encounter before the trier of fact. (See *California v. Green* (1970) 399 U.S. 149, 156-158.) As this Court has stated:

> The right of confrontation seeks to ensure that the defendant is able to conduct a personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. [Citations] To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling into question the ultimate integrity of the fact-finding process. [Citations].

(*People v. Herrera* (2010) 49 Cal.4th 613, 621.)

This Court's statement reflects the long-held view of the United States Supreme Court that "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."[18] (*Barber v. Page* (1968) 390 U.S. 719, 725.) The *Barber* Court affirmed the independent constitutional value of live testimony before the jury, regardless of whether or not cross-examination had previously occurred, when it observed that cross-examination at a preliminary trial was, by its nature, inferior to confrontation at trial. (*Id.* at pp. 721, 725.)

Recognition that the Framers meant the Sixth Amendment right to confrontation to be a trial right is an important aspect of the determination of how to apply any exceptions to this mandate. As discussed below, because the Framers believed that the essential component of the Sixth Amendment is the right to confront at trial–as opposed to some time prior to trial–witnesses providing testimonial evidence against a defendant, any exceptions to that right must be assessed by what the Framers would have contemplated at the time the amendment was adopted.

---

[18] In so stating, the Supreme Court rejected the view of Wigmore that live testimony before a jury was unnecessary as long as a transcript of a prior cross-examined statement could be read in court. (5 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3d ed. 1940) § 1365, at p. 27 [claiming that confrontation is "merely another term" for cross-examination, which is the only right confrontation guarantees].)

2. Brown Was Not Unavailable as that Term Was Understood by the Framers at the Time the Sixth Amendment Was Adopted

Despite the fact that the Sixth Amendment right to confrontation is a trial right, its enforcement at trial is not absolute. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *People v. Cromer* (2001) 24 Cal.4th 889, 897.) Federal and state cases have recognized the necessity for a limited exception to the confrontation requirement, admitting the prior testimony of a witness who is unavailable at the time of the defendant's trial. (*Ohio v. Roberts* (1980) 448 U.S. 56, 78; *Barber v. Page, supra,* 390 U.S. at pp. 724-725 [traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination"].)

In California, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right. (*People v. Seijas* (2005) 36 Cal.4th 291, 303.) This exception is codified in Evidence Code section 1291. (*People v. Friend* (2009) 47 Cal.4th 1, 67 [admission of former testimony in evidence not violative of defendant's constitutional right of confrontation when requirements of Evidence Code section 1291 met].)

The question of import, however, is not whether there is a limited exception to the right of confrontation at trial when the witness is unavailable–there is; the question of import is how we define "unavailable" for this purpose. Appellant's contention is that criteria were utilized for determining whether Brown was unavailable that violated the meaning of that concept as it was understood by the Framers at the time the Sixth

Amendment was adopted.

The approach to how we view confrontation clause rights was clarified by the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 (hereafter *Crawford*). There, the high court made clear that regardless of whether it may be deemed reliable by a trial court, the admission of testimonial hearsay violates the confrontation clause unless the hearsay declarant is unavailable and the defendant was afforded a prior opportunity for cross-examination. (*Id.* at p. 68.) Here, where there is no issue that the statements at issue are testimonial, and it is uncontested that the defendant had a prior opportunity to question the absent witness, the only issue for resolution is whether that witness was unavailable at the time of trial.

Appellant contends that Brown was not unavailable in the sense originally intended by the Sixth Amendment. The definition of unavailability must be defined as of 1791, and not as courts have currently defined unavailability.

Using the definition of "unavailable" envisioned by the Framers, the prosecution's mere failure to produce a witness at trial does not qualify as a circumstance that permits introduction of the witness's prior testimony. A witness was unavailable under the common law at the time of this nation's founding only where the witness was dead, in extremis, or detained by the defendant. (See e.g., *Trial of Lord Morley* (H.L. 1666) 6 How. St. Tr. 769, 770 [stating common law rule that extrajudicial statements not admissible merely because witness could not be found, but only allowed if witness's absence was because of death, illness, or defendant's wrongdoing]; *Motes v. United States* (1900) 178 U.S. 458, 471-474 [examining confrontation at common law and holding that no exceptions to live production existed

when witness's absence was caused by prosecutor's negligence]; *West v. Louisiana* (1904) 194 U.S. 258, 262 [noting that common law exceptions did not likely include "non-residence, permanent absence [or] inability to procure" witness], abrogated on other grounds by *Pointer v. Texas* (1965) 380 U.S. 400, 406.) Wigmore also acknowledged the common law exceptions to the right to confrontation: death, infirmity, insanity, and inequitable conduct. (5 Wigmore, *supra*, §1403 (death), §1405 (inequitable conduct), §1406 (infirmity), §1408 (insanity).)

In California, at common law, a witness's prior testimony was admissible upon a showing that the witness was either dead or outside the jurisdiction of the court. (*People v. Bird* (1901) 132 Cal.261, 263.) At that time, the California Code of Civil Procedure, section 1870, subdivision 8, provided that a witness's former testimony was admissible where the witness was deceased, out of the jurisdiction, or unable to testify. (*People v. Bird*, *supra*, 132 Cal. 261 at p. 264.)

Despite these well established and narrowly-drawn definitions of unavailability, Wigmore promulgated the idea that the law of evidence permitted substantial extensions to the common law rules without offending the confrontation clause. (5 Wigmore, *supra*, § 1404, at p. 149.) Subsequently, the United States Supreme Court endorsed what was by then a tradition of expanding on the common law definition of unavailability, finding that it included the prosecutor's failure to procure the attendance of a witness at trial. (*Barber v. Page, supra,* 390 U.S. at pp. 725-726.) *Barber* defined unavailability as follows: "[a] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." (*Id.* at pp. 724-725.)

California has followed *Barber* and extended the common law definition of unavailability to include the prosecution's failure to procure the witness's attendance at trial. (See, e.g., *People v. Enriquez* (1977) 19 Cal.3d 221, 235, disapproved on other grounds by *People v. Cromer*, *supra*, 24 Cal.4th at p. 898; see also *People v. Valencia* (2008) 43 Cal.4th 268, 291-292 ["California law and federal constitutional requirements are the same."].) This acceptance, however, must now be re-examined due to the absolute necessity for historical conformance dictated by the United States Supreme Court in *Crawford*.

In *Barber v. Page*, *supra*, the United States Supreme Court impliedly accepted the premise that state courts are free to alter and extend the boundaries of a hearsay exception consistently with the Sixth Amendment so long as the formal categories of unavailability and prior cross-examination are observed. Later, in *Ohio v. Roberts*, *supra*, the high court followed much the same philosophy in focusing on reliability as the linchpin of confrontation clause concerns. *Crawford*, however, established that these questions are a matter of historical substance and not contemporary definition.

The high court held in *Crawford* that "a defendant has a constitutional right to confront and cross-examine at trial all witnesses against the defendant, *unless an exception to that right was firmly established under the common law at the time of this nation's founding*." (*Crawford, supra,* 541 U.S. at p. 54, italics added.) *Crawford*, although not specifically addressing the evolving definition of unavailability, attempted to dial back the phenomenon of judicially-created exceptions to confrontation, stating that proper application of the Sixth Amendment confrontation right did not countenance exceptions developed solely by the

courts. The Court specifically held:

> The text of the Sixth Amendment *does not suggest any open-ended exceptions* from the confrontation requirement *to be developed by the courts*. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, *admitting only those exceptions established at the time of the founding*. See *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. [*State v.*] *Houser* [(1858)] 26 Mo. [431,] 433-435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore *incorporates* those limitations.

(*Crawford, supra*, 541 U.S. at pp. 53-54, italics added.)

Essentially putting *Barber* and other judicially-created exceptions to the confrontation requirement in question without resolving the issue, *Crawford* established that courts are confined to the exceptions to confrontation established at ratification and are not free to develop any additional exceptions. While *Crawford* noted that the common law conditioned admissibility of written testimony on a witness's unavailability, it had no occasion to dwell on the fact that in 1791 unavailability did not mean mere prosecutorial failure to procure a witness's attendance at trial. Rather, in an indirect acknowledgment of the common law exceptions to confrontation, *Crawford*, noting the common law's construction of strict rules of unavailability, confirmed that a witness was historically excused from testifying where the witness was *unable* to testify. (*Crawford, supra*, 541 U.S. at p. 45.) The use of "unable," rather than "unavailable," fits within the concept that the exception exists only when the witness is dead, in extremis, or detained by the defendant. (See *Trial of Lord Morley, supra*,

6 How. St. Tr. at p. 770.)

Here, the witness was not "unable" to testify, he simply chose to make himself unavailable to testify; a circumstance that should not deprive appellant of his Sixth Amendment right to confront the prosecution's witnesses at trial. This conclusion is amply supported by the reasoning used in *Crawford* when discussing why the *Roberts* reliability standard did not adequately safeguard Sixth Amendment rights.

The *Crawford* Court observed that the Framers could not have meant to leave Sixth Amendment protections open to the "vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (*Crawford, supra*, 541 U.S. at p. 61.) The high court noted that the reliability framework was too unpredictable and subjective to provide meaningful protection from confrontation clause violations. (*Id.* at pp. 62-63.) Of perhaps the greatest significance, though, is the high court's recognition that regardless of the fact that contemporary courts may act in "utmost good faith" when assessing exceptions to the confrontation clause, the Framers would not have indulged such a presumption and that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." (*Id.* at pp. 67-68.)

There is no reasonable rationale for adopting a different approach when considering the "unavailability" exception to the confrontation clause than when considering whether reliability should be a substitute for confrontation. The high court's belief that the Framers would not have countenanced judicial interpretations of reliability to substitute for confrontation must certainly be just as apt when considering the prospect of judicial interpretations of unavailability. The standards for unavailability that existed in 1791 were well-defined and did not require trial courts to

engage in subjective and open-ended balancing tests, as does the determination of whether the prosecution engaged in due diligence when trying to secure the presence of a witness. Embracing *Crawford*'s originalist rationale, where prosecution witness Brown was not unavailable within the original understanding of unavailability, his prior testimony should have been excluded.

It is of no moment that California has established an exception to the confrontation clause that permits testimonial evidence such as Brown's if the prosecution demonstrates to the satisfaction of a trial judge that it was unable to secure the attendance of the witness despite the exercise of due diligence. State law may not define federal constitutional requirements. Justice Thomas made this clear when he recently observed that the scope of the confrontation clause "is not dictated by state or federal evidentiary rules." (*Williams v. Illinois* (2012)___ U.S. ___ [132 S.Ct. 2221, 2256] conc. opn. of Thomas, J.) And as Justices Kagan, Ginsberg, Scalia and Sotomayor remind us in their joined dissent in *Williams*, in *Crawford* the Supreme Court "firmly disconnected the Confrontation Clause inquiry from state evidence law. . . ." (*Id.* at p. 2272.) Consequently, the sole issue here is not what procedural dictates California has developed to permit the introduction of testimonial evidence from absent witnesses, but rather what the Framers meant by the term "unavailable." As discussed above, they did not take that term to apply to a witness who simply decided of his own free will to not appear at a defendant's trial.[19]

---

[19] If a defendant's confrontation clause right should not be dependent upon a trial court's balancing test, it certainly cannot be dependent upon whether a witness is skillful enough to evade discovery by

(continued...)

A contrary interpretation allows the exercise of a defendant's Sixth Amendment rights to be controlled by the whim of a witness who may make the unilateral decision to simply absent himself from court. This type of exception was unknown to the Framers, who conditioned the loss of the right of confrontation on circumstances that were beyond the control of the witness or caused by the defendant. If, as the high court addressed in *Crawford*, it is not permissible to have the right of confrontation dependent upon the vagaries of trial court rulings, certainly the right of confrontation should not be dependent upon the whims of individuals who bear testimonial evidence against the accused.

Based upon the reasoning in *Crawford*, Brown was not unavailable in a constitutional sense. The use of the due diligence test as the sole basis for the admission of testimonial evidence when a witness fails to appear for trial is not appropriate in a *post-Crawford* world and Brown's preliminary hearing testimony should not have been admitted.

C. Brown's Preliminary Hearing Testimony Was Inadmissible Because the Prosecution Failed to Exercise Due Diligence in Attempting to Ensure His Presence at Appellant's Trial

Even if this Court believes the due diligence test for the admission of testimonial evidence from an absent witness continues to hold sway after *Crawford*, the preliminary hearing testimony of Brown should still not have been admitted. The record simply does not support the trial court's finding that the prosecution made diligent efforts to obtain Brown's presence at trial. (*Barber v. Page*, *supra*, 390 U.S. at pp. 724-725; *People v. Cromer*,

---

[19](...continued)
the prosecution. Such a dynamic destroys the very meaning of the phrase "constitutional right."

supra, 24 Cal.4th at p. 892; *People v. Valencia*, *supra*, 43 Cal.4th at p. 292.)

1. Proceedings Below

a. Reluctant Prosecution Witnesses

The prosecution knew during the preparatory stages for appellant's trial that it was dealing with witnesses who were demonstrating a great reluctance to testify. Examining the approach the prosecution took to each of these witnesses is important in assessing whether the prosecution acted in good faith and with due diligence regarding attempts to secure Brown's presence at appellant's trial. Such an overall perspective is especially relevant because Brown, a person on probation with multiple felony convictions (19RT 2960, 3009-3010; 2CTSupp 339), was the only one of these witnesses who testified at the preliminary hearing (2CTSupp 323). Thus, he was the only one of these witnesses whose testimonial evidence would still have been available to the prosecution–sans cross-examination before the jury–if he failed to appear at appellant's trial.

One of these reluctant witnesses was Larry Barnes. On November 10, 1998, the prosecution sought an order for a material witness bond against Barnes on the ground that there was a significant danger he would not appear at trial. (Pen. Code, § 1332; 3RT 264-269; 3CT 623.)

In arguing for this bond, the prosecutor acknowledged he bore the obligation to ensure Barnes's presence for trial (3RT 260), and stated he had contacted the probation department which was supervising Barnes–a juvenile probationer. (3RT 223.) In further support of the bond, the prosecutor attested to his prior dealings with witnesses who did not want to testify: "what my experience in these things in the past has been is right before trial the witness takes off, you can't find the witness during the trial, and then all of a sudden after the trial the witness comes back." (3RT 261.)

The court then found Barnes to be a material witness and ordered a bond, which Barnes failed to post; consequently, the court remanded Barnes to custody. (3RT 264-269; 3CT 623.)

A few weeks later the prosecutor initiated a material witness bond hearing in connection with another witness – designated by the prosecutor as witness number one – who had failed to obey a subpoena to appear at the preliminary hearing. (4RT 324-326.) The prosecutor explained to the court that his investigators "spent a considerable amount of time" searching for the witness, including "saturating the area and speaking to a number of his associates and family members." (4RT 326.) The prosecutor further advised the court that the witness "would be very, very difficult to find again on a fairly short notice or perhaps even during the entire length of the trial." (4RT 327.) Ultimately, the prosecutor opted for releasing the witness without bond because the prosecutor did not intend to call this witness at trial. (4RT 325-326.)

On March 5, 1999, the prosecutor apprised the court of a potential problem involving Anthony Brown; Brown had told Detective Reynolds that someone named Tracy Batts, who had no known connection to this case and was in jail on unrelated murder charges, had phoned him on behalf of unspecified "defendants" and issued a threat that he should not testify in appellant's case.[20] Brown then informed Reynolds that he would not appear at appellant's trial "unless he got dragged into court." (6RT 554; 7RT 654; 19RT 2947-2948.)

---

[20] There is no indication that the prosecutor attempted to prove that Batts called on behalf of appellant or his co-defendant. Nor is there any indication that the prosecutor discussed protective measures, such as protective custody, with Brown.

Despite Brown's statement to Reynolds, the prosecutor did not seek a material witness bond, as he did with Larry Barnes. Rather, the prosecutor advised the court that he would subpoena Brown to appear at a hearing on identification procedures, which the court set for March 19, 1999. The prosecutor told the court he would exercise his best effort to ensure Brown's appearance and stated he knew he could "get him served and brought in here." (6RT 555, 564; 7RT 622; 3CT 712.)

The prosecutor was wrong; Brown did not appear at the March 19 hearing. (7RT 653-654; 19RT 2948-2949.) Reynolds advised that he had unsuccessfully attempted to find Brown that week and that it would "take some time" to bring him into court. The prosecutor explained at the hearing that Batts had a reputation in the community of being an extremely dangerous person, had a felony conviction for shooting at sheriff's deputies with fully automatic weapons, and that the prior weekend, the eyewitness in Batts's case had been brutally murdered. (7RT 653-655.)

At the time of the March 19 hearing, the prosecutor was possessed of two additional significant pieces of information regarding Brown's likelihood of appearing in court: 1) Brown had said he would not come to court voluntarily; and 2) the man who had threatened Brown if he testified had conceivably just orchestrated a witness killing in his own case. Nevertheless, the prosecutor did not request a material witness bond for Brown, as he had for two other witnesses.

On May 20, 1999, Reynolds was able to locate Brown at Melvin Hoard's shop and served him with a trial subpoena that required Brown to appear in court the next day, May 21. Brown signed the subpoena, but it appears Brown wrote the word "REFUSED" in capital letters within his signature. (19RT 2941-2943; 4CT 938; 23CT 938.) Not surprisingly,

Brown disobeyed the subpoena and failed to appear in court on May 21. (19RT 2941-2943; 4CT 938; 23CT 938.)

Despite Brown's failure to appear, there is no indication in the record that the prosecutor requested either a body attachment or a material witness bond. Nor is there any indication that the police issued a BOLO (be on the lookout) notice. Yet, on May 24, 1999, the prosecution requested, and the court issued, a body attachment for prosecution witness Larry Barnes, with bail in the amount of $500,000. Like Brown, Barnes had failed to appear for trial. (4CT 901.) Unlike Brown, Barnes did not testify at the preliminary hearing. (1CT 96; 2CTSupp 319, 499.)

Trial began with jury selection on May 26, 1999, with Brown still not having appeared. (9CT 966; CT 1116.) On June 7, more than two weeks after Brown failed to appear in response to the subpoena, the prosecutor finally told the court of Brown's failure and requested a body attachment. The prosecutor also indicated he would request to have Brown's preliminary hearing transcript read to the jury. The prosecutor represented to the court that Reynolds had put Brown "on call" (12RT 1686-1687), although the subpoena Reynolds served on Brown stated that Brown was ordered to "be in court." (4CT 938; 23CT 938.)

The court issued a body attachment for Brown. (12RT 1687; 23CT 945.) When requesting the body attachment, the prosecutor added, "hopefully, Mr. Reynolds can find him in the next couple weeks." (12RT 1687.)

b. Due Diligence Hearing

On June 17, 1999, the court held a hearing on whether the prosecution attempted with due diligence to secure Brown's appearance at trial. (19RT 2940.) The only witness produced by the prosecution was

Detective Reynolds.

Reynolds testified that he personally served Brown with a trial subpoena on May 20, 1999, to appear the next day, and that Brown failed to appear. (19RT 2941-2942; 4CT 938.) After court on May 21, 1999, Reynolds returned to Melvin Hoard's business, where he had served Brown, but Brown was not there. Hoard did not know where Brown was and had not heard from him that day. (19RT 2939, 2942-2943, 2960.)

A few times between May 21 and June 16, 1999, Reynolds went to the home of Brown's ex-girlfriend, Nicole Washington. On June 16, the day before the scheduled due diligence hearing, Reynolds finally found Washington at home. She told him that Brown called sometimes, but had "not lived there for approximately two or three months since the murders happened." Washington further told Reynolds that Brown would not give Washington his address and was "terrified" of what would happen to him if he came to court. On the evening of June 16, Reynolds and Detective Bookman "sat down the street from" Washington's apartment for 30 to 45 minutes, but Brown did not appear. (19RT 2942-2946, 2951.)

The only other place that Reynolds went to look for Brown was 135th Street and Avalon, where Reynolds was told – he did not say by whom – that Brown "sometimes hangs out." Reynolds went to the location the day before the due diligence hearing, but no one was there. In his search, Reynolds spoke with only one neighbor, who said she had not seen Brown. (19RT 2947.)

Reynolds did speak with Brown over the phone on several occasions between May 25 and June 15. On each occasion, Brown told Reynolds that he would meet Reynolds at court, the police station, or Melvin Hoard's shop, but each time Brown failed to keep the appointment. (19RT 2943-

2946.)

Reynolds testified that the day before the due diligence hearing he checked computer records to see if Brown had been arrested, but he had not been. Reynolds admitted that he did not look for another address for Brown through the United States Post Office; nor did he communicate with city, county or state agencies to see if Brown was receiving a check at another address for public assistance, unemployment, or disability. Nor did he investigate whether Brown had been hospitalized. (19RT 2947-2948, 2951-2952.)

The prosecution also failed to explore possible leads that were known to them through Brown's prior testimony. Brown testified at the preliminary hearing that the first person he called after the carwash shooting was his brother. (19RT 3002.) The prosecution did not attempt to contact Brown's brother or other family members in an effort to locate Brown. (19RT 2940-2953.) Brown had testified at the preliminary hearing that he drove himself to the carwash on the day of the murders. (19RT 2986.) Yet, the prosecution did not contact the Department of Motor Vehicles to determine whether Brown had a driver's license or car registration that disclosed his address. (19RT 2940-2953.)

Brown testified at the preliminary hearing that he was on probation emanating from felony convictions for conspiracy and fraud. (19RT 2959-2960, 3009-3010.) Although the prosecutor contacted the probation department "[i]n an effort to find" Larry Barnes (3RT 260), the prosecution never sought to find Brown's whereabouts through his probation officer. Nor did the prosecution attempt to contact Brown's co-conspirator for Brown's address. (19RT 2940-2953.)

At one point, Brown called Reynolds on a cell phone. (19RT 2945.)

Reynolds called Brown back, but did not subsequently contact the cell phone company to get an address associated with the number to enable him to look for Brown. (19RT 2940-2953.) Similarly, Melvin Hoard was able to page Brown and have him respond (19RT 2944), but Reynolds never asked Hoard to give him the number that he used to reach Brown. (19RT 2940-2953.)

The prosecution was aware of an address, 2623 E. Alondra, which was listed as Brown's address on his witness admonition form from the February 12, 1998 photographic lineup. (Trial Exh. 53.) This is the same address on Christopher Williams's February 11, 1998 witness admonition form. (Trial Exh. 63.) Yet, Reynolds did not investigate this address to locate Brown, nor did he contact Williams in an attempt to find Brown. (19RT 2940-2953.)

Besides Reynolds, the only law enforcement agents enlisted to look for Brown were Detectives Bookman and Fralich. On June 16, 1999, the day before the due diligence hearing, Bookman came to court at Reynolds's request to arrest Brown if he appeared. Likewise, Fralich attended court once with Reynolds in case Brown appeared. Bookman accompanied Reynolds twice to look for Brown, but there was no testimony that Bookman did an independent search for Brown. (19RT 2945-2946, 2951.)

Finally, Reynolds testified that Brown first told him about the calls from Batts on May 21, 1999. (19RT 2949-2950.) This testimony was contradicted, however, by the prosecutor, who represented to the court on March 5 and then again on March 19, 1999, that Reynolds had informed him of Batts's phone calls to Brown. In fact, on March 5 the prosecutor told the court that Brown instructed Reynolds, contemporaneously to informing him of the threat from Batts, that he would not appear unless "he

got dragged into court." (6RT 554; 7RT 653-655.)

Following Reynolds's testimony, defense counsel argued that the prosecution had not exercised due diligence in attempting to secure Brown's appearance at trial. The trial court, however, found that the prosecution made diligent efforts to find Brown. The court did not believe it significant that the prosecution did not seek a material witness bond and found that Brown was actively avoiding Reynolds. The court further found that if the prosecution had been able to make physical contact with Brown after May 20, 1999, it would have arrested him or obtained a material witness warrant for him. Thus, the court declared Brown to be unavailable and permitted the prosecution to read his preliminary hearing testimony to the jury. (19RT 2955-2957.)

2. Applicable Law

If the prosecution seeks to introduce prior testimony of a witness as a substitute for according the defendant the opportunity to confront and cross-examine the witness before the factfinder, it bears the burden of establishing the witness's unavailability at the time of trial. (*Ohio v. Roberts*, *supra*, 448 U.S. at pp. 74-75; *People v. Valencia*, *supra*, 43 Cal.4th at p. 292.) This burden is met only when the prosecution has engaged in good-faith efforts comprising reasonable or due diligence in attempting to secure the presence of the witness at trial. (*Ohio v. Roberts*, *supra*, 448 U.S. at p. 74; *People v. Cogswell* (2010) 48 Cal.4th 467, 476-477.)

The lengths to which the prosecution must go before trial to produce a witness is a question of reasonableness, but "if there is a *possibility, albeit remote*, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." (*Ohio v. Roberts*, *supra*, 448 U.S. at p. 74, italics added.) Whether these efforts have been

made is subject to de novo review by the appellate court. (*People v. Cromer*, *supra*, 24 Cal.4th at p. 901.)

The concept of due diligence "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. Relevant considerations include whether the search was timely begun, the importance of the witness's testimony, and whether leads were competently explored." (*People v. Cromer*, *supra*, 24 Cal.4th 889, 904, citations and internal quotation marks omitted.)

The Tenth and Third Circuits have delineated the following relevant considerations to determine whether a prosecutor has acted in good faith to safeguard a defendant's right of confrontation under the Sixth Amendment: (1) the more crucial the witness, the greater the effort required to secure the witness's attendance; (2) the more serious the crime for which the defendant is being tried, the greater the effort the government should put forth to produce the witness at trial; (3) where the witness has special reason to favor the prosecution, such as an immunity arrangement in exchange for cooperation, the defendant's interest in confronting the witness is stronger; and (4) a good measure of reasonableness is to require the prosecution to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have prior testimony available. (*Cook v. McKune* (10th Cir. 2003) 323 F.3d 825, 835-836; *McCandless v. Vaughn* (3d Cir. 1999) 172 F.3d 255, 266-269.)

Basically, "[t]he purpose of the due diligence requirement is to ensure that the prosecution has made all reasonable efforts to procure the presence of the witness before the defendant is denied the opportunity to confront him." (*People v. Bunyard* (2009) 45 Cal.4th 836, 853.)

3. The Prosecution Failed to Exercise Good Faith or Due Diligence in Trying to Secure Brown's Presence at Trial

The failure of Anthony Brown to appear as a witness at appellant's trial could not have come as a surprise to the prosecution. There were indications substantially in advance of trial that Brown had no intention of appearing. Yet, the prosecution did not heed these warnings; indeed, the prosecution seemingly disregarded them and took no steps prior to trial to ensure Brown's appearance. This is particularly noteworthy since it did take such steps in regard to the other reluctant witnesses, witnesses for whom it did not possess prior testimony which could be offered if the witness failed to appear.

Building upon its failure to take steps in advance of trial to ensure that Brown was available as a witness, the prosecution failed at the time of trial to engage in actions that might actually secure Brown's presence. It acted in a perfunctory manner and engaged in minimal efforts to find Brown and produce him before the jury. In short, this record demonstrates neither good faith nor due diligence.

a. Prosecution Actions in Advance of Trial

As of at least March 5, 1999–over 100 days prior to trial–the prosecution knew that Brown had been threatened with harm if he testified and that Brown had told Reynolds that he would not testify unless he was "dragged into court." (6RT 554; 7RT 654; 19RT 2947-2948.) Despite Brown's fears and stated unwillingness to voluntarily appear, the only action the prosecution took was to issue a subpoena requiring Brown's appearance at a March 19 hearing. (6RT 555, 564; 7RT 622; 3CT 712.) When Brown did not appear on March 19, Reynolds advised that he had

been unable to find him and that it would take some time to locate him. (7RT 653-654; 19RT 2948-2949.)

As of March 19, the prosecution was aware that a significant witness had been threatened and had indicated he would not voluntarily appear for trial. At that point the prosecution had two clear remedies available to it to combat Brown's fears and unwillingness–protective custody and a material witness bond. Yet, the prosecution pursued neither of these remedies.

The record shows that Brown's fear was grounded in reality–Batts was a dangerous person who apparently had the means to carry out his threats. One way of utilizing good faith and due diligence would have been to offer Brown protection from harm. It is hardly unknown for a witness who has been threatened to be placed in protective custody to ensure appearance at trial. (See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 99.) Yet, there is no indication that this offer was ever made to Brown.[21] This was the prosecution's first opportunity to show good faith and due diligence. It did not.

The next step which would have demonstrated some form of good faith and due diligence would have been seeking a material witness bond; an action the prosecutor took with two other witnesses–witnesses for whom

---

[21] It could be that Brown would have refused such an offer. However, in addressing a failure to seek an order from a court to produce a prisoner as a witness at trial, the United States Supreme Court observed that the possibility of a refusal is not the equivalent of actually asking and receiving a rebuff. (See *Barber v. Page*, *supra*, 390 U.S. at p. 724.) Additionally, the issue is whether the prosecution diligently sought to ensure the witness's appearance, not whether the witness responded favorably to those diligent actions.

the prosecutor had no prior testimony. (See *Cook v. McKune*, *supra*, 323 F.3d at p. 836 ["good measure of reasonableness is to require State to make same sort of effort to locate and secure witness for trial that it would have made if it did not have prior testimony available"].) Yet, the prosecutor failed to take this step.

The latest logical time to have sought a material witness bond would have been on May 20, 1999, when Reynolds served Brown with a trial subpoena; the subpoena upon which Brown wrote "REFUSED." At this point in time, Brown had already indicated he would have to be dragged into court against his will and he had, in fact, backed up that statement by failing to appear at the March 19 hearing. It then apparently took Reynolds another two months to find him; at which point Reynolds simply gave him a piece of paper and walked away.

Penal Code section 1332 empowers a trial court to detain a material witness and require security when it finds good cause to believe that the witness will not attend the trial and testify. (Pen. Code, § 1332, subd. (a).) A case exemplary of when a material witness bond should be sought is *In re Francisco M.* (2001) 86 Cal.App.4th 1061, a case eerily similar to this one. In *Francisco M.*, the trial court issued a material witness bond because Francisco M. was a witness to a shooting, fled police when they came to take him to the preliminary hearing, expressed a fear of being killed if he testified, and told police he would have to be dragged to court before he would testify. (*Id.* at pp. 1066-1068.)

In *People v. Bunyard* (2009) 45 Cal.4th 836, this Court found *Francisco M.'s* factors to be useful guidelines for whether or not a trial court should order the detention of a material witness. (*Id.* at p. 854, fn. 6.) The factors include: (1) the seriousness of the criminal charges; (2) the

importance of the witness's testimony; (3) the length of the proposed detention; (4) evidence relevant to whether the witness will appear, including employment, residence and other community ties; (5) the witness's age, experience and maturity, including the witness's prior experience with the criminal justice system; (6) the harm to the witness's family from incarceration; (7) the witness's financial resources; (8) the likelihood of continuances that will prolong the prosecution; and (9) whether steps short of incarceration are feasible, including electronic monitoring, protective custody, and a conditional examination under Penal Code section 1335. (*In re Francisco M.*, *supra*, 86 Cal.App.4th at pp. 1076-1078.)

An application of the relevant factors to the facts of this case lead to the inexorable conclusion that requiring a material witness bond of Anthony Brown was fully warranted in this case. Despite this, and despite the fact that the prosecutor was obviously aware of this remedy since he had utilized it with other prosecution witnesses, such a bond was not sought. This reveals a lack of good faith and a lack of due diligence.

Having failed to offer Brown protective custody, and having failed to seek a material witness bond, there was still one more pretrial step the prosecution could have taken to ensure Brown's presence if it had been truly interested in acting in good faith and with reasonable diligence: it could have instituted surveillance on Brown after serving him with a subpoena on May 20. At 3:35 p.m. on May 20, Reynolds served Brown with a subpoena requiring him to appear in court on May 21 at 8:30 a.m. (23CT 938), a subpoena that Brown accepted, but also annotated with the word "REFUSED."

As Reynolds stood with Brown on the afternoon of May 20, 17 hours

before Brown was due in court, he was facing a witness who had been the subject of a credible threat warning him to not give testimony at the trial; a witness who had made it clear he would have to be dragged into court to testify; a witness who failed to appear in court on March 19; a witness who had only been found after a three-month search; and one who had just written "REFUSED" on his subpoena. Despite being aware of all of these things, Reynolds just gave Brown the subpoena and did nothing to attempt to ensure his appearance in court the next day.

A prosecutor contemplating the offer of a witness's former testimony has a stringent "'duty to use reasonable means to prevent a present witness from becoming absent.'" (*People v. Louis* (1986) 42 Cal.3d 969, 991, quoting *United States v. Mann* (1st Cir. 1978) 590 F.2d 361, 368; *United States v. Yida* (9th Cir. 2007) 498 F.3d 945, 955 [agreeing with Second Circuit that "'[i]mplicit . . . in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent'"].) In order to preserve Wilson's constitutional right to confront Brown at trial, Reynolds and the other prosecutorial authorities should have kept Brown under surveillance for the *17 hours* that it would have taken to learn whether Brown would appear in court. (*People v. Louis*, *supra*, 42 Cal.3d at p. 992 [where witness is known flight risk, reasonable diligence may require prosecutor to prevent witness's absence either by keeping witness under surveillance or by invoking material witness provisions of Penal Code].) The failure to take this simple step is hard to reconcile with the prosecution's requirements of good faith and due diligence.

b. Prosecution Actions at Time of Trial

Brown's failure to appear on May 21 should have immediately triggered action on the part of the prosecution, but it did not. Certainly, the prosecution should have obtained a bench warrant for Brown's arrest, as it subsequently did for Larry Barnes on May 24. (1CT 96; 4CT 901; 2CTSupp 319, 499.) But instead of acting immediately to try and secure Brown's attendance at trial, the prosecutor waited until June 7, 18 days after trial had started, to request a body attachment for Brown. (4CT 942, 945.)

It is revealing that the prosecutor requested the bench warrant contemporaneously with advising the trial court that he intended to request that Brown's preliminary hearing testimony be admitted in lieu of his live testimony. (12RT 1686-1687.) At the same time, the prosecutor misrepresented to the trial court that Reynolds had merely put Brown "on call," whereas the subpoena issued to Brown expressly stated that he was to "be in court" and that a failure to appear was punishable as contempt. (12RT 1686-1687; 4CT 938; 23CT 938.)

When requesting the body attachment, the prosecutor added, "hopefully, Mr. Reynolds can find him in the next couple weeks." (12RT 1687.) Unfortunately, this statement was an accurate reflection of the prosecutor's approach to securing Mr. Brown's presence, since hope rather than good faith or diligence is what drove the prosecution's future actions in looking for Mr. Brown.

The inadequate efforts undertaken by the prosecution to find Brown have been set forth previously in this argument. (See C.1.b, above.) What is also noteworthy, however, are the steps the prosecution failed to take–in addition to those previously discussed–that are truly revelatory regarding its lack of good faith and due diligence.

From the time that Brown failed to appear at trial, the prosecution only devoted limited resources to obtaining his presence. This stands in contrast to other absent witnesses for whom the prosecution did not have prior testimony. For example, to find one prosecution witness who had not given prior testimony the prosecution investigators "spent a considerable amount of time" searching for the witness, including "saturating the area and speaking to a number of his associates and family members." (4RT 326.) For Brown, Reynolds constituted the entire investigative "team."

This problem was compounded by the lack of diligence demonstrated by Reynolds. As pointed out previously, his testimony at the hearing on due diligence revealed consistent failure to do obvious tasks that would normally be pursued in attempting to find a missing witness. (See C.1.b, above.) There were additional failures by Reynolds that belie the trial court's finding of due diligence. For example, even though Reynolds served Brown at his job location, Reynolds did not ask Brown's employer for any employee information that might have provided leads to where Brown might be found. (19RT 2960.) Nor did Reynolds ask Brown's ex-girlfriend if he had any family or friends in the area. Reynolds did not ask her if Brown had any locations he frequented, such as bars where he might be found. Reynolds spoke with only one of Brown's former neighbors. (19RT 2947.)

Another omission was that Reynolds did not mention searching for Brown under his alias. According to Brown's body attachment, he was 360 pounds and went by the name "Fat Tone." (23CT 945.) Brown's probation report indicated that he had used an alias, Anthony Green, to obtain credit. (19RT 2961.) This obvious information should have been helpful in locating Brown, but there is no indication Reynolds used any of it.

While this Court has not developed a list of steps that the prosecution and its agents must take in order to establish due diligence, an examination of this Court's cases reveals the types of actions that should be taken before a finding of due diligence may be made. The cases resoundingly suggest that three basic steps must be taken to find a missing witness, steps not taken by the prosecution in this case:

- Contact family members (*People v. Bunyard* (2009) 45 Cal.4th 836, 855; *People v. Hovey* (1998) 44 Cal.3d 543, 562-563; *People v. Cummings* (1993) 4 Cal.4th 1233, 1297-1298; *People v. Jackson* (1980) 28 Cal.3d 264, 312; *People v. Friend* (2009) 47 Cal.4th 1, 67);
- Assign multiple officers to look for the witness (*People v. Bunyard, supra,* 45 Cal.4th at p. 855; *People v. Hovey*, *supra*, 44 Cal.3d at pp. 562-563; *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298; *People v. Jackson*, *supra*, 28 Cal.3d at p. 312); and
- Check with the Department of Motor Vehicles for an address for the witness (*People v. Hovey*, *supra*, 44 Cal.3d at pp. 562-563; *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298; *People v. Valencia* (2008) 43 Cal.4th 268, 292).

In addition to these three basic steps, this Court has noted other steps that serve as indicators of due diligence–none of which were taken here:

- Post a "be-on-the-lookout-for" bulletin for the witness (*People v. Bunyard, supra,* 45 Cal.4th at p. 855);
- Check jails and hospitals in neighboring counties (*People v. Bunyard, supra,* 45 Cal.4th at p. 855);
- Check with known associates (*People v. Bunyard, supra,* 45

Cal.4th at p. 855; *People v. Wilson* (2005) 36 Cal.4th 309, 342);

- Solicit neighborhood assistance in locating witness (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298);
- Check with last employer (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298);
- Check with public assistance (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298);
- Check with probation officers (*People v. Jackson*, *supra*, 28 Cal.3d at p. 312);
- Check phone company (*People v. Valencia*, *supra*, 43 Cal.4th at p. 292);
- Check with multiple neighbors (*People v. Valencia*, *supra*, 43 Cal.4th at p. 292; *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298);
- Run a "CII rap sheet" (*People v. Valencia*, *supra*, 43 Cal.4th at p. 292);
- Check credit information (*People v. Valencia*, *supra*, 43 Cal.4th at p. 292); and
- Check under different aliases (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342).

Basically, other than serving Brown with a subpoena and speaking to him a few times on the phone, the extent of Reynolds's diligence was to go to Brown's girlfriend's house and to make one trip to another location where he had been told Brown "hung out." In light of what this Court has considered to be due diligence in the past, this cannot qualify as meeting that standard.

Two additional factors should be considered when assessing whether the prosecution's actions constituted due diligence: 1) Brown's importance as a witness; and 2) the seriousness of the charged offense. When these two factors are added into the equation, the efforts by the prosecution to produce Brown at trial look pitiful indeed.

The key issue in this case was identity. The prosecutor relied upon Brown's identification of appellant at the live lineup during his argument to the jury at the guilt phase. (28RT 4498 [prosecutor: "And when you look at [Brown's] I.D. form from the live lineup . . ., what does he put on it? [¶] He picks no. 3, Mr. Wilson"]; 28RT 4501 ["again, the evidence clearly shows that . . . Anthony Brown had an opportunity to see what [he told you he] saw"].) "[J]urisprudence and legal scholarship have well established that . . . eyewitness testimony has a profound impact on juries." (*Moss v. Hofbauer* (6th Cir. 2002) 286 F.3d 851, 874.)

It would be foolish to posit that an identification witness is not an important witness when identity is the key contested issue at trial. Both this Court and federal courts have recognized that the importance of a witness is part of the equation in determining whether due diligence was exercised by the prosecution. (See *People v. Cromer*, *supra*, 24 Cal.4th at p. 904 [importance of witness's testimony is due diligence factor]; *Cook v. McKune*, *supra*, 323 F.3d at p. 835 ["more crucial the witness, the greater the effort required to secure his attendance"].)

Finally, the fact that this is a capital case impacts on the way this Court should assess whether the prosecution actually utilized due diligence to find this witness. (*Cook v. McKune*, *supra*, 323 F.3d at p. 835 ["the more serious the crime for which the defendant is being tried, the greater the effort the government should put forth to produce the witness at trial].) "In

a capital case, . . . it is fair to ask more of the prosecution than in a situation involving significantly less serious consequences." (*McCandless v. Vaughn*, *supra*, 172 F.3d at p. 266].) As the Arizona Supreme Court has observed, the burden on the prosecution to prove unavailability means that "in a capital case, no stone should have been left unturned." (*State v. Medina* (1994) 178 Ariz. 570, 576 [875 P.2d 803, 809].)

Here, the prosecution barely made a dent in the quarry, let alone overturn every stone. The prosecution knew at least 104 days before the start of the trial that it had a witness who had been threatened and who indicated he would not voluntarily appear in court. Sure enough, he failed to appear at a pretrial identification hearing. Then, when he was finally located and served for his trial appearance, 17 hours prior to the start of trial, the prosecution once again took no steps to ensure that he would appear; such as by taking him into custody, requesting a material witness bond, or at least conducting a surveillance on him for the ensuing 17 hours. Unsurprisingly, he did not appear for the start of the trial. The prosecution then had one investigator engage in minimal efforts–doing none of the things this Court has relied upon to find due diligence–before telling the judge that the witness could not be located and requesting to use this crucial witness's preliminary hearing transcript. This entire process reveals a remarkably cavalier, if not reprehensible, disregard of a defendant's right of confrontation and the trial court erred by making a due diligence finding and by permitting the prosecution to profit from its charade by enabling it to use this witness's preliminary hearing testimony.

D. The Erroneous Admission of Brown's Preliminary Hearing Testimony Identifying Wilson Was Not Harmless Beyond a Reasonable Doubt in Light of the Inherent Power of Eyewitness Testimony and the Otherwise Unreliable and Weak Evidence Tying Wilson to the Shooting.

A violation of the right to confrontation is subject to harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18. (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 682.) The focus under *Chapman* is not on what effect the error might be expected to have on a reasonable jury, but rather the effect the error had on the jury in this case. This Court must determine "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

As shown below, this test cannot be met by the state because it needed the testimony of all three eyewitnesses–Brown, Randy Bowie and Christopher Williams–to meet its burden of proof against appellant. All three were convicted felons with long criminal histories and the prosecution understood a jury was unlikely to accept the testimony of just one of them; the prosecution needed each witness to corroborate the others.

Without Brown's identification testimony, the prosecutor was left with the identification by Randy Bowie–who was entirely untrustworthy–and Christopher Williams, who conceded his identification was based on a mere glance. The remaining prosecution evidence linked virtually any other rank-and-file member of the Young Mafia Organization to the crime as much as it linked appellant. The prosecutor needed Brown's

testimony to try and hold the case together. Hence, the prosecution will not be able to carry its burden of proving "beyond a reasonable doubt that the error complained of" – admitting Brown's preliminary hearing testimony – "did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

1. Brown's Testimony Identifying Wilson as the Driver was Important to the Prosecution's Case

Eyewitness identification evidence has a powerful impact on juries. (See *Barker v. Fleming* (9th Cir. 2005) 423 F.3d 1085, 1100.) "To a jury, 'there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says[,] "That's the one!"' *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (emphasis in original)." (*United States v. Brownlee* (3d Cir. 2006) 454 F.3d 131, 142.)

The prosecutor argued to the jury that at the live lineup, Brown "picks no. 3, Mr. Wilson," as the driver. (28RT 4498.) The prosecutor further argued, "the evidence clearly shows that . . . Anthony Brown had an opportunity to see what [he told you he] saw." (28RT 4501.)

Thus, because eyewitness identifications are often "considered direct evidence of guilt" and accorded great importance by juries (MacLin & Malpass, *The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making* (2001) 7 Psychol. Pub. Pol'y & L. 98, 98), Brown's identification testimony was important to the prosecution's case.

2. The Prosecution's Case Was Not Strong

a. Bowie's Trial Testimony Was Untrustworthy in General, and His Identification of Wilson Was Unreliable in Particular

(1) Bowie Lacked Credibility as a Witness

Randy Bowie was not the type of witness around whom any prosecutor would choose to build a case. He was an eight-time felon who had suffered convictions for robbery, battering the mother of his child, two burglaries, possessing a knife in prison, possessing nunchaku sticks, possessing a dirk or dagger, and possessing marijuana. (12RT 1521, 1627-1628, 1681.) These convictions alone provided a basis for the jury's rejection of his testimony (Evid. Code, § 788), and the jury was so instructed by the trial court. (29 RT 4753.)

The jury could also have rejected Bowie's testimony because it found him to be biased in favor of the prosecution. The court instructed the jury that in determining the believability of a witness, it could take into account the attitude of the witness toward testifying and the existence of a bias, interest, or other motive. (29RT 4750.)

Bowie testified that the police gave him money on at least three occasions. Reading his testimony literally, Bowie may have received more money on even more occasions. At a minimum, the police paid him at least $287 in connection with this case. (12RT 1559-1560.) The jury could easily have found that he was now singing for his supper.

This view would have been further reinforced by Bowie's antagonism toward defense counsel. For example, on cross-examination Bowie called Wilson's counsel a fool. Then after the court ordered Bowie not to disparage counsel ("let's not call each other names"), Bowie said,

"Well, that's stupid right there," presumably referring to defense counsel's cross-examination and not the court's instruction. (12RT 1650.) The combination of the prosecution's payments and Bowie's hostility toward defense counsel would give the jury ample reason to apply the court's instruction and find Bowie's testimony to be untrustworthy because of a bias in favor of the prosecution.

Finally, the jury may well have disbelieved Bowie because of his overall unreliability as a witness. The court instructed Wilson's jury as follows: "A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (29RT 4752; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107, fn. 4. [jurors may reject entire testimony of witness who lies].) A brief examination of Bowie's testimony, other than as it relates to identification, reveals that the jury could have utilized this instruction to reject the entire body of his testimony.

Bowie's testimony was rife with lies and internal contradictions. He consistently lied about his employment at the carwash. In answer to the first question put to him, he told the jury that he went to work at the carwash on Super Bowl Sunday, January 25, 1998, the day of the shooting. (12RT 1508-1509.) But as he later admitted on cross-examination, the carwash was not even open on Sundays. (12RT 1664.) Though he tried to testify throughout as if the carwash was a legitimate business, he admitted

that he was paid in cash and he paid no income taxes.[22] According to Bowie, Williams paid him approximately $300 per week. (12RT 1511, 1671-1672, 1682.) Williams testified, however, that he did not pay Bowie anything at all. (13RT 1788.)

Bowie lied to the jury about never having been a gang member. When asked whether he had ever been affiliated with a gang, Bowie said no. (12RT 1620.) Nevertheless, the sheriff's database for tracking gang members showed that Bowie previously admitted his membership in the Nutty Block Gang, the same gang to which defendant Pops belonged. (16RT 2434; 17RT 2508, 2511; 27RT 4419.)

Bowie lied again to the jury when he maintained on direct examination that he did not have an armed robbery conviction. Later, on cross-examination, he admitted the conviction. (12RT 1672, 1681.)

On direct examination, Bowie stated he had never testified before a jury until that day. On cross-examination, when presented with a minute order from his own trial showing that he had testified, Bowie agreed he had testified but still insisted not recalling that he had. (12RT 1562-1563, 1630-1631.)

Appellant's jury had substantial grounds on which to discredit Bowie's testimony, even without examining the specific testimony identifying Wilson. As demonstrated next, Bowie's identification testimony itself was so lacking in credibility that it could not make up for his general unreliability as a witness.

---

[22] On cross-examination, Bowie admitted that while working at the carwash, he thought there was a "possibility" that the carwash was a "drug spot." (12RT 1623.) A short time later, though, he contradicted himself and said he did not suspect anything. (12RT 1626.)

(2) Bowie's Identification of Appellant Lacked Reliability

Randy Bowie identified Wilson as the driver of the car in the most extreme, most unequivocal, language – "absolutely positive," "no doubt at all," and "no doubt whatsoever." Indeed, six times Bowie told the jury that he had no doubt that Wilson was the driver. (12RT 1519, 1520, 1571-1572, 1668, 1680.) Yet, as we know, these absolutes cannot be taken at face value.

Case law and social science research demonstrate that a witness's certainty in making an identification "is no guarantor of, and indeed, appears to be uncorrelated to accuracy." (*United States v. Brownlee* (3rd Cir. 2006) 454 F.3d 131, 143, fn. 9 [citing studies showing no meaningful correlation between confidence and accuracy]; *People v. Jimenez*, *supra*, 165 Cal.App.4th at p. 82 [social scientists have found witness's confidence in identifying suspect does not correlate with accuracy, citing Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach* (2007) 12 Berkeley J.Crim. L. 1, 18-19; *People v. Woolcock* (N.Y.Sup. 2005) 7 Misc.3d 203, 206 [792 N.Y.S.2d 804, 807]; *State v. Romero* (2007) 191 N.J. 59, 76 [revising model jury instruction to include caution that "witness's level of confidence, standing alone, may not be an indication of the reliability of the identification"].)

The Sixth Circuit has also noted that "empirical evidence on eyewitness identification undercuts the hypothesis that there is a strong correlation between certainty and accuracy." (*Haliym v. Mitchell* (6th Cir. 2007) 492 F.3d 680, 706, citing Stein, *The Admissibility of Eyewitness Testimony About Cognitive Science Research on Eyewitness Identification* (2003) 2 L., Probability & Risk 295, 296 and Loftus & Doyle (1997)

Eyewitness Testimony: Civil and Criminal 67.) A survey of eyewitness experts confirmed this view – 73 percent of them agreed that confidence is not a good predictor of identification accuracy. (Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration* (2002) 8 J. Experimental Psychol. 44.)[23]

Given what we know about the value of seemingly absolute identifications, it is of more significance in measuring the worth of an identification to examine the supporting testimony. When that occurs in this case, it becomes clear that the absolute nature of Bowie's identification of Wilson was a feeble attempt to support an insupportable identification.

Initially, Bowie's opportunity to actually see the driver at the crime scene was poor. Bowie first saw the driver from a distance as Bowie walked through the front gate of the carwash, and the driver was sitting in a car behind a steering wheel. The car was parked next to the carwash building. Bowie walked up to a payphone at the front of the carwash building. As he used the phone, he faced the passenger side of the car parked approximately six feet away. Bowie described the driver as a black man, without specifying what part of the driver Bowie was able to see.

---

[23] See also Bradfield, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy* (2002) 87 J. Applied Psychol. 112 ("finding that certainty and accuracy are controlled by different factors and that post-identification feedback confirming the identification tends to inflate the witness's certainty to a greater extent for inaccurate identifications than it does for accurate witnesses"); Mandery, *Due Process Considerations of In-court Identifications* 60 Alb. L.Rev. 389, 418 (1996) (citing research studies indicating the lack of correlation between the certainty and accuracy of eyewitness identifications).

(12RT 1511, 1513, 1515, 1526.)

Bowie provided no other description of the driver; no indication of his clothing, height, size, or age. Perhaps more significantly, he failed to mention that the driver wore a distinctive cap with writing on it, something both Anthony Brown and Christopher Williams testified about. (13RT 1765; 19RT 3071.) Nor did Bowie mention that the car had a tinted windshield. (19RT 3026-3027.) Indeed the sum total of Bowie's description of the driver was that he was a black male with a "smirky grin on his face." (12RT 1647-1648.)

What occurred next removed Bowie's attention from the driver; the passenger in the car raised a gun, pointed it at Bowie, and told him not to move or try to warn anyone. (12RT 1515, 1579.) According to Bowie, when the passenger pointed the gun at him, "Everything stopped. I didn't move." (12RT 1515.) The passenger got out of the car, "grabbed [Bowie] in the back of [his] collar and put his gun under [Bowie's] arm and used [him] as a shield." (12RT 1517.) The driver then got out of the car and put his gun in Bowie's back. They then marched Bowie into the carwash.

At no point in his testimony did Bowie explain when he first saw the driver's face. In fact, Bowie never provided any form of real description of the driver's facial features. The only time that Bowie mentioned anything about the driver's face was when he referred three times in two transcript pages to "the smirky grin on his face." (12RT 1647-1648.) The word "mouth" appears 11 times in questions and answers in Bowie's testimony concerning the driver. (12RT 1548, 1598, 1612, 1647, 1648, 1659, 1661.) Reading Bowie's testimony leaves one with the distinct impression that the only part of the driver's face, if any, that Bowie saw was the driver's "smirky grin" or mouth. This lack of detail is consistent with Bowie's

inability to assist the police later in sketching the driver's face, as discussed below.

This lack of detail is readily explained by the fact that Bowie never got a good look at the driver. When first seen, the driver was sitting behind a tinted windshield and a steering wheel. Then, the passenger pointed a gun at Bowie and his attention became focused on that. As Bowie said, with his attention on the passenger and the passenger's gun, he froze. The passenger then grabbed Bowie, turned him around, and Bowie was marched into the carwash building. While Bowie was lying on the ground in the building he saw the driver searching inside a car, but there is no indication he had a clear view of the driver's face.

Another explanation for Bowie's inability to recall the driver's appearance is that Bowie was more focused on the guns being pointed at him than anything else. As he stated, once the passenger pointed his gun at Bowie from inside the car, "I just froze, man. Everything stopped, the whole world, everything. So at that point I was lost." (12RT 1528.) "Once the guns was pulled on me, I froze." (12RT 1577.) "When the guns was drawn on me everything stopped in time. I don't even know if I was still on the same planet." (12RT 1645.) Lying on the ground, "I was gone. I was – I mean, I was too terrified." (12RT 1673.)

Bowie was so focused on the guns that he could positively identify them. His responses are consistent with the scientific research on "weapon focus" – where a witness assaulted with a weapon concentrates on the weapon rather than on the features of the assailant. (See *People v. Earle* (2009) 172 Cal.App.4th 372, 405-406 [acknowledging that "weapon focus"

could well cast doubt on a victim's identification of her assailant].)[24]

Furthermore, with a gun pointed straight at him, Bowie was no doubt under tremendous stress, making his identification of the driver less reliable. As the Court of Appeal has noted, dangers inherent in eyewitness identification include the effects of stress on human memory. (*People v. Jimenez* (2008) 165 Cal.App.4th 75, 82.) The combination of "weapon focus" and stress certainly explain why Bowie could not adequately describe the driver's appearance.

Bowie's inadequacy in identifying the driver is best exemplified by his lack of descriptive abilities immediately following the crime. The morning after the incident, Bowie described the driver's face to police detectives as lighter skinned and smaller than the passenger's; which is obviously not an actual description of the driver, but merely a comparison between the driver and the passenger. Bowie also said that the driver was 25 to 30 years old (12RT 1597-1599); whereas Wilson was 20 years old on the date of the incident. (13RT 1725; 34RT 5768; Exh. 67.) The closest he came to an actual description of any aspect of the driver's appearance was when he told Detective Chavers the day after the shooting that the driver had a "funny shaped mouth." (12RT 1597-1599.)

---

[24] See also *Raheem v. Kelly* (2d Cir. 2001) 257 F.3d 122, 138 ("it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it"); *State v. Wright* (Idaho App. 2009) 206 P.3d 856, 860 ("Studies indicate that . . . 'weapon focus[]' occurs because witnesses fixate their vision on the weapon"); *People v. Banks* (N.Y.Co.Ct. 2007) 16 Misc.3d 929, 943 [842 N.Y.S.2d 313] (finding "that the relevant scientific community generally accepts as reliable the proposition that the phenomenon of 'weapons focus' impairs the ability of a witness to make a subsequent identification of the perpetrator").

Bowie's description to graphic artist John Shannon was so inadequate that Shannon was unable to draw any sketch of the driver. Shannon recalled Bowie's mentioning a receding hairline or tight eyes or "something like that," but nothing more. (17RT 2556.) Wilson does not have a receding hairline or tight eyes. (Prelim. Hrg. Exh. 13; Trial Exh. 60.) Bowie's description of a receding hairline would also cause one to wonder how he could see such a feature, since both Anthony Brown and Christopher Williams averred that the driver wore a cap. (13RT 1765; 19RT 3071.)

Shannon also testified that in his experience, when a witness remembers something very unusual about a suspect, the witness is able to describe it to him, but Bowie did not mention to Shannon anything about the suspect's having a smirk on his mouth. (17RT 2556.) This runs counter to Bowie's later ability to identify Wilson based entirely on the "smirky grin" that Bowie associated with the driver's face. (12RT 1647, 1648 [twice] 1661.)

Bowie's inability to meaningfully describe the driver of the car soon after the crime makes his identification of Wilson at a photo lineup one month later of suspect value. (12RT 1549.) "[T]he accuracy of most peoples' memories declines sharply shortly after an event, but then declines very little over an extended period of time." (Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal* (1991) 79 Ky. L.J. 259, 291, citing Loftus, Eyewitness Testimony (1979) p. 53 and Shepherd et al., *Identification Evidence: a Psychological Evaluation* (1982) pp. 80-86; Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt* (1987) 16 J. Legal Stud. 395, 399.)

Given Bowie's inability to meaningfully describe the driver in any way immediately after the crime, any reasonable jury would have looked askance at his identification of Wilson from the photo lineup. Because of this, it was essential to corroborate his identification – corroboration supplied by Anthony Brown's testimony. Consequently, the admission of Brown's testimony identifying Wilson cannot be said to have been harmless beyond a reasonable doubt.

b. Williams's Identification of Wilson Was Not Worthy of Belief

(1) Williams Was a Suspect Witness Who Gave Consistently Contradictory Testimony

At the time of the carwash shooting, Williams, a convicted felon, was on probation for receiving stolen property (a gun) and possession of marijuana with intent to sell. He used and sold marijuana at the carwash even though a condition of his probation was that he not associate with known drug users or sellers. (13RT 1708-1709, 1796, 1799.) Further, as Williams was forced to admit at trial, he committed perjury at the preliminary hearing by lying under oath that marijuana was not sold at his carwash. (13RT 1747.)[25] Williams gave extensive testimony about the

---

[25] Detective Reynolds discussed Williams's perjury with the prosecutor after Williams's testimony or at the end of the day of the preliminary hearing. (18RT 2711.) Notwithstanding that "[u]nder well-established principles of due process, the prosecution cannot present evidence it knows is false and *must correct any falsity of which it is aware in the evidence it presents*, even if the false evidence was not intentionally submitted" (*People v. Seaton* (2001) 26 Cal.4th 598, 647, citing *Giles v. Maryland* (1967) 386 U.S. 66, italics added), there is no indication in the record that the prosecutor informed the preliminary hearing judge of

(continued...)

carwash operations which contained both admitted lies as well as contradictions from which the jury could readily assume he was a liar. This is important, even though it did not relate to the crime itself, because Wilson's jury could readily reject Williams's identification testimony altogether because of his commitment to mendacity. (See *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 777 [in conducting harmless error analysis, evidentiary weight of testimony by witnesses who lie significantly undermines argument that evidence of guilt was overwhelming].)

Williams repeatedly lied to the jury about whether the carwash was an actual carwash rather than a front for his marijuana business. At the outset, Williams insisted that the business was a "fresh carwash." (12RT 1508; 13RT 1750.) Yet, he acknowledged that the carwash had no particular hours and that he kept no records of the amount of money that came into or went out of the carwash. (13RT 1750.) In fact, he said that he did not charge for washing cars – car washers were not even supposed to ask customers for money. Instead, according to Williams, he accepted "donations" (13RT 1752), and he had no employees but merely volunteers who washed cars. (13RT 1782, 1809.) Ultimately, Williams conceded that with no profits from car washing, he paid rent for the carwash out of his marijuana sales proceeds. (12RT 1508; 13RT 1756.)

There were many direct contradictions between Williams's trial testimony and his preliminary hearing testimony. At the preliminary

---

[25](...continued)
Williams's perjury. According to Williams, the prosecutor, who was in the courtroom, told Williams that he did not "care about" Williams's lying to the court. (13RT 1833.)

hearing, he testified that he could not always cover the rent for the carwash, whereas at trial he contradicted himself and testified that he could cover his rent. (13RT 1756-1757.) At the preliminary hearing, Williams testified he never paid workers any money to wash cars, whereas at trial he testified he paid workers. (13RT 1751-1752.) At the preliminary hearing, Williams testified that "a lot of the car washing that was going on was just practice," whereas at trial he denied that there was any practice taking place at the carwash. (13RT 1754-1755.) At the preliminary hearing, Williams testified that he did not know that marijuana was stored in the soda machine at the carwash, but then admitted at trial that he lied at the preliminary hearing and that he did know this took place. (13RT 1821-1822.)

At trial Williams also provided contradictory testimony about something as seemingly straight-forward as his application for a business license. Early in his cross-examination, Williams identified his signature on the application (13RT 1776; Exh. CC), and then later in the cross-examination denied that he had signed the application (13RT 1822). There can be little doubt that even before addressing the worth of his testimony regarding his identification of Wilson, any reasonable jury would have been more than justified in finding Williams to be an unrepentant liar who was not worthy of belief on any subject.

(2) Williams's Pretrial Identification of Wilson Was Suspect

Williams testified that he only got a glance at the driver of the car and "did not get a good look at him." (13RT 1703, 1707, 1712, 1774.) He further testified: "I wasn't looking inside [the car]. I would glance over at it and I would look back. I've got a habit of not staring at people I don't know so, yeah, I looked over towards them and mind my own business, then

I would maybe look again." (13RT 1811.) Williams also admitted to Detective Reynolds that he paid more attention to the car than to the driver because staring at young males is received as an insult or a challenge.[26] (17RT 2650.)

Williams's inability to provide an adequate description of the driver is demonstrated by the fact his only description of him was that he had skin lighter than the passenger's and wore a black designer wave cap with white writing on it. (17RT 2612; 18RT 2732.) This description of the driver must have matched untold thousands of people in the Los Angles area alone.

Then, while viewing a photo array 18 days after the shooting, Williams identified a person other than Wilson as the driver. (18RT 2730, 2732.) He identified a young black male with a nose and bridge flatter and wider than Wilson's, with a larger forehead, shorter hair, larger and fuller lips, darker skin, and a block-shaped head compared to Wilson's oval-shaped one. (Compare Exhibits 47, 54, and HH, all photographs of the man identified by Williams as the driver, to Exhibit 50, containing a picture of Wilson in position number 2.)

Eleven days after making this identification, Williams examined a mug shot of Wilson in a photo array (Exhibit 50) and rejected Wilson as being the driver. (13RT 1772-1774; 17RT 2611-2612, 2649; 18RT 2703.) He said that even though Wilson's picture showed he had light skin like the driver, Wilson did not look like the driver. Specifically, Williams stated, "no, I don't think these – none of these guys look like that, no." He also

---

[26] Williams was probably further hampered by the fact that the car windows were tinted. (19RT 3026-3027.)

told the police that he did not think that the driver was pictured in Exhibit 50, though Wilson's photo was actually in position number two. (13RT 1773-1774.)

Finally, 135 days after the incident, Williams selected Wilson as the driver at a live lineup. (13RT 1817.) This selection, however, was likely based on the fact that Wilson had the lightest skin of anyone in the lineup. We know this because Williams had told the police that the driver was light-skinned and he told the jury that Wilson was "lighter than all the rest of these guys I" saw at the live lineup and had "the brightest" skin.[27] (13RT 1812-1813, 1819.) Thus, with skin lighter and brighter than the other lineup participants, Wilson stood out in a way that suggested to Williams that he should select Wilson as the driver. (See *People v. Uvula* (2009) 46 Cal.4th 680, 698 [to determine due process violation, first question is whether anything caused the defendant to "stand out" from the other lineup participants in a way that would suggest the eyewitness should select the defendant].)

The identification was also probably aided by the fact that before making it, Williams saw a photograph of Wilson attached to a folder entitled "MUG SHOW-UP FOLDER," which necessarily implied Wilson had been previously arrested and perhaps convicted. (Exh. 50; 17RT 2611; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 384 [mug shots "carry the inevitable implication that appellant suffered previous arrests and perhaps convictions"]; U.S. Dept. of Justice, Eyewitness Evidence: A Guide for

---

[27] Anthony Brown was also at the live lineup and testified that Wilson had a light complexion. (19RT 2991.) Brown added, "due to his complexion, he is the *only one* in that lineup that I can pick out." (19RT 3008, italics added.)

Law Enforcement (1999) at p. 30 [photo lineup should contain no visible information concerning previous arrest].) Wilson, moreover, was the only one in the live lineup who also appeared in the six pack examined by Williams. (Compare Exhibits 50 and 67.) Consequently, the jury would have been justified in believing that the basis for Williams's identification was not having glanced at Wilson in the car at the scene of the incident, but rather the basis was because Williams had recently examined a suggestive mug shot of Wilson. (*Simmons v. United States* (1968) 390 U.S. 377, 383-384 [when witness views photograph of individual, "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification"].)

(3) Williams's Trial Identification of Wilson was Confused

Williams's trial identification of Wilson was not a strong independent identification that would have stood on its own, apart from the corroborative identification of Anthony Brown. Williams testified that he was unsure whether Wilson was the driver *or* the passenger. He specifically stated: "I'm confused about who was in the passenger seat and the driver's seat. It's the only thing – a small thing to be confused about; otherwise, those are the two people in the car. [¶] Now, right now, they almost look similar so for me to know which one was driving and which one was in the passenger seat is hard for me but I do know those are the two people in the car, yes." (13RT 1761.)

This testimony is curious since Wilson and Pops are not similar in appearance. Pops is considerably taller and darker and has a much narrower face than Wilson, and apparently had a three-inch pony tail at trial. (9RT

959; 17RT 2709 [Detective Reynolds describing Wilson as fair skinned]; compare Exhs. 66 [Pops] and 67 [Wilson].) Thus, when Williams said Wilson and Pops looked almost similar, though they clearly do not, he was showing that his powers of observation and identification were highly suspect.

c. There Was a Lack of Evidence Other Than the Identifications to Connect Wilson to the Crime

The identifications of Brown, Bowie, and Williams constituted the only direct evidence linking Wilson to the crime. Since Brown's identification was necessary to prop up the otherwise unreliable identifications of Bowie and Williams, the admission of his identification cannot be considered harmless. The question then remains as to whether the state can demonstrate beyond a reasonable doubt that there was other evidence showing Wilson's guilt such that its existence rendered the admission of Brown's identification harmless. It cannot.

The remaining evidence produced by the state is circumstantial evidence that, at best, connects Pops to the commission of the crime. It might also, at best, tend to show that Wilson shared a gang affiliation with Pops, but not that Wilson committed the crime at issue. The burden is on the state to demonstrate beyond a reasonable doubt why this circumstantial evidence renders the admission of Brown's identification harmless. This is logical because otherwise appellant would have to recite in mind-numbing detail all of the evidence that fails to connect him to the crime; which is virtually all of the evidence in this case. Nonetheless, in order to illustrate his thesis that the circumstantial evidence is unavailing of his guilt, appellant will briefly demonstrate types of evidence adduced by the state

that could potentially be used to connect Pops to the crime, but which fail to connect appellant to the crime.

Larry Barnes, a friend of Pops, testified that late in the afternoon of the day of the crime he went to a barbeque at the home of one of Pops's relatives. Pops, Harris, Wilson, and several others were there. During the party, Harris asked Barnes to burn a car. Pops's girlfriend drove Harris and Barnes to an alley where Harris and Barnes incinerated Jessie Dunn's El Camino, which did not have its IROC rims at that time. (12RT 1558;13RT 1869-1870, 1874, 1876-1877, 1879-1880, 1882; 14RT 1925-1926; 18RT 2766-2767; Exh. 84-C.) There was no evidence that Wilson had any role in burning the El Camino.

Barnes also told the jury that he, Pops, Harris, and Wilson were members of the Young Mafia Organization ("Y.M.O."), and he identified a list of 22 aliases found in a looseleaf binder in Wilson's apartment that placed Pops (known as "Nut"), Harris ("Scrap"), Wilson ("Bird") and Barnes ("Smurf") in position numbers 1, 2, 3, and 18, respectively. The binder also contained some drawings and a reference to the Y.M.O. (Exhs. 34A-D, 68-B; 13RT 1865-1868; 14RT 1898-1899, 1956-1962, 1985; 15RT 2170.) Other than the presence of his name, there was no evidence indicating that Wilson was responsible in any way for this binder or its contents.[28]

The binder also contained drawings of Pops, one of which was a

---

[28] Although the person who wrote the list of 22 gang members and made the drawings was not identified for the jury, Pops's counsel informed the court during a pretrial hearing that Everett Rivers made at least one drawing and some part of the lists; Rivers's name appears on one page of the binder. (8RT 714-715.)

sketch of Pops with his Camaro and IROC rims. (14RT 1950, 1956-1957; 15RT 2170-2174.) This relates to testimony that a couple of weeks after the crime, Pops was seen driving the Camaro, with IROC rims similar to those of Jessie Dunn. Harris, Wilson, and Barnes were also seen to be in the car with him. (15RT 2116-2120; 16RT 2252-2260.) The prosecutor used this evidence to argue to the jury that the state had proven that the rims taken from Dunn were the ones on Pops's vehicle. (27RT 4460.)

An additional drawing of Pops depicted him with a Y.M.O. tattoo on one arm, while he held a Glock in one hand and a Tech-9 in the other hand. (14RT 1956, 1961-1962; Exhibits 34-B, 68-C, 68-E.) This drawing depicted him alone; Wilson was not present. Nor were there any similar drawings of Wilson in the binder.

There were also items discovered underneath couch cushions in the gang hangout. Police found a bullet that had been ejected from the 9mm gun used in the shooting. (14RT 2164-2165.) A Tech-9 fires a 9mm bullet similar to the 9mm bullet found in the hangout. Deputy Sheriff Walley agreed that the bullet could have been dropped in the couch before or after the carwash shooting (19RT 2872, 2880-2885, 2889, 2930-2931), and there was no evidence of Wilson's fingerprints on the fully preserved bullet and casing.

Police also retrieved a gun shop business card from a wallet under the couch cushion. The wallet also contained a video rental card and a calling card, both in Wilson's name. (14RT 2174-2175.) On the back of the gun shop card were prices for .26 and .30 caliber Glock firearms, but not for a .40 caliber Glock, the gun used in the shooting. (16RT 2247.)

The police also found in the apartment an empty box for K-Swiss tennis shoes, size 10 ½. (14RT 2166; 27RT 4387.) Defense expert Carol

Hunter could not exclude Pops or Wilson from having left shoe prints at the scene of the carwash shooting. (21RT 3243.)

Finally, a January 26, 1998 Long Beach newspaper was discovered in a photo album in the apartment. The front page of the newspaper included an article on the carwash shooting from the preceding day. (15RT 2167.)

The import of the preceding evidence was the fundamental tenet of the prosecution's case: Wilson was the driver because he and Pops were in the same gang; therefore, evidence implicating Pops also implicated Wilson, and any evidence that might link the gang to the crime meant that Wilson committed the crime with Pops. This was the crux of the prosecutor's theory of the case that Wilson's apartment was more of a gang hideout than an apartment (8RT 717), and that the list was a gang list (28RT 4510). Clearly, this was an effective approach to secure a conviction, since it did. However, in assessing the worth of this evidence as sufficient to convict apart from the unreliable identifications of Bowie and Williams, it fails. This evidence may show that Wilson was in a gang with Pops, but fails to show that Wilson committed the crime at issue with Pops. That link had to be made by the identification testimony; testimony which only possessed overall worth if Anthony Brown's identification was a component part of it.

F. Conclusion

The trial court erred by admitting Anthony Brown's preliminary hearing testimony. Brown was not "unavailable," as that term is meant by the federal Constitution. Even if he could be deemed to be unavailable, the prosecution failed to exercise due diligence in trying to produce him for trial. Consequently, neither the constitutional nor statutory requisites

necessary for the introduction of his preliminary hearing testimony were met.

The error in admitting Brown's preliminary hearing testimony cannot be shown beyond a reasonable doubt to be harmless. Identification testimony by Brown, Williams, and Bowie constituted the only direct evidence tying Wilson to the carwash robbery. Brown's identification was necessary to prop up the unreliable identifications rendered by Bowie and Williams. Without Brown's preliminary hearing testimony identifying Wilson, the direct evidence of Wilson's participation in this crime was too unreliable to support a verdict.

The putative circumstantial evidence tying Wilson to the carwash robbery was woefully inadequate to support a conviction in the absence of the identification evidence. The most that it proved was that Wilson may have been a member of the same gang as Pops. Unless this state chooses to adopt "guilt by association" as a standard of proof, this is simply not enough.

The burden is on the state in this instance to demonstrate beyond a reasonable doubt that the admission of Anthony Brown's preliminary hearing testimony was harmless. It could do this if it could demonstrate that the jury's verdict was surely unattributable to Brown's testimony. It cannot do so. Reversal of appellant's conviction is thus required.

//

//

3.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON UNPREMEDITATED SECOND DEGREE MURDER BECAUSE SUBSTANTIAL EVIDENCE QUESTIONED WHETHER FIRST DEGREE FELONY MURDER WAS COMMITTED, AND IT SHOWED THAT THE LESSER OFFENSE WAS COMMITTED INSTEAD.

A. Introduction

Two young men drove to a well-known drug spot, a carwash in Compton, and got into an argument and a shoving match with some men inside the carwash. As so often happens these days, the two young men were armed. They shot four men including a drug dealer. Two other men inside the carwash were unharmed. On the way out of the carwash property, one of the young men stole one shooting victim's car, an El Camino. They took only the car, that is, they took no marijuana or anything else belonging to the victims including any money.[29]

The foregoing is a reasonable description of what occurred at the carwash on Super Bowl Sunday 1998. And it shows a case of

---

[29] Guns are so prevalent in Compton that since 2005, under a program known as "Gifts for Guns," the Los Angeles County Sheriff's Department has sought to reduce violent crime by exchanging gift cards to residents in return for receiving guns anonymously. (L. A. Cnty. Sheriff's News Advisory (Dec. 19, 2008) <http://www.lasdhq.org/Advisories/SHB-161M-08.pdf>; Linthicum, *Residents Turn in Guns in Compton*, L. A. Times (Dec. 9, 2008) California p. 1, <http://articles.latimes.com/2008/dec/09/local/me-gifts-for-guns9> ["Sheriff's Department took in a record haul of firearms this year through its Gifts for Guns program, an annual event in Compton that allows people to anonymously turn in firearms in exchange for $100 gift cards at Target, Best Buy or Ralphs supermarkets"].)

unpremeditated second degree murder. Arguably, another reasonable interpretation of the facts is that this was a shooting during a robbery, but as suggested, it is not the only reasonable interpretation. A properly instructed jury could have reasonably found that, because no witness testified to seeing the shooting, the prosecutor failed to prove beyond a reasonable doubt that the shooting was premeditated. Having reasonable doubt that the shooting was premeditated could have caused jurors to find unpremeditated second degree murder. But the court failed to instruct the jury on this lesser included offense. The jury then had a choice between setting the defendants free – a virtually impossible option given that the jury believed the defendants were responsible for the deaths of four men – or finding them guilty of multiple first degree murders. So coerced, the jury predictably found the defendants guilty of a capital crime. Thus, this case presents a classic *Beck* problem.

The district attorney charged appellant Byron Wilson with four counts of murder with malice aforethought, four counts of robbery, and one count of burglary. (4CT 1033-1040.) In his argument to the jury, the prosecutor only pursued a felony murder theory of first degree murder; the trial court instructed the jury only on this theory. (29RT 4766-4767; 5CT 1199, 1202.) The court failed to instruct on any lesser included offenses, including unpremeditated second degree murder, despite the existence of substantial evidence raising a question as to whether all elements of first degree felony murder were present, and despite the existence of substantial evidence showing unpremeditated second degree murder. The court's failure violated state and federal law and deprived Wilson of his rights to a fair jury trial, due process of law, and reliable guilt and special circumstance verdicts, as guaranteed by the Sixth, Eighth and Fourteenth

Amendments of the United States Constitution and article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 632; *People v. Abilez* (2007) 41 Cal.4th 472, 514; *People v. Prince* (2007) 40 Cal.4th 1179, 1267; *People v. Rogers* (2006) 39 Cal.4th 826, 879; *People v. Elliot* (2005) 37 Cal.4th 453, 475.) Reversal of Wilson's first degree murder convictions, special circumstances findings, and penalty verdict is required.

B. The Court Was Obligated to Instruct on All Lesser Included Offenses Supported by Substantial Evidence.

On its own initiative, a trial court must instruct on general principles of law relevant to the issues raised by the evidence. This includes instructing "on lesser included offenses when *the evidence raises a question* as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged." (*People v. Cruz* (2008) 44 Cal.4th 636, 664, citing *People v. Breverman* (1998) 19 Cal.4th 142, 154, italics added; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637 [in capital case, lesser included offense instructions must be given when evidence "leaves some doubt" that each element of capital offense was proven].)

Indeed, trial courts have the obligation to ensure that the jury will be accorded the full range of possible verdicts whenever the evidence suggests the defendant may be guilty of a lesser offense than the one charged. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 159.) This rule is interpreted broadly, so that the trial court must instruct on all lesser included offenses raised by the evidence, not just those that seem the strongest based on the evidence or those on which the parties have openly relied. (*Id.* at pp. 161-

162; *id.* at p. 155 ["every lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury"]; *id.* at p. 160 ["regardless of the tactics or objections of the parties, or the relative strength of the evidence on alternate offenses or theories, the rule requires sua sponte instruction on any and all lesser included offenses, or theories thereof, which are supported by the evidence"]; *People v. Barton* (1995) 12 Cal.4th 186, 203 ["The trial court must instruct on lesser included offenses when there is substantial evidence to support the instruction, regardless of the theories of the case proffered by the parties"].)

Instructions on a lesser included offense are required whenever evidence that the defendant is guilty only of the lesser offense is substantial, that is, evidence from which a reasonable jury could conclude that the lesser, but not the greater offense, was committed. A trial court, however, should not measure the substantiality of the evidence by weighing the credibility of the witnesses, a task exclusively for the jury. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) The testimony of a single witness can constitute substantial evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

This Court independently reviews the issue of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) "'[D]oubts as to the sufficiency of the evidence to warrant an instruction should be resolved in favor of the accused.'" (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1180, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12.) Thus, in determining whether there was substantial evidence of a lesser offense, this Court looks at the evidence in the light most favorable to the defendant. (*People v. Manriquez* (2005) 37 Cal.4th 547, 585; *People v. Turk* (2008) 164

Cal.App.4th 1361, 1368, fn. 5.)

C. Second Degree Murder Is a Lesser Included Offense of the Murder Charges Alleged Against Wilson.

An offense is a lesser included offense of another if (1) the greater statutory offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in the elements of the greater ("the elements test"), or (2) the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed in that manner, the lesser offense must necessarily be committed ("the accusatory pleading test"). (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.) Under either test, second degree murder is a necessarily included offense of the murder charges against Wilson.

The amended information charged Wilson with committing murder in violation of section 187, subdivision (a). (2CT 386-388.) An information alleging murder under section 187 is sufficient to charge both premeditated and felony murder, first and second degree. (*People v. Harris* (2008) 43 Cal.4th 1269, 1295; *People v. Hughes* (2002) 27 Cal.4th 287, 369.) Thus, second degree murder is a necessarily included offense in the section 187 murder charges against Wilson. Moreover, because murder under section 187 includes the charge of first degree premeditated malice murder, second degree unpremeditated malice murder is a lesser included offense. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344.) Finally, because the language of the accusatory pleading alleges that Wilson committed each murder "with malice aforethought," which can be express but unpremeditated, thereby constituting second degree murder (*People v. Swain* (1996) 12 Cal.4th 593, 601), second degree murder is a necessarily included offense. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 445

[even where prosecutor pursues only felony murder liability, second degree murder is lesser included offense because offense charged in information is murder with malice aforethought under section 187]; see *People v. Taylor* (2010) 48 Cal.4th 574, 623 [leaving open question whether second degree murder is lesser included offense of first degree felony murder].)

Hence, assuming the existence of substantial evidence of second degree murder, the trial court should have instructed the jury on this crime.[30]

D. The Evidence Raised a Question as to Whether Felony Murder Was Committed, and at the Same Time It Supported Instructions on Unpremeditated Second Degree Murder.

The jury returned four first degree felony-murder verdicts against Wilson in the deaths of Hurd, Dunn, Potter, and Hoard based on the prosecutor's theory of murder during the commission or attempted commission of robbery or burglary or both. (5CT 1140-1143; 29RT 4767-4769.) The jury also found Wilson guilty of robbing Dunn and Hurd (5CT 1137, 1144) and not guilty of attempting to rob Hoard and Potter. (5CT 1145, 1146.) Finally, the jury found Wilson guilty of the burglary of the

---

[30] Because the prosecutor chose to allege murder under section 187, the court was required to instruct the jury on unpremeditated second degree murder if supported by the evidence, notwithstanding that the prosecutor ultimately chose to argue to the jury only a felony murder theory of first degree murder. (25RT 4292; 27RT 4434.) The prosecutor never amended the information to allege felony murder only. Thus, at closing argument, he could have argued a first degree murder theory based on premeditation, which necessarily includes second degree unpremeditated murder. A fair inference is that the prosecutor chose not to argue premeditation because, as shown later, it was unsupported by the evidence that developed at trial.

building occupied by "Wheels 'N Stuff." (5CT 1138.)[31]

The evidence raised a question as to whether every element of the felonies required to support the felony-murder verdicts – robbery, burglary, or their attempts – was present. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) Moreover, a reasonable jury could have concluded that the lesser included offenses of unpremeditated second degree murder of the victims were committed instead. Hence, the court should have instructed the jury on second degree murder. (*Id.* at p. 162.)

1. The evidence raised a question as to whether felony murder based on robbery, burglary, or their attempts was committed.

As shown in detail below, all of the charged murders and all of the felonies turned on the prosecutor's central thesis that on Super Bowl Sunday 1998, the defendants went to the Wheels 'N Stuff carwash, a front for a drug operation, to accomplish a single purpose – to rob the business and everyone inside it. If substantial evidence raised a question as to whether the prosecutor proved that thesis, then every conviction is subject to question, too. Indeed every conviction is questionable because there is substantial evidence that the perpetrators went to the drug spot on Super Bowl Sunday, not to steal marijuana, but to buy marijuana for a party later that day. Once at the carwash they got into a confrontation with the drug dealer that immediately escalated into a shooting that left four dead.

It is important to keep in mind that this is not a claim that the evidence was insufficient to support the jury's verdicts. Rather the issue is whether the evidence *raised a question* as to whether the prosecutor proved

---

[31] The jury returned similar verdicts with respect to Pops. (4CT 1096-1099.)

every element of felony murder. (See *People v. Valdez* (2004) 32 Cal.4th 73, 141 (dis. opn. Chin, J.) ["The issue is *not* whether the robbery evidence was sufficient to sustain the robbery felony-murder conviction, but whether a jury *could have reasonably concluded* that defendant committed second degree murder but not robbery felony murder"].) And as shown below, the evidence is more than enough to raise this question. Indeed, three indications from the record prove the point – the prosecutor's own concessions, the jury's verdicts, and the evidence itself.

a. The prosecutor conceded that he failed to show that any property was taken from inside the carwash.

Although the prosecutor claimed that Wilson entered the carwash to rob everyone inside (27RT 4441 [Prosecutor: "the whole intent in going to the carwash that day was to rob the people inside and take things inside that did not belong to Mr. Pops and to Mr. Wilson"]), the prosecutor conceded that he failed to prove that anything was taken from inside the carwash. (27RT 4447-4448; see, e.g., 27RT 4447 [Prosecutor: "I can't show you that any piece of property was taken from Mr. Hurd"].) As noted, the jury nonetheless found that Hurd was a robbery victim along with Dunn, the latter for the theft of his El Camino parked outside the carwash building. (5CT 1137, 1144.) The prosecutor's failure to prove that anything was taken does not *necessarily* mean that the perpetrators did not enter the carwash with the intent to rob. It is, however, *strong* evidence that robbery was never the plan, thereby raising a question as to whether the Hurd robbery and the burglary of the carwash were committed. (29RT 4779-4781 [court instructing jury on robbery – CALJIC No. 9.40]; 29RT 4784-4785 [burglary instruction – CALJIC No. 14.50].)

b. The not guilty verdicts for attempted robbery show the jury flatly rejected the prosecutor's theory of the case – robbery.

Even more significant was the jury's rejection of the prosecutor's theory of the case when it found Wilson not guilty of attempting to rob Hoard and Potter. (5CT 1145, 1146.) If the jury had accepted the prosecutor's interpretation of the facts, that Wilson entered the carwash to rob everyone inside, then the jury would have been compelled to find Wilson guilty of attempting to rob Hoard and Potter. (29RT 4768, 4784 [court instructing jury on attempted robbery – CALJIC Nos. 6.00, 9.40].) Therefore, in the jury's view, the perpetrators went to Wheels 'N Stuff for a purpose different from robbery, thereby raising a question as to whether robbery was the intent and whether all underlying felonies – robbery, burglary, or their attempts – were proved.

c. The evidence itself raises a question as to whether felony murder was committed.

As noted, the jury found three felony verdicts on which it likely based the felony murder verdicts: the Hurd and Dunn robberies and the carwash burglary, which in turn were all based on the prosecutor's robbery theory. A reasonable understanding of the evidence, however, is that the perpetrators went to the carwash to buy marijuana to use at a party later that day to celebrate Super Bowl Sunday. In fact, the owner of the carwash, Christopher Williams, thought that the two young men were there to buy marijuana. Williams testified that he saw the two men parked in a car outside the carwash building. (13RT 1703.) Because he was in the business of selling marijuana, Williams thought the car occupants were there to buy some marijuana, so he asked them what they needed. As Williams told the jury, "we were selling weed, so on my way out I asked

them what are you guys doing, what do you need." (13RT 1712.) The prosecutor acknowledged as well that Williams saw the visitors as potential marijuana buyers: "It may be he was going to sell marijuana. But that's why he asked them what do you guys need?" (28RT 4494.)

It is well known that the Super Bowl is one of the most popularly celebrated annual events in this country, particularly for young men. Williams, himself, went to the carwash on Super Bowl Sunday to pick up some marijuana for a Super Bowl party. (13RT 1736.) Wilson and Pops attended a Super Bowl party on the afternoon of January 25, 1998, where marijuana was smoked. (13RT 1884; 18RT 2760, 2802, 3979.) Thus, the jury could have reasonably believed that the defendants went to the drug spot to buy marijuana, not to steal it and not to steal from everyone inside the carwash. This view of the facts would explain why the jury concluded by its verdict that the defendants did not intend to rob Hoard and Potter.

A further examination of the evidence raises questions regarding the commission of robbery and burglary, and hence felony murder. Anthony Brown saw both perpetrators leave the carwash; Brown said nothing about the perpetrators' carrying away any loot. (19RT 2987-2991, 2993-2997.) In fact, no one testified to seeing the perpetrators with any loot. If, as the prosecutor insisted, there was a lot of marijuana at the carwash and the defendants stole it (29RT 4723), then Brown would have seen the perpetrators carry it, but he saw nothing.

In addition there was no evidence that the defendants possessed any property belonging to the victims or to the carwash. And as noted, Christopher Williams was present at the carwash just before the shooting, as he was every day. He should have been able to tell the jury if anything was missing. But despite his long and exhaustive testimony, he said nothing

about anything having been taken. (12RT 1698-13RT 1834.) Thus, there was no evidence that the defendants took anything from anybody, raising serious doubt that the defendants committed robbery, burglary, or felony murder.

Randy Bowie, the mendacious felon, provided the only testimony supporting the prosecutor's view of the evidence, but even his testimony raised a question as to whether the prosecutor proved his case. Bowie testified that after the perpetrators entered the carwash building with guns drawn, "they said where is the money and where is the shit." (12RT 1517.) But ample evidence and the applicable law would give a reasonable jury reason to reject Bowie's testimony as simply one more lie on top of many others. Moreover, Bowie did not testify that anything was taken from the carwash or the individuals inside the carwash, including himself, or that any individual was searched by the perpetrators, or ordered to open his pockets. (12RT 1531-1532.) The lack of effort by the perpetrators to take property from the victims supports a finding that robbery was not intended.

Bowie had as many as eight felony convictions (the number is unclear), including battering the mother of his child, robbery, two burglaries, possessing a knife in prison, and possession of marijuana. (12RT 1520-1521, 1627-1628, 1681.)

But not all felonies are created equal. While possessing marijuana may not move some jurors to be especially distrustful of Bowie, battering the mother of his child (12RT 1628) would likely fill at least some jurors with revulsion (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [inflicting corporal injury on a spouse or cohabitant connotes general readiness to do evil]). Bowie's robbery and two burglary convictions reflect crimes of dishonesty that are most probative on the issue of

credibility, showing Bowie's proclivity for lying. (*People v. Turner* (1990) 50 Cal.3d 668, 705.) A reasonable jury could rely on these convictions to disbelieve Bowie's testimony altogether. (Evid. Code, § 788; 29RT 4753 [court instructing jury that it could consider witness's felony convictions in determining believability of witness].)

Aside from his felony convictions, Bowie's many and important lies would provide a properly instructed jury, as here, a reasonable basis to disbelieve his entire testimony. (29RT 4752 [CALJIC No. 2.21.2: "A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars"].)

For example, Bowie lied on direct examination when he denied that he had an armed robbery conviction. On cross-examination he admitted the conviction. (12RT 1672, 1681.) Bowie lied when he told the jury that he had never testified in court until that day, when in fact he had testified in his own criminal trial. (12RT 1562-1563, 1630-1631.)

Bowie lied when he testified that he had never been affiliated with a gang. The sheriff's database for tracking gang members showed that Bowie admitted his membership in the Nutty Block Gang. (12RT 1620; 16RT 2434; 17RT 2508, 2511; 27RT 4419.)

Bowie lied when he tried to distance himself from Wheels 'N Stuff's illegal drug business, pretending that he did not know the carwash sold drugs. Bowie, convicted of possession of marijuana, claimed that he did not notice any drug dealing. He was too busy washing cars, for which Williams paid him $300 weekly, so said Bowie. (12RT 1623, 1627, 1671.)

First, Williams denied paying Bowie anything at all. (13RT 1788.) And second, as Williams explained to the jury, washing cars was *the* means to dealing marijuana: "Well, we tend to smoke a lot of weed, me and the guys I hung out with, and a lot of times the people that would get their car washed would want us to sell us some of the weed we were smoking and from time to time we would." (13RT 1788.) "A lot of times" and "from time to time" were often enough to enable Williams to pay the carwash rent from marijuana sales. (13RT 1756.) Furthermore, drug sales were not hidden from view, as Williams's testimony suggested. Crime scene photographs taken immediately after the shooting show marijuana and drug paraphernalia out in the open. But Bowie denied seeing those items at the carwash. (12RT 1623-1626; 13RT 1804-1805, 1837, 1848, 1854-1855, 1859-1860.) It is highly doubtful that a reasonable jury would believe Bowie's claim that he was unaware that his carwash customers bought marijuana from Wheels 'N Stuff.

In *People v. Breverman*, *supra*, 19 Cal.4th 142, the defendant insisted that he did not shoot into a crowd with intent to kill, that is, "he did not 'aim [ ]' or fire 'at them.'" This Court found that "a jury could reasonably disbelieve that claim and conclude, from all the evidence, that defendant killed intentionally . . . ." Hence, based in part on a jury's reasonable disbelief of this evidence, the Court held that the trial court erred in failing to instruct on a lesser included offense. (*Id.* at p. 164.)

Similarly, in *People v. Barton*, *supra*, 12 Cal.4th 186, the defendant testified that he accidentally shot the victim. (*Id.* at p. 192.) He argued, therefore, that the trial court should not have given lesser included offense instructions on voluntary manslaughter, which includes the intent to kill. Nevertheless, even though such instructions would require the jury to

disbelieve the defendant's testimony (*id.* at p. 202 ["Although defendant claimed that the gun discharged accidentally, the jury could reasonably discount this self-serving testimony"]), the Court held that voluntary manslaughter instructions were appropriate (*id.* at p. 204). Thus, if a jury may reasonably disbelieve testimony, then lesser included instructions based in part on such reasonable disbelief may be warranted.

Based on the foregoing, a reasonable jury could disbelieve Bowie's testimony supporting the prosecutor's theory that the perpetrators went to the carwash to rob and steal. Furthermore, in rejecting the truthfulness of Bowie's testimony, a reasonable jury could conclude that the two young perpetrators intended to buy marijuana, not to steal it. Having a reasonable basis to disbelieve Bowie necessarily raises a question as to whether any supporting felony, and hence felony murder, were committed.

As demonstrated in Argument 5 and incorporated here, the evidence was insufficient to support the Hurd robbery conviction, raising the strongest question whether any robbery of Hurd could be a basis for felony murder. Even assuming for the sake of argument that marijuana was taken from the marijuana business, Hurd was not connected to that business. Therefore, as a matter of law, Hurd could not be robbed of its property. Williams testified that only he and Michael Hoard were in the marijuana business that also operated on the premises of Wheels 'N Stuff. (13RT 1796.) In *People v. Scott* (2009) 45 Cal.4th 743, this Court concluded that "all employees on duty during a robbery have constructive possession of their employer's property." (*Id.* at p. 746.) *Scott* further ruled that a robbery victim has constructive possession of another's property taken during a robbery if the victim has a "special relationship" with the owner of the property whereby "the victim had authority or responsibility to protect

the stolen property on behalf of the owner." (*Id.* at p. 750.) Hurd was not an employee of the Williams and Hoard marijuana business, and did not have a special relationship with the marijuana owners, whereby Hurd had authority or responsibility to protect the marijuana. Hence, Hurd was not robbed of any marijuana taken.

Williams testified that Hurd was in the carwash business with him. But Williams also testified that Hurd did not work for him; Hurd had his own clientele and washed his own customer's cars. There was no evidence that anything was taken from Hurd's business. (11RT 1508; 13RT 1700, 1710, 1785.)

In discussing the *Hoard* attempted robbery count, the prosecutor argued to the jury that money taken from the cash register would have been taken from *Hurd* since the "location" was Hurd's. (27RT 4448.) There was no evidence that any money was taken. Indeed there was no evidence that the carwash even had a cash register.

Furthermore, the prosecutor made no real effort to prove that Hurd was an owner or employee of the Wheels 'N Stuff carwash, and he almost surely was neither. Although Williams testified that Hurd was in the carwash business with him (13RT 1710), implying that they were business partners, they were not partners in Wheels 'N Stuff. Six months before the shooting, Williams signed an application for a business license for Wheels 'N Stuff, where he indicated that the business was a "sole proprietorship" and he was its "owner" (Exh. CC). When Williams was asked on cross-examination whether Hurd was an employee of the carwash, Williams did not clarify matters by offering that Hurd was a co-owner. (13RT 1784-1785.) Instead Williams answered that he "never considered him somebody who would work for me. Spanky was my friend and he came and left as he

pleased. . . . Spanky had like his own clientele, yeah. He would come and do his own cars. Some of the guys he knew, yeah." (13RT 1785.) And though Williams testified at length about paying rent for the carwash – the rent money came from drug sales because the carwash did not charge for washing cars and made no profit – Williams said nothing about Hurd ever contributing to the rent. (13RT 1752, 1756-1757, 1777-1782.) Finally, although Bowie answered "yes" to the prosecutor's leading question, "the other owner was a guy you knew as Spanky," Bowie did not even know Spanky's real name (Charles Hurd); moreover, the prosecutor failed to lay any foundation to establish for the jury that Bowie had any personal knowledge that Hurd was an owner. (12RT 1573.) And at an earlier point in Bowie's testimony, the prosecutor asked Bowie this leading question about Williams, "was he *the* owner of the carwash," to which Bowie responded, "Yes." (12RT 1511. italics added.) Note Bowie was not asked whether Williams was "an" owner of the carwash. A reasonable jury could conclude that based on the business application and Williams's testimony, Hurd was not an owner of the carwash. Thus, Hurd was not robbed of anything taken from the Wheels 'N Stuff carwash.

The jury's other robbery verdict on which felony murder might have been based involved the taking of Jessie Dunn's El Camino car. Although the prosecutor proved that it was taken, the evidence raised a question as to whether every element of the Dunn robbery charge was present because there was strong evidence that the car was taken as an afterthought, that is, the perpetrators formed the intent to take the car after the assault on Dunn. Therefore, there was no robbery, but only theft. (*People v. Ledesma* (2006) 39 Cal.4th 641, 715 ["If there is evidence to support a finding that the defendant did not form the intent to steal until after the killing, the court

should instruct on its own motion on the lesser included offense of theft"]; *People v. Bradford, supra*, 14 Cal.4th at pp. 1055-1056 ["If intent to steal arose only after the victim was assaulted, the robbery element of stealing by force or fear is absent"].)

First, the prosecutor did not even argue that the defendants went to the carwash for the purpose of taking the car. In fact the prosecutor avoided entirely the issue of when the intent to steal the El Camino was formed. (27RT 4449 [Dunn robbery].) In contrast, the prosecutor repeatedly argued "that these men . . . entered the carwash that day with the intent to commit the crime of robbery, to rob the people *inside* or to steal something off the counter, to commit the crime of theft." (29RT 4435, italics added.) Thus, the prosecutor's own argument suggests that the taking of the El Camino was an afterthought and therefore theft, not robbery.

In addition Bowie testified that Dunn arrived at the carwash in his El Camino while the perpetrators sat in their car next to the carwash building. Dunn parked his car outside and went into the carwash building. (12RT 1512-1516.) There was no evidence that the perpetrators knew the El Camino would be at the carwash that day. Thus, it was mere happenstance that the car was there.

That the El Camino was incinerated the very day it was taken also suggests that the perpetrators did not intend to steal the truck at the time of or before the shootings. (13RT 1869-1870.) Immediately destroying the car is evidence that the El Camino was stolen as a means of escape. (*People v. Thompson* (1980) 27 Cal.3d 303, 323-324 [stealing car to effectuate getaway from intentional shootings evinces property gain as secondary goal].) Jurors could reasonably believe that the perpetrators chose to escape from a major crime scene in two cars to increase their

chances of at least one of them avoiding authorities. Although the prosecutor argued that Pops kept the rims, there was no evidence that Pops knew of their existence before the shooting. (27RT 4460.) Furthermore, jurors could reasonably believe that killing four people for the purpose of stealing wheel rims is much less likely than stealing a car to effectuate an escape from a multiple shooting.

The final felony verdict against Wilson was for burglarizing the building occupied by Wheels 'N Stuff. (5CT 1138; § 459.) The jury was instructed that burglary is the entry of a building with the intent to commit larceny and robbery. (29RT 4785-4786.) A reasonable interpretation of the evidence raises a question as to whether the prosecutor proved every element of burglary, specifically intent at the time of or before entry. (*People v. Waidla* (2000) 22 Cal.4th 690, 734 ["burglary based on larceny requires intent to steal on entry"].)

For many of the same reasons that the evidence raised questions with respect to the Hurd and Dunn robbery convictions, it raised questions with respect to the burglary felony verdict: the prosecutor failed to prove that anything inside the carwash was taken, suggesting that robbery and theft were not intended; the prosecutor failed to prove that the defendants left the carwash with any property belonging to the victims or the carwash, or that any such property was later found in the defendants' possession; Bowie provided no testimony that the perpetrators demanded that the victims empty their pockets; Bowie provided no testimony that the perpetrators even picked up any property belonging to the carwash or the victims; jurors could have reasonably concluded that if Eric Thornton, who was present in the carwash for the entire assault (12RT 1517; 19RT 3000) would have confirmed the prosecutor's robbery theory, he would have testified, but he

did not; a reasonable jury could have rejected Bowie's testimony in its entirety because of his lies and felony convictions; if robbery was the intent, one would expect evidence that the perpetrators searched the cabinets towards the front of the carwash building, the office, a bathroom, and a soda machine where the marijuana was stored (13RT 1675-1676, 1737, 1816, 1821), but there was no such evidence.

When the perpetrators entered the carwash, there were six other men inside, including eventual survivors Randy Bowie and Eric Thornton. The prosecutor's failure to prove that any property was taken from six human victims and a business, whether the business was a carwash or a drug seller, is most remarkable and raises the obvious question as to whether every element of the felonies required to support the felony-murder verdicts – robbery, burglary, or their attempts – was present.

2. A reasonable jury could have concluded that the lesser included offense of unpremeditated second degree murder of the victims was committed.

In *People v. Wickersham* (1982) 32 Cal.3d 307, this Court recognized as follows: "The fact that heated words were exchanged or a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance." (*Id.* at p. 329.) Here, there was substantial evidence that the victims were killed following a confrontation, thereby justifying a determination by the jury that the prosecutor failed to prove premeditation beyond a reasonable doubt and requiring instructions on unpremeditated second degree murder.

Bowie testified that he did not actually see the shootings, but only heard shots as he fled the scene. (12RT 1652-1655.) In fact, no one

testified to seeing any circumstances of the shootings or hearing threats to shoot or kill that would negate provocation. While this fact may not defeat a sufficiency of the evidence claim, it does raise a question as to whether the prosecutor proved premeditation beyond a reasonable doubt.

On the other hand, Bowie testified that while he lay on the carwash floor, he heard "struggling," "a bunch of commotion," "bumping around and words being exchanged," "a bunch of bumping around," "a confrontation with my friends," a "discrepancy with . . . my friends," and "a lot of ruckus" on the other side of the carwash door where the shootings eventually occurred. (12RT 1530-1532, 1581, 1672-1673.) In addition, Christopher Williams testified that one of the suspects was drinking a 40-ounce bottle of beer in the parked car before the shootings and another 40-ounce beer bottle sat between the two suspects. (13RT 1810.) Thus, the perpetrators were already drinking alcohol on the morning of Super Bowl Sunday. (13RT 1699.) The night before, the defendants went to a club with two carloads of friends and stayed at the club until after midnight. (13RT 1864; 14RT 1918-1919.)

Thus, a jury could have reasonably believed that the shootings were the result of an altercation between the perpetrators and the victims, assisted by alcohol, where the parties argued and disagreed (a "discrepancy"), while exchanging heated words and physically struggling. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 330.) Further, a jury could reasonably conclude that these facts fail to show premeditation and deliberation beyond a reasonable doubt.

It should be noted as well that the prosecutor implicitly conceded a lack of premeditation by not requesting instructions on or arguing premeditated murder, and by advancing only a felony murder theory of first

degree murder. The prosecutor also told the jury that the shootings could have been accidental, and hence, unpremeditated. (27RT 4434 [Prosecutor: "I don't have to show that it was intentional. It could be accidental"].) Furthermore, by instructing that the killings could have been unintentional or accidental, the trial court shared the prosecutor's view of a lack of premeditation, as manifested by the rule that a court is precluded from giving instructions not supported by the evidence. (29RT 4767-4770 [court instructing jury on first degree felony murder]; *People v. Memro* (1995) 11 Cal.4th 786, 868; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.)

In addition, because Bowie testified that shots were fired immediately after he escaped from the carwash (12RT 1530-1533), a reasonable jury could find that Bowie's escape itself provoked an impulsive response by the perpetrators and that second degree murder verdicts were therefore justified. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1266 ["an unpremeditated explosion of violence may constitute a second degree murder"]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1345 [nature of murders themselves might not preclude finding that defendant acted on impulse].)

Of course, because Bowie repeatedly lied to the jury and had several felony convictions, as discussed above, a reasonable jury could reject Bowie's testimony altogether, including any testimony that supported a finding of premeditation and deliberation. Courts should not evaluate the credibility of witnesses, a task for the jury, in deciding whether there is substantial evidence of a lesser offense. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) But so long as a jury has a reason founded in substantial evidence for rejecting the truth of a witness's testimony, an appellate court may rely on such reasonable rejection in determining whether substantial

evidence supports lesser included offense instructions. (*Id.* at p. 164 [jury could reasonably disbelieve defendant's claim of no intent to kill and find intent to kill from other evidence]; *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [jury could reasonably disbelieve defendant's "self-serving" testimony of accidental shooting and find intentional shooting]; see *People v. Valdez*, *supra*, 32 Cal.4th at p. 143 (dis. opn. Chin, J.) ["the issue here is whether the jury—in assessing and weighing the evidence independently—could have reasonably concluded that defendant committed second degree murder, but not first degree robbery murder"].)

Moreover, based on substantial evidence, a reasonable jury could have discredited Bowie's specific testimony that the perpetrators displayed guns before they entered the carwash, and therefore rejected this purported evidence of premeditation and deliberation. (12RT 1517.) Bowie testified that each perpetrator pointed a gun at him as he stood by the telephone immediately outside the door to the carwash. But according to Bowie, neither Charles Hurd nor Jessie Dunn reacted to this sight as each walked through the carwash door, a highly implausible proposition if Bowie spoke the truth about pointed guns, thus providing circumstantial evidence that no guns were in fact drawn. (12RT 1640-1642.)

In dismissing sufficiency claims, this Court has repeatedly expressed the view that "when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688; see, e.g., *People v. Kelly* (2007) 42 Cal.4th 763, 788 ["Murders are commonly committed to obtain money or other property"].) If this is a reasonable presumption to make, then so too is one reflected in one newspaper story after another, that murders are commonly committed by armed young men

after a confrontation with other men who are not robbed.

Williams thought the perpetrators were there to buy marijuana, and according to Bowie, the perpetrators got into a confrontation with Bowie's friends, who sold marijuana at Wheels 'N Stuff. Given that Williams did not recognize the perpetrators, a fair inference is that they were new to Wheels 'N Stuff and may have been nervous about buying illicit drugs from this dealer for the first time. The dealer may have been apprehensive as well about selling to the new prospective buyers. For as common as drug dealing is, it is still an underground unlawful enterprise, where nerves are often frayed, likely over a fear of possible arrest, on both sides. But regardless of how the confrontation developed, there was a confrontation before there was a shooting. And a confrontation before a shooting is evidence of an unplanned shooting. Had robbery been the motive, then there should have been evidence that something was taken from the victims, or evidence that the perpetrators attempted to take something from the victims or the carwash, but there was none.

Confrontation, "a lot of ruckus," words exchanged, a "discrepancy," "struggling," alcohol, a drug buy, the impulsiveness of youth (Wilson was 20 [34RT 5768]) and no witness to the shooting itself to testify as to what actually happened, all demonstrate a heated argument and physical struggle, and explain why the prosecutor did not argue a premeditated, deliberate shooting.

Even assuming that "the evidence was sufficient to justify a finding of deliberation and premeditation, such a finding was not compelled. The jury could have found that appellant did not premeditate but rather acted upon a sudden and unconsidered impulse." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 330, citation, internal quotation marks, and brackets

omitted.)

Finally, this Court has held that "w[]here the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the only guilty verdict a jury may return is first degree murder. . . . The trial court . . . need not instruct the jury on offenses other than first degree felony murder or on the differences between the degrees of murder." (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909, citations and internal quotation marks omitted.)

But here, the evidence does *not point indisputably* to murder in the perpetration of a robbery, burglary, or attempted robbery or burglary. How could it? The jury rejected robbery as a theory and attempted robbery as a crime. Nothing was taken, but a car after the shooting, likely to assist in the escape and then immediately destroyed. No eyewitness testified to seeing the shooting. There were words exchanged, struggling, a discrepancy and a shooting, which do not point indisputably to felony murder.

Accordingly, in light of the weak evidence of premeditation, the jury could have reasonably returned verdicts for second degree unpremeditated murder.

3. Conclusion

The evidence raised a question as to whether felony murders based on robbery, burglary, or their attempts were committed, and at the same time the evidence supported instructions on unpremeditated second degree murder. Accordingly, second degree murder instructions should have been given to the jury.

E. The Failure to Instruct on Any Lesser Included Offenses of First Degree Murder Violated *Beck v. Alabama*.

The requirement that the jury receive instructions on a lesser included offense supported by the evidence is particularly critical in a capital case. "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. [¶] Such a risk cannot be tolerated in a case in which the defendant's life is at stake." (*Beck v. Alabama*, *supra*, 447 U.S. 625, 637.) Thus, the United States Supreme Court held in *Beck*: "'[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury *in a capital case*.'" (*Howell v. Mississippi* (2005) 543 U.S. 440, 442, quoting *Beck* at p. 638 and dismissing writ of certiorari as improvidently granted because petitioner failed to raise *Beck* claim in state court; italics added.)

Although *Beck* demands that *every capital defendant* receive a lesser included noncapital offense instruction if the offense exists under state law and the evidence supports the instruction (*Hopper v. Evans* (1982) 456 U.S. 605, 610 ["our holding [in *Beck*] was that the jury must be permitted to consider a verdict of guilt of a noncapital offense '*in every case*' in which 'the evidence would have supported such a verdict,'" italics added]), this Court has observed the *Beck* holding entirely in its breach rather than in its

application.[32]

The Court has stated that *Beck* is satisfied as long as a capital jury receives a single noncapital third option "between" the capital charge and acquittal. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 167.) Thus, *Beck* is automatically satisfied in every capital case in California, according to this Court, because there is always a noncapital option of first degree murder without special circumstances. (*People v. Beames* (2007) 40 Cal.4th 907, 930; *People v. Horning* (2004) 34 Cal.4th 871, 906, citing *People v. Sakarias* (2000) 22 Cal.4th 596, 621, fn. 3; see also *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15 [finding *Beck* inapplicable in part because the jury "could have found [the defendant] guilty of first degree murder on a theory of willful, premeditated, and deliberate murder under no special circumstances – a result that would have precluded any exposure to the death penalty whatsoever"].)

This Court has also found the *Beck* rule inapplicable in California because a jury here is not forced into an all-or-nothing choice between a conviction of murder that would legally compel it to fix the penalty at death, on the one side, and a finding of innocence, on the other. The Court

---

[32] See also *Hopper v. Evans*, *supra*, 456 U.S. at p. 611 ["*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction"]; *Everette v. Roth* (7th Cir. 1994) 37 F.3d 257, 261 [omission of lesser included instructions violates federal due process where it results in "fundamental miscarriage of justice"]; *Vujosevic v. Rafferty* (3d Cir. 1988) 844 F.2d 1023, 1028 [failure to instruct on lesser included offense supported by the evidence violates federal due process]; *Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, 374 [in a capital case, where the evidence warrants a lesser included offense instruction, due process requires that the court give the instruction on its own initiative].)

believes *Beck* is satisfied because a jury always has the option of sentencing a defendant to life imprisonment without the possibility of parole rather than death. (*People v. Rundle* (2008) 43 Cal.4th 76, 143; *People v. Wilson* (2008) 43 Cal.4th 1, 18; *People v. Prince*, *supra*, 40 Cal.4th at p. 1269; *People v. Valdez*, *supra*, 32 Cal.4th at p. 119; *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15.)

Finally, the Court has noted the difference between the Alabama law under examination in *Beck* and California law. Alabama prohibited instructions on lesser offenses in capital cases, while California law has not. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1269.) Hence, according to this Court, the *Beck* rationale does not apply to capital trials here. (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 118-119; *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15.)

None of these justifications for holding *Beck* satisfied or inapplicable withstands scrutiny in this case.

1. A Murder with No Special Circumstance Finding Is No Third Option Under *Beck*.

The United States Supreme Court has consistently affirmed that the third option required by *Beck* is a lesser included offense. (*Howell v. Mississippi*, *supra*, 543 U.S. at p. 442; *Hopkins v. Reeves* (1998) 524 U.S. 88, 90; *Schad v. Arizona* (1991) 501 U.S. 624, 646 [referring to "the *Beck* rule" that mandates lesser included noncapital offense instructions in capital cases].) Thus, a noncapital option of first degree murder without special circumstances, which is not a lesser included offense of first degree murder, does not satisfy *Beck*.

In *Beck* itself, the high court rejected Alabama's argument that the jury was provided with a mistrial as a viable third option. The *Beck* jury

had been instructed that a mistrial would be declared if it was unable to agree on a verdict, and that in the event of a mistrial, the defendant could be tried again. The State argued that this third option was enough to safeguard against an absent lesser included offense instruction because it provided the jury with a choice between a verdict of death or an acquittal. The Supreme Court, however, concluded that the mistrial third option was not "an adequate substitute for proper instructions on lesser included offenses." (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 643-644.)

"*Beck* made clear that in a capital trial, a lesser included offense instruction is a necessary element of a constitutionally fair trial." (*Spaziano v. Florida* (1984) 468 U.S. 447, 454.) Thus, before reaching a reliable verdict on guilt, every capital jury must have at least three concurrent options to choose from: (1) the capital offense, (2) a noncapital lesser included offense existing under state law that is supported by the facts, and (3) acquittal. That is the only way to satisfy *Beck*.

As suggested by this Court's "between" language in *Breverman*, *Sakarias*, and *Horning*, set forth above, first degree murder without special circumstances is not a lesser included "offense" of first degree murder with special circumstances. In *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, the appellate court held precisely that. (*Id.* at p. 1231 ["The lying-in-wait special circumstance is not . . . an added element which would create a greater offense out of the charged murder"].) On automatic appeal this Court affirmed the *Jurado* Court of Appeal decision as law of the case, in part because the decision was not a manifest misapplication of the law and there had been no intervening change in the controlling law. (*People v. Jurado* (2006) 38 Cal.4th 72, 96.) Accordingly, *Sakarias* and *Horning*, and more recently *People v. Beames*, *supra*, 40 Cal.4th at p. 930,

were wrong to conclude that *Beck* is satisfied if the jury is instructed on first degree murder without special circumstances.

Moreover, first degree murder without special circumstances is not an adequate substitute for an actual lesser included offense because *Beck's* reliability mandate would still not be met. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623 ["the Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases," citing *Beck*].) The United States Supreme Court has observed that *Beck* would not "be satisfied by instructing the jury on *just any* lesser included offense, even one without any support in the evidence." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 648, italics added.) The Court has also said, "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 455.) At bottom, "*Beck* was based on th[e] Court's concern about 'rules that diminish the reliability of the guilt determination' in capital cases." (*Schad*, 501 U.S. at p. 647.)

Here, as required by California law, the court instructed the jury to find guilt first, before the jury was even permitted to consider the special circumstances allegations. (§ 190.1, subd. (a); 5CT 1205; CALJIC No. 8.80.1 ["if you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true"]; see also *People v. Millwee* (1998) 18 Cal.4th 96, 155 [jurors prohibited from making special circumstance finding until they find defendant guilty of first degree murder]; *People v. Cain* (1995) 10 Cal.4th 1, 56 [the "correct order" of deliberations under Penal Code section 190.1,

subd. (a) is guilt first, then the truth of the special circumstances]; *People v. Odle* (1988) 45 Cal.3d 386, 411, fn. 11 ["the special circumstance findings are made at the close of the 'guilt phase' trial, following a first degree murder verdict"].)[33]

Presumably the jury followed the court's instructions (*People v. Elliot*, *supra*, 37 Cal.4th at p. 474), and confronted a choice between two, not among three, options: first degree felony murder (5CT 1199, 1202) and acquittal. Only after finding first degree felony murder did the jury consider the special circumstances allegations. (5CT 1205; CALJIC No. 8.80.1.) According to *Sakarias*, *Waidla*, *Horning*, and *Beames*, it would be at this point that jurors had the third option of finding no special circumstance if they desired to spare Wilson's life. But any juror who allowed a decision on guilt and the special circumstances allegations to be influenced by a desire to save Wilson would violate the court's instruction not to consider or discuss penalty during deliberations. (5CT 1211 [CALJIC No. 8.83.2]; see also 27RT 4453 [prosecutor informing jury not to consider penalty].)

Moreover, any "option" of finding no special circumstance was too late to be an option at all, and could not satisfy *Beck's* primary concern with the reliability of the *guilt* conviction. *Beck* relied on a line of cases in which the Court "invalidated procedural rules that tended to diminish the reliability of the sentencing determination," and held that "[t]he same

---

[33] That the guilt phase verdict and the special circumstance finding are truly separate components of a capital trial in California is underscored by the fact that under the California scheme, a jury can find guilt and hang on the special circumstance, and be replaced by a second jury or even a third jury to find the truth of the special circumstance, though guilt has already been established. (§ 190.4, subd. (a).)

reasoning must apply to rules that diminish the reliability of the guilt determination." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Throughout *Beck*, the Court focused on the reliability of the guilt conviction. (See, e.g., *id.* at p. 637 ["For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense . . . the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction"]; *id.* at p. 642 ["In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, . . . the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished"]; *id.* at p. 645 [recognizing "the risk that the jury may return an improper [guilt] verdict because of the unavailability of a 'third option'"].)

This emphasis on the reliability of the guilt conviction continued in the Supreme Court cases following *Beck*. In *Hopper*, the Court noted that "our holding [in *Beck*] was that the jury must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" (*Hopper v. Evans*, *supra*, 456 U.S. at p. 610.) The Court further clarified that because lesser included offense instructions were required by due process "*only* when the evidence warrants such an instruction, [t]he jury's discretion is . . . channelled so that it may convict a defendant of any crime fairly supported by the evidence." (*Id.* at p. 611, original italics; see also *Spaziano v. Florida*, *supra*, 468 U.S.

at p. 455 ["The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free"]; *Schad v. Arizona*, *supra*, 501 U.S. at p. 646 ["Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital *conviction* if the only alternative was to set the defendant free with no punishment at all," italics added]; *id.* at p. 647 ["*Beck* was based on th[e] Court's concern about 'rules that diminish the reliability of the *guilt determination*' in capital cases," italics added].) Accordingly, under *Beck* and its progeny, the United States Supreme Court requires reliability at each stage of a capital trial.

Thus, because California law and the trial court in this case required the jury to reach a guilt conviction on the murder charges before even deliberating on the special circumstances, the theoretical possibility that the jury could find no special circumstance is irrelevant. The jury had already reached its unreliable guilt verdict, and thereby violated *Beck* due to the absence of a lesser included offense instruction that the jury could have considered in making its guilt finding on the charged offense.

Moreover, to propose, as *Sakarias*, *Waidla*, *Horning*, and *Beames* have proposed, that a capital jury has the three contemporaneous options of (1) first degree murder with a special circumstance, (2) first degree murder with no special circumstance, and (3) acquittal, is to suggest that the jury may violate its oath to follow the law and may engage in jury nullification. Under Penal Code section 190.1, subdivision (a), a jury must reach a decision on guilt before it determines whether the special circumstance allegation is true. A jury that believes it has the simultaneous option of

voting for guilt on the capital offense and finding no special circumstance violates its oath to decide the question of guilt first. And, as this Court stated in *People v. Williams* (2001) 25 Cal.4th 441, a juror, let alone an entire jury, who refuses to follow the law and engages in jury nullification is subject to discharge for violating the juror's oath. (*Id.* at p. 463.)

Finally, to illustrate how first degree murder without a special circumstance finding is not a reliable third option under *Beck*, one need only consider that the prosecution charged Wilson with a multiple-murder special circumstance. (4CT 1036.) Once the jury found more than one first degree murder because it was deprived of instructions on second degree murder, it was compelled by law to find the multiple-murder special circumstance and did not have the so-called option of returning a verdict of first degree murder with no special circumstance. (§ 190.2, subd. (a)(3).)[34]

Accordingly, a properly instructed California jury that abides by its oath to follow the law does not have a third option under *Beck* to return a finding of no special circumstance; it only has a choice, as in this case, between two options, a first degree murder conviction or an acquittal.

---

[34] Also consider the case where the prosecutor alleges a prior murder conviction as the sole special circumstance. The jury hears the prior murder evidence in a separate proceeding after it has already returned a guilty verdict on the capital offense. (§ 190.1, subd. (b).) Proving a prior conviction is strictly a formality and the resulting affirmative finding inevitable, assuming the formality is correctly executed. Clearly, a jury that hears a prior murder allegation as the sole special circumstance does not have the option of finding first degree murder with no special circumstance, and any jury that would so find would almost certainly engage in jury nullification.

2. *Beck* Applies Even Where the Jury Is Not Compelled to Impose Death, But May Impose Life Without Parole.

This Court was similarly mistaken in *Valdez* and *Waidla* in asserting that "'the *Beck* rule [is] not implicated in its purpose . . . because the 'jury was not forced into an all-or-nothing choice between a conviction of murder that would *legally compel it to fix the penalty at death*, on the one side, and innocence, on the other: Even if it found [the defendant] guilty of [felony murder under the special circumstance allegations], it was not legally compelled to fix the penalty at death, but could fix it instead at a term of imprisonment for life without possibility of parole.'" (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119, quoting *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15, italics and brackets added by *Valdez*; accord, *People v. Rundle*, *supra*, 43 Cal.4th at p. 143 [noting "structural difference in California's death penalty statute distinguishing" it from Alabama's]; *People v. Wilson*, *supra*, 43 Cal.4th at p. 18; *People v. Prince*, *supra*, 40 Cal.4th at p. 1269.)

In the United States Supreme Court's most recent discussion of *Beck*, the Court quoted from *Schad v. Arizona*, *supra*, 501 U.S. at p. 646, as follows: "Our fundamental concern in *Beck* was that a jury . . . might . . . vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." (*Howell v. Mississippi*, *supra*, 543 U.S. at p. 442, editing by *Howell*.) The Court earlier stated in *Spaziano* that "the *Beck* rule rests on the premise that a lesser included offense instruction in a capital case is of *benefit to the defendant*." (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 456, italics added.) And, as *Beck* itself stated and *Howell* also quoted, "'[I]f the unavailability of a lesser included offense instruction

enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case.'" (*Howell v. Mississippi*, *supra*, 543 U.S. at p. 442 [quoting *Beck v. Alabama*, *supra*, 447 U.S. at p. 638]; *Herrera v. Collins* (1993) 506 U.S. 390, 407, fn. 5 ["To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance"].)

Therefore, that a jury is legally compelled to fix the penalty at death does not implicate the purpose of the *Beck* rule. As *Beck*, *Schad*, *Spaziano*, *Herrera*, and *Howell* all demonstrate, the purpose of the *Beck* rule is to reduce the risk of an unwarranted conviction against the defendant due to the absence of a lesser included offense instruction. Or, in the words of this Court, the federal guarantee of a lesser included offense instruction "seeks *only* to prevent the state from coercing a judgment of death eligibility by preventing the jury from considering a lesser included noncapital charge as an alternative to setting the defendant free." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 161, fn. 8, italics added.)

In fact, a jury compelled to impose death – as in Alabama – actually favors a defendant and is not what the *Beck* rule was designed to address. That is, as *Beck* explained, the mandatory nature of the death penalty may encourage the jury to acquit because "whatever his crime, the defendant does not deserve death." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 643.)

On the other hand, as *Beck* also explained, "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 643.) That is what *Beck* was concerned about. And

that is precisely the situation in this case: due to the absence of any lesser included offense instruction, the jury may have been encouraged to convict Wilson of first degree murder because the unpalatable alternative would have been to acquit and set Wilson free, though the jury believed that he was involved in a serious crime.

Thus, California's death penalty scheme enhances the risk of an unwarranted conviction even more so than Alabama's scheme in *Beck*. Because there is no mandatory death penalty in California, there is no pressure on a California jury to acquit, while there is pressure on the jury to find the defendant guilty of first degree murder.

And contrary to the *Waidla* footnote – that even if the jury found first degree murder and the special circumstances, it was not legally compelled to fix the penalty at death, but could fix it at life without possibility of parole (*People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15) – reliance on a later stage in a capital trial to make up for the unreliability of an earlier stage is constitutionally unacceptable under *Beck*. There, the State argued "that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 745.) The Supreme Court, however, was "not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a 'third option.' If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence." (*Ibid.*) Here, if a fully instructed jury would find Wilson guilty of a lesser, noncapital offense, the jury would not have the opportunity to impose the death sentence.

In addition, the United States Supreme Court has consistently applied *Beck* to cases where, even after convicting the defendant of the capital offense, the jury had discretion at the sentencing phase to impose alternatives to the death penalty. Thus, in *Spaziano*, the Court addressed the defendant's *Beck* claim on the merits, even though the Court knew that the Florida jury, like a California jury, was not legally compelled to fix the penalty at death after returning a first degree murder verdict, but could recommend life. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 451.) In fact, the *Spaziano* jury recommended life imprisonment, which the trial judge disregarded in sentencing the defendant to death. (*Id.* at p. 452.) For this reason alone, this Court is incorrect in insisting that the *Beck* rule is not implicated in its purpose unless the jury is legally compelled to fix the penalty at death.

Spaziano further undermines *Waidla* and its progeny. The *Spaziano* trial court had offered to instruct the jury on several noncapital offenses, but only if the defendant waived the statute of limitations, which had expired on all offenses but capital murder. The defendant refused and the court accordingly instructed the jury solely on capital murder. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 450.) Mr. Spaziano claimed that he was entitled to the benefit of the *Beck* rule even though the statute of limitations prevented him from actually being punished for a lesser included offense. Seven members of the United States Supreme Court held that "the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses." (*Id.* at p. 456; see also *People v. Cole*, *supra*, 33 Cal.4th 1158, 1220 [expressing *Spaziano's* holding].) Thus, under *Spaziano*, had the defendant waived the statute of limitations, the trial court

would have been required to instruct the jury on the lesser included offenses of capital murder, notwithstanding that the Florida jury was not compelled to fix the penalty at death. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 451.)

In *Schad*, the Court held that a single second degree murder instruction satisfied *Beck* and that instructions on an additional lesser included offense (robbery) were not required. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 647-648.) And more to the point, while dealing with the merits of the *Beck* claim, the Court acknowledged that a jury convicted Mr. Schad of first degree murder, but a judge, not the jury, sentenced him to death. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 629.) Thus, the *Schad* jury, too, was not legally compelled to return a death verdict.[35]

Finally, in *Reeves* the Court held that *Beck* does not require state trial courts to instruct juries on offenses that are not lesser included offenses of the charged crime under state law. (*Hopkins v. Reeves*, *supra*, 524 U.S. at pp. 90-91.) In so doing the high court explicitly recognized that the jury was prohibited from imposing sentence and that a three-judge panel had the option of sentencing the defendant to life imprisonment. (*Id.* at pp. 98-99.) Clearly the *Reeves* jury was under no compulsion to impose a death sentence either.

Applying this Court's understanding of *Beck's* purpose means that

---

[35] Thus, contrary to this Court's view, when *Spaziano* and *Schad* referred to "capital murder," the United States Supreme Court did not mean "murder that legally 'require[s]' the jury 'to impose the death penalty'" (*People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15, citing *Beck v. Alabama*, *supra*, 447 U.S. at p. 629), given that the Court used the term to refer to the murder verdicts before it, and neither Florida in *Spaziano* nor Arizona in *Schad* required the jury to impose death after a verdict of "capital murder." (*Spaziano v. Florida*, *supra*, 468 U.S. at pp. 451-452; *Schad v. Arizona*, *supra*, 501 U.S. at p. 629.)

the *Beck* rule would apply solely to a state with a mandatory death penalty statute, which would include only Alabama because, as *Beck* recognized, the high court had struck down mandatory death penalty statutes as unconstitutional in earlier cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 638-639, citing among others *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn. of Stewart, J., Powell, J., and Stevens, J.).) But as the question presented in *Beck* made clear, that a state had a mandatory death penalty statute was not controlling. Rather the issue was, "'May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?'" The Court responded, "the death penalty may not be imposed under *these* circumstances." (*Beck* at p. 627, italics added.) Thus, as the 2005 *Howell* decision acknowledged, *Beck* held: "'[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case'" (*Howell v. Mississippi*, *supra*, 543 U.S. at p. 442 [quoting *Beck v. Alabama*, *supra*, 447 U.S. at p. 638]), making clear the United States Supreme Court's view that *Beck* applies to any state that increases the risk of an unwarranted conviction by depriving a capital defendant of a lesser included offense instruction supported by the evidence.

Federal courts of appeals have also applied a *Beck* analysis, though the states from which the cases arose permitted, like California, jury discretion to impose a sentence less than death following conviction of a capital offense. (*Taylor v. Workman* (10th Cir. 2009) 554 F.3d 879, 887, 894 [reversing for *Beck* error because Oklahoma state court's decision to

deny defendant second degree murder instruction was unreasonable application of clearly established law]; *Larry v. Branker* (4th Cir. 2009) 552 F.3d 356, 361, 364 (North Carolina); *Slaughter v. Parker* (6th Cir. 2006) 450 F.3d 224, 237-238 (Kentucky); *Aguilar v. Dretke* (5th Cir. 2005) 428 F.3d 526, 531 (Texas); *Abdus-Samad v. Bell* (6th Cir. 2005) 420 F.3d 614, 627 (Tennessee); *Mitchell v. Gibson* (10th Cir. 2001) 262 F.3d 1036, 1049 ["*Beck* applies even 'where the convicting jury later had the discretion to sentence the defendant to life, instead of death,'" quoting *Hooks v. Ward* (10th Cir. 1999) 184 F.3d 1206, 1223-1229 (Oklahoma); *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1262-1263 (Arizona); *Ransom v. Johnson* (5th Cir. 1997) 126 F.3d 716, 724-726 (Texas); *Kornahrens v. Evatt* (4th Cir. 1995) 66 F.3d 1350, 1354-1355 (South Carolina).)

As a practical matter, moreover, the possibility that a jury might choose life at the sentencing stage is an inadequate substitute for an option to convict of a lesser included offense. First, any doubt a jury had about whether first degree murder had been proven at the guilt phase could easily be erased by the kind of evidence a jury typically hears in the penalty phase. Victim impact evidence, which often evokes deep sympathy in the jury for the victim's family, could cause a jury to forget very quickly any doubt it previously harbored, even though victim impact evidence is clearly irrelevant to guilt. (§ 190.3, factor (a).) Even more troubling, evidence of other violent criminal activity (§ 190.3, factor (b)) and prior felonies (§ 190.3, factor (c)) would likely convince a jury that the defendant was indeed the kind of person who would commit first degree murder, despite the fact that such information would be excluded during the guilt phase as propensity evidence under Evidence Code section 1101.

Second, the constitutionality of a death sentence should not depend

on whether a defendant's lawyer argued lingering doubt of guilt at the penalty phase. Furthermore, this Court has repeatedly affirmed a trial court's refusal to instruct the jury on lingering doubt. (See, e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 1067 ["Notwithstanding defendants' motion to have the trial court instruct on lingering doubt, the trial court was within its authority to deny the motion]; *People v. Earp* (1999) 20 Cal.4th 826, 903 ["[t]here is no constitutional entitlement to instructions on lingering doubt"].) The lack of both an argument and a lingering doubt instruction would virtually extinguish any possibility that the jury would review the doubt it had at the guilt phase.

Third, jurors would likely have a vested interest in their guilt verdict during the penalty phase and as a result be disinclined to reconsider their guilt verdict at that point.

In sum, a jury that gets to the penalty phase based on an unreliable determination at the guilt phase may not be able to convey accurately its doubt about guilt through its sentencing verdict. (*Hooks v. Ward*, *supra*, 184 F.3d at p. 1229.)

Accordingly, the United States Supreme Court and the circuit courts of appeal will consider a *Beck* claim on the merits even though the jury was not compelled into an all-or-nothing choice between a murder conviction that would legally require it to impose death, on the one hand, and innocence, on the other. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119.) This Court should consider Wilson's *Beck* claim on the merits as well.

3. Because a Denial of Due Process Is a Denial of Due Process, the *Beck* Holding Applies to a California State Judge's Denial of Mr. Wilson's Right to Due Process, Just as It Applied to the Alabama Legislature's Denial of Mr. Beck's Right to Due Process.

This Court has also distinguished the Alabama law invalidated in *Beck* from California law on the basis that Alabama prohibited lesser included offenses in capital cases, while California does not forbid them. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1269 ["Nor, unlike the situation in the *Beck* case, does our state prohibit the giving of lesser included offense instructions in capital cases"]; *People v. Valdez*, *supra*, 32 Cal.4th at pp. 118-119; *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15 [California has not erected an artificial barrier restricting juries to a choice between a capital offense conviction and acquittal].) But this is a distinction without significance.

"*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction." (*Hopper v. Evans*, *supra*, 456 U.S. at p. 611.) In fact, *Beck* held that due process demands "that the jury must be permitted to consider a verdict of guilt of a noncapital offense '*in every case*' in which 'the evidence would have supported such a verdict.'" (*Id.* at p. 610, italics added.) Thus, it makes no difference whether a capital defendant was deprived of a lesser included offense because state law prohibited it, as in Alabama, or because the state trial court failed, as here, to instruct the jury on a lesser included offense required under state law. In either case, the capital defendant is denied due process. (See *Cordova v. Lynaugh* (5th Cir. 1988) 838 F.2d 764, 767, fn. 2 ["A plain reading of *Beck* and *Hopper* inexorably leads to

the same conclusion. If due process is violated because a jury cannot consider a lesser included offense that the 'evidence would have supported [citation], the source of that refusal, whether by operation of law or refusal by the state trial judge, is immaterial.'"]; *Reed v. Quarterman* (5th Cir. 2007) 504 F.3d 465, 489, fn. 8 ["*Beck's* holding – that a lesser included offense instruction must be given when the evidence warrants such instruction – contains no limitations that might preclude it from being applied to decisions by judges as well as legislatures"].)

Furthermore, *Beck* expressly noted that Alabama was the only state to prohibit lesser included offenses in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 635 ["Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law"].) Yet this uniqueness did not prevent the United States Supreme Court from considering *Beck* claims that arose from Florida (*Spaziano*), Arizona (*Schad*), and Nebraska (*Reeves*), states that – like California – require their courts in capital cases to instruct on lesser included offenses supported by the evidence. (*Jones v. State* (Fla. 1986) 484 So.2d 577, 579; *State v. Schad* (1989) 163 Ariz. 411, 417; *State v. Simants* (1977) 197 Neb. 549, 555.)

Waidla cited *Reeves* for the proposition that *Beck* does not apply in this state because, unlike Alabama, no California statute has erected an artificial barrier restricting juries to a choice between conviction and acquittal; instead this state permits lesser included offense instructions in capital cases. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15, citing *Hopkins v. Reeves*, *supra*, 524 U.S. at p. 96.) *Waidla* misread *Reeves*, particularly in misunderstanding what the high court meant by "artificial barrier."

In *Reeves*, the state trial court refused the defendant's proposed instructions on second degree murder and manslaughter because under Nebraska law, these crimes were not lesser included offenses of felony murder, the charge against the defendant. Justice Thomas wrote for the majority and noted a critical distinction between the Alabama statute in *Beck* and the conduct of the Nebraska trial court:

> The Alabama statute prohibited instructions on offenses that state law clearly recognized as lesser included offenses of the charged crime, and it did so only in capital cases. Alabama thus erected an 'artificial barrier' that *restricted* its juries to a choice between conviction for a capital offense and acquittal. Brief for United States as Amicus Curiae 20 (citing *California v. Ramos*, 463 U.S. 992, 1007, 103 S.Ct. 3446, 3456-3457, 77 L.Ed.2d 1171 (1983)). Here, by contrast, the Nebraska trial court did not deny respondent instructions on any existing lesser included offense of felony murder; it merely declined to give instructions on crimes that are not lesser included offenses. In so doing, *the trial court* did not create an 'artificial barrier' for the jury; nor did it treat capital cases differently from noncapital cases. Instead, it simply followed the Nebraska Supreme Court's interpretation of the relevant offenses under state law.

(*Hopkins v. Reeves*, *supra*, 524 U.S. at p. 96, italics added.) In *Ramos*, mentioned by *Reeves*, the high court concluded that restricting the *Beck* jury to two alternatives – conviction of a capital offense or acquittal – essentially put "artificial" choices before the jury when a third option – otherwise recognized by state law but for the fact that Mr. Beck had been charged with a capital crime – should have been available. (*Ramos*, 463 U.S. at p. 1007.)

As *Reeves* recognized, the Nebraska *trial court* did not create an artificial barrier that restricted the jury to choices that excluded lesser

included offenses existing under state law. The trial court merely followed Nebraska law, which did not recognize the defendant's proposed crimes as lesser included offenses of the crime charged. In fact, had the trial court instructed the jury on a lesser included offense unrecognized by state law, it would have then created an artificial choice for the jury. (See *Spaziano v. Florida*, *supra*, 468 U.S. at p. 455 ["Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process"].) Thus, *Reeves* accepted that a trial court was capable of creating an artificial barrier, just as the Alabama statute created an artificial barrier in *Beck*.

Here, the trial court created an artificial barrier that restricted the jury to a choice between a first degree murder conviction and acquittal. Though required by state law to instruct on every lesser included offense supported by the evidence, the court prevented the jury from considering a lesser included offense that, like the law in Alabama, state law clearly recognized as a lesser included offense of the charged crime. Thus, *Waidla* was wrong to find support for its view in *Reeves*.

Schad also underscored the United States Supreme Court's position that a single trial court is capable of violating *Beck* and that a *Beck* violation does not require a legislative prohibition. The issue in *Schad* was whether *Beck* required instructions on all lesser included offenses of the charged capital offense or whether a single third option could suffice to ensure the reliability of the jury's capital murder verdict. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 627, 648.)

Although the *Schad* trial court instructed the jury on the noncapital lesser included offense of second degree murder, the defendant argued that *Beck's* due process principles required that the court instruct on every lesser

included noncapital offense supported by the evidence. *Schad* explained, however, that the "fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 646.) Because the jury in *Schad* was not presented with an all-or-nothing choice between the offense of conviction (capital murder) and acquittal, but had the third option of second degree murder, *Beck's* holding was satisfied. (*Id.* at p. 647.) It necessarily follows that if the trial court had *not* provided the third option of second degree murder, which sufficed to ensure the verdict's reliability, then the trial court *would* have violated *Beck*.

Finally, *Spaziano*, too, compels the conclusion that the high court intended the *Beck* principle to apply to all state capital cases. *Spaziano* first acknowledged *Beck's* concern that "the risk of an unwarranted conviction is created when the jury is deprived of the 'third option' of convicting the defendant of a lesser included offense." (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 454.) The Court then quoted from *Beck* as follows: "We concluded that '[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake' and that 'if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [a State] is constitutionally prohibited from withdrawing that option from the jury in a capital case.'" (*Ibid.*) *Spaziano* supplied the bracketed language, "a State," to replace a single word, "Alabama." Thus, the United States Supreme Court clearly meant for *Beck* to apply to every state where capital punishment exists and lesser included offenses are available under state law – including California.

4. Conclusion

In sum, *Beck* requires a lesser included offense instruction in all capital trials, where supported by the evidence and available under state law. First degree murder without a special circumstance is not a lesser included offense of murder with special circumstances, nor is it an adequate substitute. *Beck* applies even where the jury is not legally compelled to fix the penalty at death. And lastly, a capital defendant is denied due process when a trial court fails to instruct on a single lesser included offense supported by the evidence. Accordingly, *Beck* applies in California and the rationalizations offered by this Court thwarting its application are unsound.

F. The Trial Court's Errors Were Prejudicial and Require Reversal Under Federal and State Law.

1. The Failure to Instruct the Jury on a Single Lesser Included Offense of First Degree Murder in This Capital Case Is Reversible Per Se.

As shown, the failure of the trial court to provide the jury with instructions on any noncapital lesser included offense of first degree murder violated Wilson's rights under the federal Constitution. Under *Beck*, reversal is automatic. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 646.)

In *Cordova v. Lynaugh*, *supra*, 838 F.2d 764, the Fifth Circuit analyzed *Beck* and *Hopper v. Evans*, *supra*, and concluded that *Beck* error can never be harmless. The very nature of the error – that a jury could have rationally convicted of a less than capital offense but was not allowed to consider that offense – precludes a harmless error analysis. (*Id.* at p. 770, fn. 8.)

In *Vickers v. Ricketts*, *supra*, 798 F.2d 369, the Ninth Circuit reached the same conclusion. There, the defendant did not request any instructions

on lesser included offenses of first degree murder and none were given. The jury convicted the defendant of first degree murder and the trial judge sentenced him to death. On appeal of the denial of his federal habeas petition, the defendant argued *Beck* error due to the trial court's failure to sua sponte instruct the jury on unpremeditated second degree murder. Finding a due process violation, the Ninth Circuit reversed the district court order denying the writ without engaging in harmless error analysis. (*Id.* at p. 374.)

Other courts have also held that *Beck* error is reversible per se. (See *Hogan v. Gibson* (10th Cir. 1999) 197 F.3d 1297, 1312, fn. 13 ["*Beck* error can never be harmless"]; *Eaddy v. State* (Fla. 1994) 638 So.2d 22, 25 [reversed for denial of due process because of failure to instruct on lesser offenses where death penalty imposed]; *Berry v. State* (Miss. 1990) 575 So.2d 1, 11 ["The unconstitutional denial of a lesser included offense instruction in a capital case can never be harmless error"]; *United States ex rel. Reed v. Lane* (D.C. Ill. 1983) 571 F.Supp. 530, 534, fn. 11, affd. *United States ex rel. Reed v. Lane* (7th Cir. 1985) 759 F.2d 618 ["what *Beck* teaches is that by definition the omission of an instruction that enhances the risk of a death sentence cannot be harmless"].) Wilson is therefore entitled to automatic reversal of his conviction because the jury was not presented with a single noncapital alternative to first degree murder.

2. The Error in Failing to Instruct on Second Degree Murder Was Not Harmless Beyond a Reasonable Doubt.

Wilson is aware that this Court has not applied a reversible per se test to *Beck* error. The Court's reasoning, however, is flawed. In any event, reversal is required even if the Court utilizes the federal test for harmless

error.

This Court has concluded that *Beck* error, assuming it occurred, is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. More particularly, the Court has utilized the harmless error test set forth in *People v. Sedeno* (1974) 10 Cal.3d 703, overruled on other grounds in *People v. Breverman*, *supra*, 19 Cal.4th 142, 149, 165, to determine whether the *Chapman* test has been met where the issue is failure to instruct on a lesser offense. (*People v. Elliot*, *supra*, 37 Cal.4th 453, 475 [no prejudice to defendant from failure to instruct on lesser offense when factual question posed by omitted instruction was resolved in another context].) In this case, the state cannot meet its burden of showing harmless error under *Chapman* and *Sedeno*.

a. The error was not harmless under *Chapman*.

By its very nature, *Beck* error is prejudicial in California under *Chapman*. A California court commits *Beck* error by failing to provide a jury the option of a noncapital verdict, even though the jury could reasonably conclude that the lesser included noncapital offense was committed instead of the greater capital offense. (*Hopper v. Evans*, *supra*, 456 U.S. at p. 610; *People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

In addition or put differently, *Beck* error enhances the risk of an unwarranted conviction. (*Howell v. Mississippi*, *supra*, 543 U.S. at p. 442 [state cannot withdraw lesser offense option from jury in capital case where unavailability of the option enhances risk of unwarranted conviction]; *Schad v. Arizona*, *supra*, 501 U.S. at p. 647 ["*Beck* was based on th[e] Court's concern about 'rules that diminish the reliability of the guilt determination' in capital cases"].)

It follows that the prosecution cannot carry its burden of proving

beyond a reasonable doubt that the error in failing to provide the noncapital option was harmless, that is, the state cannot show that the capital guilty verdict was surely unattributable to the error of depriving the jury of an option it reasonably might have chosen and of enhancing the risk of an unwarranted conviction. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error"].) Furthermore, as shown in the next section, because the court's error in failing to instruct the jury on second degree murder was prejudicial as state law error, it necessarily follows that it was prejudicial under *Chapman*.

b. This Court has misapplied *Sedeno* in capital cases.

Viewing *Chapman* through the prism of *Sedeno* does not yield a different result. The defendant in *Sedeno* was charged with first degree murder. The trial court instructed the jury "fully" on first and second degree murder: first degree murder on a theory of a wilful, deliberate and premeditated killing with malice aforethought (*People v. Sedeno*, *supra*, 10 Cal.3d at pp. 711, fn. 2, 714); and second degree murder on two theories, an unpremeditated intentional killing and an implied malice killing (*id.* at p. 714, fn. 3.) The defendant claimed on appeal that the trial court erred because in addition to the full murder instructions, the court should have given the jury instructions on involuntary manslaughter. In reaching the appropriate verdict, instructions on involuntary manslaughter would have required the jury to specifically determine whether the defendant had acted without an intent to kill. (*Id.* at p. 718.)

Because there was evidence that the defendant lacked both the intent to kill and malice, this Court found that the trial court erred in failing to include instructions on involuntary manslaughter, a lesser included offense of first degree murder. The error was harmless on the issue of intent to kill, however, because "although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under *other*, properly given instructions." (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 721, italics added.) And those other instructions were for second degree implied malice murder, which required the jury to focus on and address the specific issue that would have been raised by an instruction on involuntary manslaughter: whether the defendant acted without the intent to kill. "In the instant case, the jury necessarily rejected defendant's evidence that his diminished capacity negated intent to kill *when* it found the shooting to be first degree rather than second degree murder. Thus, the failure to give an instruction on involuntary manslaughter could not have been prejudicial to defendant since the offense could have been no less than voluntary manslaughter." (*Ibid.*, italics added.)

Note that *Sedeno* found harmless the failure to instruct on the lack of intent in connection with the requested involuntary manslaughter instruction because *at the same time* ("when") the jury would have considered the lack of intent under the requested instruction to determine the defendant's *offense*, it considered and rejected the lack of intent in addressing the second degree murder, implied malice instructions. Thus, the Court could be sure the issue was properly addressed by the jury. This is consistent with *Chapman's* requirement, as explicated in *Sullivan*, that the verdict must be "surely unattributable" to the court's instructional error to avoid *Chapman*

prejudice. If the jury considers the issue raised by the requested instruction at a later point during deliberations, and not when it reaches its guilt verdict, that is, not when it determines the actual offense committed by the defendant, an appellate court could not be sure the issue was properly addressed because the jury's earlier finding as to the offense committed, which excluded addressing the omitted issue, likely would dictate the later result, rather than the later result making harmless the earlier omission. Thus, critical to the *Sedeno* holding was the use of the word *when*, because the jury addressed the omitted issue under "other, properly given instructions" at the same time it would have if it had not been erroneously instructed and given proper instructions instead.

Requiring that the jury determine the factual question posed by the omitted instruction contemporaneously with its determination of the question under other instructions is also consistent with the purpose in instructing on lesser included offenses. "The rule's purpose is not simply to guarantee some plausible third choice between conviction of the charged offense or acquittal, but to assure, in the interest of justice, the *most accurate possible verdict* encompassed by the charge and supported by the evidence." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 161, italics added.) "A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function." (*People v. Barton*, *supra*, 12 Cal.4th at p. 196.)

In *Sedeno*, as in all cases where a court errs in failing to instruct on a lesser included offense, the jury's truth-ascertainment function may suffer. Nevertheless, *Sedeno* recognized that ascertaining the truth and determining the most accurate possible verdict is not impaired, if at the same time the

jury determines the underlying offense that most accurately reflects the defendant's level of culpability, it addresses and resolves under other instructions the factual questions posed by the omitted instruction.

This Court further explained and followed *Sedeno* in the unanimous decision, *People v. Wickersham*, *supra*, 32 Cal.3d 307:

> In *Sedeno*, the trial court erred in failing to give an instruction *sua sponte* on involuntary manslaughter due to diminished capacity. Such an instruction would have required the jury to *specifically determine* whether the accused had acted without an intent to kill and malice. The error was harmless as to the question of the intent to kill because the jury had received instructions on second degree murder without an intent to kill and had *specifically and necessarily rejected* that theory by returning a verdict of first degree murder.

(*Id.* at pp. 335-336, citations omitted, italics added.)

In *Wickersham*, the defendant was convicted of first degree premeditated and deliberate murder with malice aforethought, and argued on appeal that the trial court should have instructed on unpremeditated second degree murder. Applying *Sedeno*, this Court found that the error was *not* harmless, stating:

> [N]o instruction presented the jury with a theory of intentional homicide which was not premeditated and deliberate. Once the jury found that the killing was intentional, it had no choice but to return a verdict of first degree murder. Hence, "the factual question posed by the omitted instruction" – whether appellant had acted with malice and intent, but without premeditation and deliberation – was not "necessarily resolved adversely to the defendant under other, properly given instructions." Since the jury was not required to decide *specifically* whether appellant had committed an intentional but nonpremeditated, nondeliberate murder, the trial court's error in failing to instruct on second degree murder cannot be

deemed to be harmless.

(*Id.* at p. 336, citation omitted, italics added.) Thus, *Wickersham* made clear that in applying *Sedeno*, the proper analysis for determining harmlessness is not to view each element separately, but instead it is to look at the elements in context.

In *Wickersham*, the trial court instructed the jury on premeditated and deliberate first degree murder with malice aforethought (CALJIC Nos. 8.10, 8.11, 8.20; *People v. Wickersham*, *supra*, 32 Cal.3d at p. 323.) Thus, the jury was instructed on the factual questions and elements of intent, premeditation and deliberation. These are the same elements a jury would consider in determining unpremeditated second degree murder. But, as the *Wickersham* decision explained, although the jury was instructed on a theory of intentional, premeditated and deliberate murder (first degree), it was not instructed on intentional but nonpremeditated, nondeliberate murder (second degree). Therefore, a sound application of *Sedeno* would not deem harmless the failure to offer the second degree murder instruction. Otherwise, even though a jury is solely instructed on first degree premeditated murder and given no other option, a failure to instruct on second degree unpremeditated murder would always be harmless and *Beck* would be ineffectual in California in these circumstances. Consequently *Sedeno* must be carefully applied for there to be harmless error. And note again, for there to be harmlessness, *Wickersham* assumed the jury would have addressed the omitted issue at the same time it determined the defendant's offense or the proper theory of homicide.

Another unanimous decision, *People v. Ramkeesoon* (1985) 39 Cal.3d 346, enlightens on this issue as well. There, on appeal the defendant

pointed to evidence at trial showing that he had not thought of stealing any of the victim's property until after the assault. The Court determined that the trial court erred in failing to instruct on theft as a lesser included offense of robbery where the jury had returned first degree murder and robbery verdicts. Because the jury was given standard felony murder and robbery instructions (CALJIC Nos. 8.21, 9.10), it necessarily decided that the intention to take the property was formed before or during the assault. Nevertheless, applying *Sedeno*, the Court concluded: "The findings of robbery and murder did not *necessarily resolve* the factual question of whether the intent to steal was formulated after defendant had inflicted the fatal blows because the jury was never required *to decide specifically* whether defendant had formed the intent to steal after the assault." Hence, the error in failing to instruct on theft was not harmless. (*Id.* at pp. 352-353, italics added.) And like *Sedeno* and *Wickersham*, *Ramkeesoon* analyzed harmlessness in the context of whether the jury addressed the omitted issue contemporaneous with deciding the offense.

The seemingly clear path for resolution of this type of issue, which was followed by *Sedeno, Wickersham,* and *Ramkeesoon*, took a deviant turn in *People v. Edelbacher* (1989) 47 Cal.3d 983. There the defendant was convicted of the offense of first degree lying-in-wait murder (*id.* at p. 1019), with a special circumstance finding that the defendant intentionally killed the victim while lying in wait (*id.* at p. 995). The defendant contended that the trial court erred in refusing to instruct on second degree murder on theories of implied malice or a lack of premeditation and deliberation ("on impulse") or both. This Court found any error harmless under *Sedeno* because in returning a true finding on the lying-in-wait special circumstance, the jury expressly found that the murder was intentional and

committed while lying in wait. "Thus, the jury found that the murder was committed with express malice and in a manner which, by force of statute, elevated it to first degree murder." (*Id.* at pp. 1028-1029.)

This holding either misconstrues the intent of *Sedeno* or it extends *Sedeno* in a manner that renders its philosophy inapplicable to capital cases where *Beck* is a concern. In either event, it does not present a sound philosophic basis for denying Wilson relief.

The most obvious deviation from *Sedeno* in *Edelbacher* was that for the first time, this Court relied on a special circumstance, not an offense, to rule that the absence of an instruction on another offense was harmless. And *Edelbacher* did so in three short paragraphs with no analysis confronting this stark deviation, while citing *Sedeno* and *Wickersham* as its only authority. (*People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1028-1029.) *Edelbacher* misread *Sedeno* and *Wickersham* and should be overruled.

As *Sedeno, Wickersham*, and *Ramkeesoon* demonstrated, the erroneous omission of a lesser included offense instruction is only harmless if the jury specifically and necessarily and contemporaneously decided – through other proper offense instructions – the same factual question the jury would have decided in determining the offense under the omitted lesser included offense instructions. In *Sedeno*, this meant that even though the court erred in failing to give an involuntary manslaughter instruction, the jury necessarily decided the specific factual issue whether the defendant lacked an intent to kill and malice because the jury was given instructions to determine the defendant's guilt based on a theory of second degree murder without an intent to kill. In *Wickersham*, even though the jury addressed the issues of intent, malice, premeditation, and deliberation in reaching a first degree premeditated murder verdict, this did not necessarily resolve the

question that would have been posed by a second degree murder instruction – whether the defendant acted with malice and intent while at the same time he acted without premeditation and deliberation. And in *Ramkeesoon*, the felony murder and robbery verdicts did not necessarily decide the specific factual question whether the defendant formed the intent to steal after the assault, even though the jury found that the defendant formed the intent either before or during the assault.

As these three decisions show, the error in failing to instruct on a lesser included offense is deemed harmless because the jury is called on to make the decision regarding the defendant's *guilt* for the greater offense at the same time it would decide the factual questions raised by the defendant's proposed lesser included offense instructions. All of these decisions concern the effect the jury's consideration of one offense has or would have on another offense – in *Sedeno*, second degree murder on involuntary manslaughter; in *Wickersham*, first degree murder on second degree murder; and in *Ramkeesoon*, robbery and felony murder on theft.

Sedeno, *Wickersham*, and *Ramkeesoon* all held that the trial court erred in failing to instruct the jury on an offense, a lesser included offense. Thus, these cases involved involuntary manslaughter, second degree murder, first degree premeditated murder, second degree unpremeditated murder, felony murder, robbery and theft, all offenses that allowed this Court to find the trial court's error harmless, because the omitted issue was considered by the jury at the same time it would have otherwise considered it if the trial court had not committed its error in failing to instruct on the omitted offense. None of these cases involved special circumstances, which are simply allegations related to an underlying offense, and which a jury finds true or false *after* having already reached a verdict based on

whether the underlying offense was proved beyond a reasonable doubt. But *Edelbacher* relied on a belated special circumstance to find the lack of an offense instruction harmless, departed from *Sedeno* and its progeny, and offered no reason for doing so.

Moreover, the *Edelbacher* jury reached the first degree lying-in-wait murder offense verdict without the benefit of an instruction on another offense, second degree murder as proposed by the defendant, that would have focused the jury on the factual issues of whether the defendant acted impulsively or without an intent to kill or both. No instructions permitted the jury to resolve those factual questions before it found guilt. And the lying-in-wait special circumstance that the Court relied on in finding the lower court's error harmless was decided *after* the jury already rendered its guilt verdict. Unlike a lesser included offense, which a jury may choose instead of the greater offense, the special circumstance decision had no impact on the jury's guilt decision. Hence, the lack of a lesser included offense instruction should not have been deemed harmless.

Since *Edelbacher* the Court has continued to misapply the harmless error standard by utilizing special circumstance findings to render harmless the erroneous omission of an instruction on a lesser offense. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th 453, 476 ["the true finding as to the attempted-robbery-murder special circumstance establishes here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more extensive instructions were given on second degree murder"]; *People v. Horning*, *supra*, 34 Cal.4th 871, 906 [any *Beck* error was harmless because the jury found burglary and robbery special circumstances, which meant it necessarily found the killing was first degree felony murder].) And, as

shown, the Court has been repeatedly incorrect in doing so.[36]

Using a later special circumstance finding to hold harmless an error in failing to fully instruct a jury on an appropriate lesser included offense not only violates *Chapman* and *Sedeno*, it violates *Beck*. As this Court has stated, the purpose of *Beck's* lesser included offense requirement is "to prevent the state from coercing a judgment of death eligibility by preventing the jury from considering a lesser included noncapital charge as an alternative to setting the defendant free." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 161, fn. 8, citing *Schad v. Arizona*, *supra*, 501 U.S. at pp. 646-648.) Moreover, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant

---

[36] In *People v. Breverman*, *supra*, 19 Cal.4th 142, this Court "abrogat[ed] the *Sedeno* standard of reversal for instructional error on lesser included offenses in noncapital cases" (*id.* at p. 178, fn. 26), after referring to "the *Sedeno* standard of near-automatic reversal" (*id.* at p. 149). Since *Breverman* was decided, this Court has applied the *Sedeno* test of near automatic reversal to 22 capital cases, and 22 times the Court has *not* reversed but has found harmless any error to instruct (sua sponte or on request) on a lesser included offense. (*People v. Lancaster* (2007) 41 Cal.4th 50, 85-86; *People v. Prince* (2007) 40 Cal.4th 1179, 1268; *People v. Beames* (2007) 40 Cal.4th 907, 928; *People v. Cook* (2006) 39 Cal.4th 566, 597; *People v. Demetrulias* (2006) 39 Cal.4th 1, 24; *People v. Chatman* (2006) 38 Cal.4th 344, 392; *People v. Hinton* (2006) 37 Cal.4th 839, 885; *People v. Manriquez* (2005) 37 Cal.4th 547, 582; *People v. Elliot* (2005) 37 Cal.4th 453, 475; *People v. Blair* (2005) 36 Cal.4th 686, 747; *People v. Horning* (2004) 34 Cal.4th 871, 906; *People v. Haley* (2004) 34 Cal.4th 283, 314; *People v. Coffman* (2004) 34 Cal.4th 1, 97; *People v. Heard* (2003) 31 Cal.4th 946, 982; *People v. Yeoman* (2003) 31 Cal.4th 93, 129; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087; *People v. Seaton* (2001) 26 Cal.4th 598, 672; *People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Coddington* (2000) 23 Cal.4th 529, 593; *People v. Sakarias* (2000) 22 Cal.4th 596, 621; *People v. Earp* (1999) 20 Cal.4th 826, 885-886.)

the full benefit of the reasonable-doubt standard." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 634, citing *Keeble v. United States* (1973) 412 U.S. 205, 208 [the requirement of a lesser included offense instruction is based on the risk that a defendant might otherwise be convicted of a crime more serious than the jury believes was committed simply because the jury wishes to avoid setting the defendant free].)

Thus, to effectuate *Beck's* policies, the lesser included offense instruction must be considered by the jury *before* it reaches a guilty verdict. Without a lesser included offense instruction, once the jury reaches its verdict, the damage is done and *Beck* error has already occurred. At that point the defendant has been subjected to the risk that the jury was coerced into reaching a more serious verdict than it should have. And at that point the defendant has been deprived of the full benefit of the reasonable doubt standard. All because the court failed to instruct the jury on a lesser included offense.

c. Wilson's jury reached its unreliable felony murder verdicts before addressing the special circumstances allegations so the latter had no effect on the former and could not make the error harmless.

In capital cases, as in this one, juries are instructed quite sensibly not to consider the special circumstances allegations until after they have first found the defendant guilty of first degree murder. (29RT 4772 ["If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true: murder in the commission of a robbery, murder in the commission of a burglary and multiple murder"]; CALJIC No. 8.80.1 .) Even if jurors were inclined to review the special circumstances instructions before

finding guilt, they would quickly realize that before they could find the multiple murder special circumstance, for example, they needed to first find a defendant guilty of more than one murder. Hence, resolution of the factual issues raised by the murder charges come first and consideration of the special circumstances are too late in the process to affect an earlier coerced finding of guilt.

Moreover, if the jury, without the benefit of a lesser included offense instruction, found that Wilson committed felony murder, it would almost certainly find the felony murder special circumstance. Consistent with *Horning* (which cited *People v. Price* (1991) 1 Cal.4th 324, 464, which cited *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1028, which cited *Sedeno* and *Wickersham*), this Court would then use this finding to prove that the failure to instruct on the lesser included offense was harmless. But this proves too much. Given that the first degree murder verdict was unreliable under *Beck*, the unreliable murder verdict more likely tainted or dictated the special circumstance finding rather than the special circumstance finding making harmless any error in reaching the guilt verdict.

Thus, because the trial court in this case required that the jury reach a guilt conviction on the murder charges without considering the lesser included offense instructions demanded by *Beck* and before deliberating on the special circumstances, the first degree murder conviction was already unreliable and unconstitutional under *Beck*, and therefore could not be made harmless by the later special circumstances findings.

d. The error was not harmless under *Sedeno*.

Even assuming for the sake of argument that *Sedeno* applies to this capital case and Wilson's *Beck* claim, the trial court erred prejudicially in failing to instruct the jury on unpremeditated second degree murder. The

court instructed the jury that to find the special circumstance true, the murder must have been committed while the defendant was engaged in the commission of a robbery. (5CT 1208 [CALJIC No. 8.81.17].) The court similarly instructed on the burglary murder special circumstance. (5CT 1209.) These are nothing more than descriptions of felony murder itself, which may be "intentional, unintentional or accidental." (5CT 1199 [CALJIC No. 8.21]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197; *People v. Parnell* (1993) 16 Cal.App.4th 862, 874 [under felony murder special circumstance, defendant is strictly liable for killing committed in attempt to perpetrate a robbery even if killing was unintentional, accidental or wholly unforeseeable].) They plainly do not address whether Wilson acted without premeditation and deliberation.

With respect to both felony murder special circumstances, the court also instructed the jury with the second paragraph from CALJIC No. 8.81.17, that each murder must have been committed in order to carry out or advance the commission of the felony, or to facilitate the escape therefrom or to avoid detection, or in other words, the felony was not merely incidental to murder. (5CT 1208-1209.) This Court has explained the meaning of CALJIC No. 8.81.17's second paragraph: "'if the felony is merely incidental to achieving the murder – the murder being the defendant's primary purpose – then the special circumstance is not present, but if the defendant has an "independent felonious purpose" (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present.'" (*People v. Horning*, *supra*, 34 Cal.4th 871, 907, quoting *People v. Navarette* (2003) 30 Cal.4th 458, 505.)

Thus, by finding the special circumstances true, the jury concluded

that Wilson intentionally, unintentionally or accidentally committed murder during the commission of robbery and burglary (or aided and abetted murder with the intent to kill (5CT 1205 [CALJIC No. 8.80.1]), had an independent felonious purpose (robbery and burglary), and committed murder to advance the robbery and burglary. Nevertheless, the special circumstances findings do not mean that the jury found Wilson acted without premeditation and deliberation; the findings do not even suggest that the jury addressed the issue. (*People v. Thornton* (2007) 41 Cal.4th 391, 436, citing *People v. Jennings* (1988) 46 Cal.3d 963, 979 [robbery murder special circumstance is established even absent premeditation or deliberation].) Thus, the jury did not "necessarily resolve" the "factual question" of premeditation and deliberation posed by the omitted unpremeditated second degree murder instruction, which is precisely what *Sedeno* requires. (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 721.) Either the *Sedeno* test is inapplicable to these circumstances, or if applicable, the court's error was not harmless beyond a reasonable doubt because the jury did not necessarily resolve premeditation and deliberation.[37]

---

[37] For the same reasons, *Elliot* wrongly concluded that the robbery murder special circumstances findings necessarily meant that the jury found felony murder "at a minimum." (*People v. Elliot*, *supra*, 37 Cal.4th at p. 476.)

3. The Trial Court's Error Was Prejudicial Under State Law Because an Examination of the Entire Record Establishes a Reasonable Probability That a Result More Favorable to Wilson Would Have Been Reached in the Absence of the Court's Error in Failing to Instruct the Jury on Unpremeditated Second Degree Murder.

For over 20 years, this Court has said that the failure in a capital case to instruct on a lesser included offense supported by the evidence is federal constitutional error. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 103 ["sentence of death violates the Fourteenth Amendment when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense and the evidence would have supported such a verdict"]; *People v. Geiger* (1984) 35 Cal.3d 510, 518 [*Beck* "expressly held that instructions on lesser offenses are required in capital cases"].) Accordingly, any such error should be subject to *Chapman* harmless error review.

For the reasons discussed above, assessing the failure to instruct on second degree murder in a capital case as if it were merely state law error is not supportable. But even if the Court chooses to follow this approach, reversal is required here because an examination of the entire record establishes a reasonable probability that a result more favorable to Wilson would have been reached in the absence of the court's error in failing to instruct the jury on second degree murder. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

Appellate review under *Watson* "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a

different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177.) "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484, quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 837.)

Although *Breverman* spoke of what a jury is "likely" to have done absent the error, *Breverman* did not mean what a jury is "more likely than not" to have done. Rather, this Court has "'made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, quoting *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Although *Cassim* was a civil case, its interpretation of the *Watson* test applies to state law error in criminal cases. (*Id.* at p. 801 ["Although the *Watson* standard is most frequently applied in criminal cases, it applies in civil cases as well"].)

In applying *Watson*, the entire record should be examined, including the evidence, instructions, arguments of counsel, and verdicts, as well as any communications from the jury during deliberations. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; see also *People v. Hill* (1967) 67 Cal.2d 105, 118-119 [in finding instructional error harmless under *Watson*, Court concluded guilty verdict reflected jury's belief in prosecution witness's testimony]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [finding *Watson* prejudice in view of verdict reflecting jury's selective belief in evidence and refusal to convict on all counts].)

a. Introduction

As shown below, evidence of killings during the commission of a robbery and burglary is not so relatively strong, and the evidence supporting unpremeditated second degree murder is not so comparatively weak. An examination of the record demonstrates that there is a reasonable probability that a result more favorable to Wilson would have been reached absent the court's errors – failing to give the jury the option of second degree murder. Indeed, at the very least, an equal balance of reasonable probabilities exists in this case.

b. Evidence of killings during the commission of a robbery, a burglary, or their attempts is not so relatively strong.

The jury returned robbery (Hurd and Dunn) and burglary (Wheels 'N Stuff) verdicts and four felony murder (Hurd, Dunn, Potter, and Hoard) verdicts. But the robbery and burglary judgments on which the felony murder verdicts relied are not so relatively strong, as demonstrated above at pages 134-142 and 142-151, respectively, incorporated here by this reference.

First, the prosecutor failed to prove, and conceded as much, that any money, marijuana, or anything else, was taken from the carwash, Hurd, Hoard, or Potter. Only Dunn's El Camino was taken. (28RT 4447-4448, 4506-4507.)[38]

---

[38] The prosecutor made no attempt to show that any other personal property was missing from any of the victims. Except for the El Camino, the prosecutor did not attempt to prove that the victims had personal property with them when they went to the carwash, and as a result he did not question the law enforcement personnel present at the crime scene whether they examined the premises or the bodies for money, wallets,

(continued...)

Second, the jury rejected the prosecutor's theory of the case when it returned not guilty verdicts for the attempted robberies of Hoard and Potter, thereby showing its disbelief that robbery of everyone present was the motive. (27RT 4441, 4448; 5CT 1145, 1146, 1216.)

Third, the prosecutor's theory depended entirely on the testimony of Randy Bowie, a multiply-convicted felon who lied repeatedly to the jury, including an implausible story about having two guns pointed at him while two of the victims walked right by him without reacting to the guns at all. (12RT 1620-1631, 1640-1642, 1672, 1681; 16RT 2434; 17RT 2508, 2511; 27RT 4419.) A question from the jury also reflected a lack of belief in Bowie's testimony. Although Bowie testified that he had "no doubt" and was "absolutely positive" that Wilson was the driver of the car that sat next to the carwash (12RT 1519-1520), the jury asked to have Christopher Williams's testimony read back to determine whether *Williams* identified Wilson. (30RT 4842-4843.) The Hoard and Potter not guilty verdicts also show that the jury did not believe Bowie's pivotal testimony that while displaying guns, the defendants marched Bowie into the carwash and demanded money and "the shit" from Hoard, Potter, and everyone present, because otherwise the jury would have returned guilty verdicts. (12RT

---

[38](...continued)
jewelry, or any other personal property belonging to the victims. (14RT 2022; 18RT 2761.) Thus, the jury would have no way of knowing whether any personal property, other than the El Camino, was taken. Although the defense tried to show that Hurd had money and jewelry with him that landed in the possession of Randy Rollins, who purportedly confessed his guilt for the carwash killings to trial witness Curt Douglas, the defense also did not question law enforcement agents on whether they examined the crime scene premises, including Hurd's body, for money, wallets, jewelry, or any other personal property. (23RT 3861-3863; 25RT 4110-4113.)

1514, 1517-1519, 1533; 28RT 4502.)

Fourth, the only witness who could have verified Bowie's testimony, Eric Thornton, did not testify, even though he would have seen and heard what occurred in the small carwash once Bowie was inside. (19RT 3000, 3037.)

Fifth, evidence supporting the Hurd robbery verdict was extremely weak, as reflected in the prosecutor's concession, "I can't show you that any piece of property was taken from Mr. Hurd" (27RT 4447), the lack of evidence that anything was taken from the carwash itself, the paucity of proof that Hurd owned the carwash (13RT 1710, 1785; 1752, 1756-1757, 1777-1782. Exh. CC), the not guilty verdicts for attempted robbery (5CT 1145, 1146), and the likelihood that the jury assumed that Dunn's El Camino was taken from Hurd because it was parked on carwash property, even though the strongest evidence is that Hurd did not own the carwash.

In sum, the evidence supporting the existing judgment is not so relatively strong.

c. Evidence of unpremeditated second degree murder is not so comparatively weak.

The evidence supporting unpremeditated second degree murder is not so comparatively weak, especially given the testimony of Randy Bowie and Chris Williams, as shown above at pages 151-156, incorporated here by this reference.

The evidence supports the prosecutor's view that the perpetrators went to the well-known drug spot to obtain marijuana. Williams believed they wanted to buy marijuana, not to steal it. (13RT 1712 [Williams: "we were selling weed, so on my way out I asked them what are you guys doing, what do you need"]; 27RT 4494 [Prosecutor to jury: "It may be (Williams)

was going to sell marijuana. But that's why he asked them what do you guys need?"].)

Furthermore, as reflected by the prosecutor's choice not to ask for first degree premeditated murder instructions, evidence of a premeditated intent to kill was not strong. The occupants of the car parked out in the open, next to the front door of the carwash, sat in broad daylight for at least 10 to 20 minutes, and drank beer, before they entered the carwash. (13RT 1701, 1703, 1705, 1712-1713, 1810.)

The suspects knew that Eric Thornton and Randy Bowie were in the carwash, but neither of these potential witnesses to the shooting was harmed, suggesting a lack of planning. (12RT 1665; 13RT 1702; 19RT 3000.)

Although Randy Bowie testified that he heard shots as he fled the scene, no witness testified to seeing a premeditated, deliberate shooting. (12RT 1530-1533.)

On the other hand, there was evidence of a verbal confrontation that led to the unpremeditated shootings. Bowie testified that he heard "struggling," "a bunch of commotion," "bumping around and words being exchanged," "a confrontation with my friends," and "a lot of ruckus" on the other side of the carwash door where the shootings eventually occurred after Bowie fled. (12RT 1530-1532, 1673; *People v. Wickersham*, *supra*, 32 Cal.3d 307, 330 ["that heated words were exchanged or a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance"].)

Furthermore, because Bowie testified that shots were fired immediately after he escaped from the carwash (12RT 1530-1533), Bowie's

escape itself may have provoked an impulsive response by the perpetrators, justifying second degree murder verdicts. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306 [existence of provocation may raise reasonable doubt that defendant formed intent to kill on, and carried it out after, deliberation and premeditation]; *People v. Prince*, *supra*, 40 Cal.4th at p. 1266; *People v. Rogers*, *supra*, 39 Cal.4th at p. 879; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1345.)

d. Conclusion

In *People v. Anderson*, *supra*, 141 Cal.App.4th 430, the court of appeal applied *Watson* and found prejudicial error where, as here, the information charged murder with malice aforethought under section 187, the prosecutor pursued first degree murder charges solely on a felony murder theory, there was substantial evidence raising a question as to whether felony murder was committed, and there was substantial evidence of unpremeditated second degree murder, but the trial court failed to instruct sua sponte on this crime. (*Id.* at pp. 446-447.)

Here, the prosecutor charged likewise. And although as in *Anderson*, the prosecutor always had the option of requesting appropriate instructions and arguing premeditated first degree murder to the jury up until the time the jury retired to deliberate, the prosecutor similarly based his case solely on felony murder. Nevertheless, as shown, there was substantial evidence here raising a question whether felony murder was committed. Nothing was stolen, except the car, which was taken as an afterthought, probably to assist in a successful escape. Therefore its taking was theft, not robbery. The prosecutor's case required that the jury believe Bowie, but it did not. If it had, it would have found Wilson guilty for the attempted robberies of Hoard and Potter due to Bowie's testimony that the

defendants entered the carwash brandishing a gun while demanding, "where is the money and where is the shit." If the jury had believed Bowie when he testified, it would not have asked for a read back of Williams's testimony where he identified Wilson, given that Bowie was absolutely certain Wilson was the driver. The jury had good reason not to believe Bowie. He was a convicted felon many times over, and he lied to the jury many times over. A case built on Bowie's testimony is not likely to meet a standard of proof beyond a reasonable doubt. That is, it is unlikely unless the jury has been coerced into a guilty verdict because the unacceptable alternative is setting free someone the jury believed was involved in the deaths of four men.

There was also substantial evidence that the shooting was not premeditated. If Bowie is to be believed, a fair read of his testimony indicates that the shooting resulted from a quickly escalating argument. And even if reasonable minds may differ, because a finding of premeditation beyond a reasonable doubt would have required that the jury believe Bowie wholesale, it is not likely that the jury was composed of 12 like minds to the extent that they all believed Bowie beyond a reasonable doubt.

Accordingly, evidence of killings during the commission of a robbery, a burglary, or their attempts is not so relatively strong, and evidence supporting unpremeditated second degree murder is not so comparatively weak. As in *Anderson*, "it is reasonably probable that a properly instructed jury would have found defendant guilty of a crime other than felony murder." (*People v. Anderson*, *supra*, 141 Cal.App.4th at p. 450.) Consequently, the trial court's failure to instruct Wilson's jury on unpremeditated second degree murder was prejudicial error under *Watson*.

G. The Judgment Must Be Reversed in Its Entirety.

This Court has acknowledged that the criminal justice system has a vested interest in requiring instructions on lesser included offenses as a method of ensuring the integrity of the system itself:

> "Our courts are not gambling halls but forums for the discovery of truth." [Citation omitted.] Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

(*People v. Barton*, *supra*, 12 Cal.4th at p. 196.)

As shown, this case presents an example of the all-or-nothing choice that *Barton* and *Beck* sought to avoid. Accordingly, Wilson's first degree murder verdicts, special circumstances findings, and death sentence must be reversed.

//

//

4.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THEFT AS A LESSER INCLUDED OFFENSE OF THE DUNN ROBBERY.

Appellant Byron Wilson incorporates by reference Argument No. 3, in particular subsection B at pages 129-131, relating to the law governing instructions on lesser included offenses.

The prosecutor argued that Jessie Dunn was robbed only of his El Camino car (27RT 4449), and the jury found Wilson guilty (5CT 1137). Theft is a lesser included offense of robbery if the intent to steal is formed "after force was used." (*People v. Turner* (1990) 50 Cal.3d 668, 688.) Theft instructions should be given on the court's own initiative if substantial evidence raises a question as to whether robbery was committed, and if at the same time a reasonable jury could have concluded that theft was committed instead of robbery. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) A failure to so instruct is prejudicial, requiring reversal, if an examination of the entire record establishes a reasonable probability that absent the error, the jury would have returned a theft verdict. (*Id.* at p. 165, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, the evidence was very weak that any intent to steal the El Camino was formed before or during the assault on Dunn or anyone else. Indeed, the evidence was stronger that any intent was formed after the assault; thus, the evidence supported an instruction on theft as a lesser included offense of robbery. Consequently, the court's failure to instruct the jury on theft was prejudicial error, requiring reversal of the Dunn robbery conviction.

Anthony Brown testified that he saw someone driving Jessie Dunn's El Camino after the assault at the carwash. (19RT 2987-2991,

3000.) This is the earliest indication that the El Camino had been taken from the carwash, and it would be reasonable for a jury to believe that the El Camino was stolen to facilitate an escape after the assault. (See, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 323-324 [defendant "had a motive to take a car simply to effect his getaway from the shootings"].) A reasonable and obvious view of the evidence is that the perpetrators chose to escape from the crime scene in *two* cars to increase their chances of at least one of them avoiding authorities. This is especially a reasonable inference under these facts because the great number of shots fired, the presence of eyewitnesses, and the ubiquitousness of cell phones (12RT 1517; 13RT 1702, 1839-1845; 14RT 2012, 2078, 2091, 2098-2099; 18RT 2847; 19RT 2986) would cause the two perpetrators to anticipate a significant police response. That many law enforcement personnel would be expected to rush to the scene was confirmed by Randy Bowie's testimony that he heard sirens and saw the police at the carwash immediately after the shootings. (12RT 1654.)

According to Bowie, Dunn arrived at the carwash in his El Camino while the perpetrators sat in their car next to the carwash building. Dunn parked his car outside and went into the carwash building. (12RT 1512-1516.) According to Christopher Williams, the carwash owner, Dunn was someone who had his car washed at Wheels 'N Stuff. (13RT 1786.) There was no evidence that the perpetrators knew the El Camino would be at the carwash that day. Thus, it was mere happenstance that the car was there.

The El Camino was incinerated the day it was taken, the strongest evidence that the perpetrators did not intend to steal the car at the time of or before the shootings because they did not intend to keep the car permanently, or to sell it whole or for parts, but only took it for a brief time

to escape capture. (13RT 1869-1870, 1873, 1876-1877, 1879-1884.)

Although the prosecutor argued that Pops kept the rims from the El Camino, there was no evidence that Pops knew of their existence before the shooting. (27RT 4460.) Furthermore, jurors could reasonably believe that killing four people for the purpose of stealing wheel rims is much less likely than stealing a car to effectuate an escape from a multiple shooting.

In addition, the prosecutor did not even argue that the defendants went to the carwash for the purpose of taking the car or its rims. In fact the prosecutor avoided entirely the issue of when the intent to steal the El Camino was formed. (27RT 4449 [Dunn robbery].)

As the prosecutor forcefully argued, the entire purpose of the defendants' appearance at the carwash on Super Bowl Sunday was to enter the carwash building and steal from the business and the people inside by taking their money and marijuana. (29RT 4441.) Thus, theft of the El Camino was an afterthought and probably to effectuate a perpetrator's escape.

Accordingly, the evidence raised a question as to whether the prosecutor proved every element of the Dunn robbery count, while at the same time there was substantial evidence for a reasonable jury to find that the intent to take the car arose after the assault to aid in the escape and its taking constituted theft. Indeed, the evidence supporting the conclusion that Jessie Dunn was robbed of his El Camino and its rims is not so relatively strong, and the evidence supporting that its taking was a theft is not so comparatively weak. Thus, it is reasonably probable that a jury properly instructed on theft would have found Wilson guilty of this crime rather than robbery. (*People v. Breverman, supra*, 19 Cal.4th at p. 177.) The Dunn robbery conviction must be reversed.

5.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE HURD ROBBERY VERDICT.

At the close of the prosecution's case-in-chief, defendant Byron Wilson moved for a judgment of acquittal, which the trial court denied, on the Charles Hurd robbery charge (count five) on the ground that the prosecutor failed to present evidence sufficient to sustain a conviction. (4CT 992, 1027; 19RT 3092; 20RT 3118, 3129; 26RT 4339-4346; § 1118.1.) Because there was no substantial evidence of the Hurd robbery, Wilson must be acquitted of the charge.

This Court independently reviews the trial court's ruling on a section 1118.1 motion for acquittal. (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) In doing so, the Court examines the record in the light most favorable to the prosecution to determine whether there exists substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Where the motion for acquittal is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it existed at that point. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.)

Although the prosecutor would later concede in argument to the jury that he failed to show that anything was taken from Hurd (27RT 4447), the trial court stated in ruling on the motion for acquittal that the jury "could find a robbery of the people connected to the business based on the narcotics." (26RT 4342.)

First, as the prosecutor conceded, no marijuana or anything else was

taken from Hurd. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Because nothing was taken from Hurd, he was not robbed.

Second, even assuming for the sake of argument that it was permissible to infer that marijuana was taken from the marijuana business, Hurd was not connected to that business and as a matter of law could not be robbed of its property. In *People v. Scott* (2009) 45 Cal.4th 743, this Court concluded that "all employees on duty during a robbery have constructive possession of their employer's property." (*Id.* at p. 746.) *Scott* further ruled that a robbery victim has constructive possession of another's property taken during a robbery if the victim has a "special relationship" with the owner of the property whereby "the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*People v. Scott*, *supra*, 45 Cal.4th at p. 750.) Hurd was not an employee of the marijuana business and did not have a special relationship with the owners of any marijuana whereby Hurd had authority or responsibility to protect the marijuana.

Chris Williams, one of the owners of the Wheels 'N Stuff carwash, testified that Hurd was in the carwash business with him. Hurd did not work for Williams, however; Hurd had his own clientele and washed his own customer's cars. (11RT 1508; 13RT 1700, 1710, 1785.)

Williams also testified that only he and Michael Hoard were in the marijuana business that also operated on the premises of Wheels 'N Stuff. (13RT 1796.) There was no evidence that Hurd was part of the marijuana selling operation with Williams or Hoard.

Thus, even if the trial court were correct in reasoning that the jury could find a robbery of those connected to the marijuana business, because

Hurd was not part of that business, he was not robbed of any marijuana taken. Judgment of acquittal should be entered on count five, the Hurd robbery charge.

//

//

6.

THE TRIAL COURT'S ERRONEOUS ADMISSION OF PREJUDICIAL HEARSAY DEPRIVED WILSON OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 1, 7, 15, 16 AND 17 OF THE CALIFORNIA CONSTITUTION, TO DUE PROCESS OF LAW, A FAIR TRIAL AND RELIABLE GUILT AND PENALTY PHASE VERDICTS.

The state's case against Wilson was basically one of guilt by association; his association with Pops–against whom there was much more solid evidence than existed against Wilson. In order to bolster this questionable theory for conviction, the prosecution needed to link Wilson to Pops in as many ways as possible. One of the ways it did this was to obtain admission–over defense objection–of a list of nicknames and three drawings which were recovered from a common area in Wilson's apartment.

The trial court permitted admission of these exhibits for a purported nonhearsay purpose of showing a connection between Pops, Wilson and Wilson's apartment. These exhibits, however, served no purpose unless they were considered for their truth, and the prosecutor blatantly used them in this manner to try and link Pops to Wilson, and thus to violent gang culture, semi-automatic weapons, and ultimately the charged carwash shootings.

For the host of reasons set forth in this argument, the list and drawings should not have been admitted. Wilson was significantly prejudiced by this evidence and its admission violated his statutory and constitutional rights, and requires reversal of his convictions and sentence.

A. Background and Proceedings Below

1. The Evidence at Issue

On March 5, 1998, police executed a search warrant at 5705 Lime Avenue, Apartment No. 1–Wilson's residence. (15RT 2111.) Wilson, Aziz Harris, and a female were at the residence. (15RT 2122.) Wilson was lying on a couch in the living room. (15RT 2147.) The female was seated at the kitchen table from which officers seized a closed writing tablet containing drawings, a list of names, and other writings. (8RT 798; 15RT 2162, 2170-2174, 2177, 2179; People's Exhibits 68-A, 68-B, 68-C, 68-D, 68-E; 34-A, 34-B, 34-C.)

Prior to trial, the prosecutor moved in limine to admit four of the drawings and the list. (4CT 855, 837-844.) The proffered exhibits included the following: (1) a diagram [People's Exhibit 68-A]; (2) a list of names [People's Exhibit 68-B]; (3) a drawing of a muscular male standing in front of a car with star-shaped rims, with the words "Nut and Monster Beefy" written on the drawing [People's Exhibit 34-A]; (4) a drawing of a male with a handgun and the words "Nut Loco" [People's Exhibit 34-C]; and (5) a drawing of a forearm, with the lettering "Y.M.O" on it, shooting a gun [People's Exhibit 68-E].[39]

Regarding authentication of the tablet, the prosecutor asserted that as to Wilson it was authenticated because he was allegedly in actual possession of the item, in that it was found at his apartment, and his nickname "Bird" appeared in it. (4CT 838, 841, 857.) As to Pops, the prosecutor initially represented that the tablet was also authenticated

---

[39] A drawing of a hooded figure shooting a person in the head was excluded as unduly prejudicial. (4CT 839; 8RT 824; 12RT 1464.)

because Pops had been seen entering and leaving Wilson's apartment shortly before the tablet was seized. (4CT 857.) The prosecutor subsequently retracted this argument because it was not supported by his own witness. (8RT 766.) The prosecutor further noted that Pops's moniker was written in the tablet and he was depicted in two of the drawings. (4CT 858.) In one drawing, "Pops" was shown standing in front of a Camaro with IROC rims. (4CT 843.) In the second drawing, "Pops" was shown holding a gun resembling one of the weapons used in the carwash shootings. (4CT 844.) Pops's tattoo, "Y.M.O.," also appeared in the tablet.

The prosecutor argued that the two drawings of "Pops," a drawing of an arm with the tattoo "Y.M.O." shooting a gun, another drawing depicting someone being shot in the head, and the list of names were all admissible as evidence of consciousness of guilt, as well as circumstantial evidence of the close relationship between Pops and Wilson and of their access to the type of weapons used in the carwash shootings. (4CT 859.)

Wilson objected, challenging the admissibility of the tablet on the grounds that (1) the drawings and list were not authenticated; (2) the relevancy, if any, of the exhibits was greatly outweighed by their prejudicial effect; and (3) the drawings and list were impermissible hearsay. (4CT 864-871.)

2. The Evidence Code Section 402 Hearing

On May 21, 1999, the trial court conducted a hearing on the admissibility of the drawings and list. (8RT 786-796.) The prosecutor presented a single witness, Tanisha Martin. (8RT 786.) Ms. Martin testified that she rented the apartment at 5705 Lime Avenue in 1996 and that Wilson had later moved in with her. (8RT 786-787.) She moved out of the apartment in February 1998, but Wilson remained. (8RT 788.)

Ms. Martin confirmed that Wilson's nickname was "Bird." She further testified that she had seen Pops at the apartment three or four times – only once in 1998, on Super Bowl Sunday. (8RT 790.) Ms. Martin had last visited the apartment the weekend before Wilson was arrested. (8RT 788.)

When questioned about the proffered tablet, Ms. Martin stated that she had never seen it. (8RT 792.) When shown two of the drawings, she testified that the person depicted in one of the drawings looked like Pops; she was not sure about the person in the other drawing. (8RT 792-793.)

The prosecutor proffered three theories of admissibility for the drawings and the list as the evidence related to Wilson: 1) the evidence was not hearsay because it was not being offered to prove the truth of the matter, but rather as circumstantial evidence that the "drawings . . . were drawn close in time to the murders [and that] they were in plain view in Mr. Wilson's house" (8RT 817); 2) the drawings were authenticated by the same circumstantial evidence – namely, that the tablet containing the drawings was on the kitchen table in Wilson's residence (8RT 815-816); and 3) the list was circumstantial evidence showing a relationship Wilson and Pops and between them and Barnes (8RT 819).

Wilson asserted that the drawings were inadmissible hearsay that came within no exception to the hearsay rule. (8RT 797-808 [co-defendant's argument, joined by Wilson], 809-813.) Wilson further argued that the evidence was inadmissible because the writings could not be authenticated (8RT 809-810); he disputed that the presence of the closed tablet in a common area of his residence constituted authentication by virtue of personal possession (8RT 809). Wilson also argued, without contradiction, that none of the contents of the tablet established directly or

circumstantially that he was the author or creator of the proffered drawings and list. (8RT 811.)

In its discussion with counsel, the court was especially troubled by the prejudicial aspect of the drawing of the hooded figure shooting someone's head. The court noted: "[B]asically, to the extent that there is a hearsay aspect to it, the thing I have to weigh is the relevance as circumstantial evidence versus will the jury misuse it and accept it as evidence of the hearsay assertion." (8RT 821.)

The court ruled tentatively that, pending some additional research, it planned to exclude the drawing of the hooded individual shooting off someone's head and to admit four of the five proffered items as "relevant circumstantial evidence of motive – the connection between the defendants and circumstantial evidence of the possession of the guns by the defendants." (8RT 824.) While agreeing that there might be unrelated explanations for the drawings of the guns, the court concluded provisionally that the recovery of the 9 millimeter bullet from Wilson's residence, the depiction in the drawings of the type of gun used in the shootings, and the alleged gang association supported the prosecutor's circumstantial evidence theory. (8RT 825-826.)

When reminded by defense counsel that the case did not involve gang allegations or gang motives, the court nonetheless reiterated that the case involved "gang culture," and the glorification of certain aspects of that culture by gang members. (8RT 826-827.) However, the court deferred a final ruling pending its weighing of the potential prejudice against the probative value. (8RT 824, 826.)

The court was concerned that the jury could not confine its use of the evidence within the permissible limits. (8RT 826.) The court urged

counsel to draft a limiting instruction for all of this evidence, especially for the drawing of the hooded shooter should the court admit it. Pops's counsel suggested that someone else draft the instruction because he did not understand its nonhearsay purpose. (8RT 827-828.)

On June 7, 1999, the court affirmed its tentative ruling admitting the drawings and the list for the limited purpose of connecting Pops to Wilson's residence and associating him with Wilson. (12RT 1464.)

3. Admission at Trial

The drawings and list were introduced through the testimony of Compton Police Officer Marvin Branscombe, who recounted the circumstances of their seizure from Wilson's apartment. (15RT 2171-2173.) The list and drawings were then admitted as People's Exhibits 68-A, 68-B, 68-C, and 68-D. Officer Branscombe offered no testimony regarding the content of these exhibits, as the court agreed with the defense that the exhibits spoke for themselves. (15RT 2171.)

Nonetheless, another prosecution witness, Larry Barnes, was allowed, over defense objection, to explain the meaning of specific words and images in the exhibits. Barnes testified that he was referred to on the list by his nickname "Smurf," and that "Nut" and "Bird" were the respective nicknames of Pops and Wilson. (13RT 1866.) Barnes then stated that "Nut" was in the top position and "Bird" was in the third position on the list. (13RT 1866; 14RT 1957.)

Barnes also was allowed to identify Pops and Pops's car in the drawings. (14RT 1958, 1961.) Barnes was shown a blow-up of People's Exhibit 68 [Exhibit 34-A] and testified that the rims in the drawing were IROC rims. Finally, Barnes was permitted to interpret the letters "Y.M.O." on the drawing of the disembodied arm firing a gun. Barnes stated that the

letters stood for "Young Mafia Organization" and that he, Nut and Bird were members. (14RT 1962.) Defense counsel then stipulated that Pops had "Y.M.O." tattooed on both his right and left arms. (14RT 1962.) Barnes did not know who made the drawings or what type of guns were depicted. (14RT 1958, 1961.)

Defense counsel objected to the prosecutor's entire line of questioning regarding the content of these exhibits, and specifically moved to strike Barnes's testimony describing the drawings. (13RT 1866; 14RT 1894-1895, 1905.) Counsel argued that the questioning went beyond the court's ruling limiting the admissibility of the list and drawings to showing a connection between Pops, Wilson and Wilson's residence. (14RT 1897.)

The prosecutor responded that the list was extremely relevant to (1) show the relationship between Pops and Wilson, as well as "Scrap," Pops's brother; (2) show the relationship between the witness Barnes and the others; (3) corroborate Barnes's testimony; and (4) show that Barnes and the others were members of the same group, represented by "Y.M.O." tattooed on the arm firing the "Tech Nine." (14RT 1897-1899.)

The court repeated its ruling that the list and drawings could be used to show Pops's connection to the apartment and the relationship between the defendants. (14RT 1899.) After a further proffer by the prosecutor regarding Barnes's proposed testimony regarding the list and Barnes's prior identification of persons and objects in the drawings, the court concluded that the testimony served a permissible purpose as circumstantial evidence of the relationship between the defendants and others, and as such did not go beyond its original ruling. (14RT 1900-1901.)

Defense counsel disagreed and continued to argue, based on the proffer, that the prosecutor's intent was to use the list and drawings, of

unknown authorship and purpose, to corroborate Barnes's testimony, raising authentication, hearsay and confrontation clause issues. (14RT 1901.)

The court responded that it believed the prosecutor intended to present a gang expert to explain the significance of gang hangouts and the items kept there to depict gang culture. (14RT 1901.) In that event, the court reasoned, the list and drawings would be "circumstantial evidence of the relationship to the members and to the locations." (14RT 1902.) The list and drawings would be indicia of gang activity at the location, and not "statements" under the hearsay rule. With that understanding, the court overruled defense counsel's continuing objection to the prosecutor's examination of Barnes. (14RT 1906-1907.) Contrary to the court's expectation, no gang expert testified at the trial. (14RT 1902.)

At the close of the evidence, defense counsel renewed their objections to the list and drawings. (20RT 3100-3104.) In addition to their continuing confrontation clause, hearsay, and Evidence Code section 352 objections, counsel argued that the foundational requirements for admission of the tablet's contents had not been met, in that no gang expert or other evidence was presented to support the court's preconception that these writings were indicia of gang activity. (20RT 3102.) The prosecutor responded that Barnes's testimony – to which appellant had strenuously objected – supplied the requisite foundation, together with other evidence at the trial which the list and drawings allegedly corroborated. (20RT 3103.) The court received the list and drawings into evidence. (20RT 3104.)

In his summation, the prosecutor argued to the jury that "You'll have the one drawing . . . of Mr. Pops that was recovered in Mr. Wilson's house in a drawing tablet on his kitchen table that shows Mr. Pops making a

muscle pose with the Camaro behind him and the IROC rims on it. *He was proud of it. He was proud of it.*" (27RT 4461 (italics added).) Defense counsel objected that this argument went beyond the purpose for which the court had admitted the drawings. (27RT 4461.) The court then inquired of the prosecutor whether the suggested inference was based solely on the drawings. (20RT 4461.) The prosecutor responded that he was relying on the totality of the evidence. (27RT 4461.) The court reiterated its belief that the drawings had been admitted for a limited purpose and the prosecutor continued that the drawings showed a relationship between the defendants. (27RT 4461.)

The prosecutor described the drawings as "little telltale things" the perpetrators left behind. (27RT 4467.) He then singled out the "gang list," as well as the drawing of an arm (with the tattoo "Y.M.O.") firing a weapon that, according to the prosecutor, looked "very similar to a Tech Nine." (28RT 4509.) The prosecutor specifically argued that to acquit, the jury would have to ignore the items found in the Wilson residence, including the gang list with Nut in position number one and Bird in position number three. (28RT 4510.)

B. The List and Drawings Were Not Properly Authenticated and Therefore Were Irrelevant and Inadmissible.

The tablet containing the drawings and list is considered a 'writing" under Evidence Code section 250. (See Comment to Evid. Code, § 1050 [writing includes all forms of tangible expression].) The predicate for the admission of any writing, even if otherwise admissible, is that it be authenticated (Evid. Code, § 1401), a preliminary determination made by the trial court. (*Stockinger v. Feather River Community College* (2002) 111 Cal.App.4th 1014, 1027-1028.)

Authentication is achieved by producing sufficient evidence to sustain a finding that the exhibit being offered is the writing that the proponent of the evidence claims it is. (Evid. Code, § 1401, subd. (a); see *Fakhoury v. Magner* (1972) 25 Cal.App.3d 58, 65 ["A document is not presumed to be what it purports to be. . . ."].) Before a writing may be admitted, its proponent must make a preliminary showing that the writing is relevant to an issue to be decided in the action; a showing of relevancy usually means proof that the writing is authentic. (1 Jefferson Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) § 24.13, p. 386, quoted in *People v. Beckley* (2010) 185 Cal.App.4th 509, 518.) Without such proof the writing is irrelevant because it has no "tendency in reason" to prove or disprove a fact at issue in the case. (*Beckley*, 185 Cal.App.4th at p. 518; Evid. Code, § 210.)

Evidence Code sections 1410 through 1421 list various methods of authentication – e.g., the testimony of a subscribing witness, or admission, by word or action, of authenticity by the party against whom the writing is offered – but these methods are not exclusive. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001.) "Circumstantial evidence, content and location are all valid means of authentication." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) Here, the prosecution failed to properly authenticate the writings in any manner.

The prosecutor offered that the tablet was authenticated as to Wilson because it was found in his apartment and his nickname, "Bird," was written in it. Consequently, the theory went, he had actual possession of it and it was properly authenticated. (4CT 838, 841, 857; 8RT 816-817 [prosecutor arguing circumstantial evidence of authentication included where items were found and their content].) The prosecutor thought it also

significant that the tablet was out in the open on Wilson's "kitchen table, not secreted anywhere." (8RT 817.) The prosecutor was wrong in believing that these facts constituted authentication of the tablet.

The essence of the prosecutor's claim of authentication was that it could be shown by circumstantial evidence which revealed the totality of the circumstances, meaning "where the items were found, the content and location of the items." (8RT 816.) By looking at these facts, the prosecutor felt that it could be inferred that the drawings were made close in time to the murders[40] and were in plain view in Wilson's apartment; thus, this was circumstantial evidence that satisfied the prosecutor's burden of proving authentication. Neither the actual facts of this case nor the case law support the prosecutor's claim of authentication.

As to the tablet's link to Wilson, the tablet was found near a person who was seated in the kitchen, a common area of the apartment. (15RT 2162, 2170.) At the time, Wilson was lying on a couch in the living room. According to the prosecutor, the apartment "was more of a *gang hangout, crash pad* type of location, rather than a residence where Mr. Wilson just lived by himself." (8RT 717, italics added; 8RT 1465 [Court: apartment where tablet found is "a gang location according to the evidence the people proffered"].) Nor was there any evidence that Wilson actually assumed the rent for the apartment or became, as Ms. Martin was, an actual tenant with a legal claim to possession of the apartment.

As to the tablet itself, there is no evidence that Wilson brought the

---

[40] Tanisha Martin testified that the tablet was not in the apartment when she moved out of it and that it was not there when she visited Wilson only days before his arrest. (8RT 786-788, 792; 32RT 5379.)

tablet into the apartment before or after Ms. Martin moved out. Since the apartment was a "gang location," the tablet could have been brought into the apartment by anyone without Wilson's knowledge. That the tablet was out in the open – not secreted in the bedroom, for example – strengthens the conclusion that someone other than Wilson could have brought the tablet into the apartment. Further, nothing in the tablet suggests that Wilson had any responsibility for its creation. The only apparent signature, as opposed to assorted nicknames, found in the notebook belonged to someone named Evert "Everett" Rivers, not Wilson. (8RT 714-716.) Indeed, the prosecutor never asserted that Wilson wrote the list or made the drawings. In short, there was insufficient evidence to support authentication on the theory that Wilson possessed the tablet or was responsible for its creation.

This conclusion becomes apparent upon examining the cases that consider authentication on the theory advanced by the prosecutor. Where courts have found authentication based on circumstantial evidence such as that referred to by the prosecutor here, facts other than merely location and accessibility have supported an inference of "authorship" of the document. For example, in *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372, the court rejected the defendant's argument that rap lyrics found in a search of his home were not authenticated where the *composer* of the lyrics was identified by the defendant's gang moniker, "Vamp," and their content referred to the defendant's part-time employment as a disk jockey. Similarly, in *People v. Gibson*, *supra*, 90 Cal.App.4th at p. 383, authentication was based not merely on the fact that the contested manuscripts were found in the defendant's residence, but also "clear references to the author being "Sasha,'" one of the defendant's aliases, and other detailed content pointed to the defendant as the owner of the items.

Important, too, was the fact that "no evidence showed that these items belonged to anyone else." (*Ibid.*)

In contrast here, the prosecutor presented no evidence to establish that Wilson was the author, in any sense, of the contents of the tablet. The prosecutor made no effort to show that Wilson's handwriting appeared in the tablet, nor even that Wilson knew about the tablet and what it contained. (See Evid. Code, § 1421 ["A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing"].) And unlike in *Gibson*, where there was no evidence that the manuscripts belonged to anyone else, here there was a logical inference that the tablet could have belonged to the person sitting at the table, given that the tablet was apparently within her reach and there was no evidence that the tablet showed up in the apartment any earlier than when she appeared there.

Further, since the prosecutor used the contents of the tablet as substantive proof – directly or by innuendo – that Pops and Wilson committed the carwash murders,[41] the case law makes clear that there needed to be proof that the creator of the exhibits had personal knowledge of the contents.

In this regard, this case is indistinguishable from *People v. Beckley*, *supra*, 185 Cal.App.4th at pp. 513-515. In *Beckley*, the court held that a photograph downloaded from the defendant's MySpace page should have

---

[41] As an obvious example, the prosecutor expressly relied on the drawings depicting "Pops" with a Tech Nine and a Glock, the types of weapons used in the shootings, to show that Pops and Wilson actually possessed or had access to the murder weapons. (See, e.g., 28RT 4509.)

been excluded as direct or circumstantial proof that a girlfriend was still involved with gangs in the absence of *authentication* that the photo was an accurate depiction of the girlfriend throwing a gang sign. (*Ibid.*)

Similarly in this case, the drawings could not be used to show a connection among Pops, Wilson and the weapons because there was no authentication that the drawings accurately depicted a historical fact – that Pops possessed the Glock and Tech Nine, much less that he shot one of them.

The same analysis applies to the "gang list." Again, as in *Beckley, supra,* the list could not be used to show that Wilson and Pops were ranking members of the same gang absent *authentication* that the list was *created* by someone with personal knowledge of the current membership of the gang. (*People v. Beckley, supra,* 185 Cal.App.4th at p. 518.) No such foundation was presented.[42]

As such, the tablet was unauthenticated and thus irrelevant and inadmissible as to any contested issue in the case. (Evid. Code, §§ 210, 350; *People v. Beckley, supra*, 185 Cal.App.4th at p. 518.) Moreover, insofar as the court purported to limit the use of the list and drawings to circumstantial evidence of a relationship between Pops, Wilson, and the apartment, it failed to inform the jury of this limitation and allowed the

---

[42] Although Larry Barnes identified several names on the list, he did not authenticate the list as a "gang list." (13RT 1866; 14RT 1957.) Moreover, insofar as Barnes testified that he, Wilson and Barnes were members of Y.M.O., he denied that Y.M.O. was a gang. (14RT 1962, 1979 [describing Y.M.O. as a group of guys who get together to party, rap and have fun].) An analogous foundational deficiency applied to the prosecutor's use of the drawing of Pops with the Camaro and IROC rims to insinuate that Pops was proud of the carwash shootings and robbery. (27RT 4461.)

prosecutor to go far beyond the permitted purpose both in his examination of witnesses and in his closing argument. (See, e.g., 13RT 1866-1867; 14RT 1901-1905; 27RT 4461, 4467; 28RT 4509-4510.)

In sum, the tablet and its contents were not properly authenticated and their erroneous admission, as demonstrated more fully below, was an abuse of discretion and was not harmless.

C. The List and Drawings Were Inadmissible Hearsay.

The court admitted the list and drawings for the limited purpose of showing the existence of a relationship between the defendants and between Pops and Wilson's residence. (12RT 1464.) Purportedly, this meant it was being admitted for a nonhearsay purpose, but the court never limited the prosecution to this use of the evidence nor informed the jury of the limitation. In reality, the prosecutor used the list and drawings for the substantive, inflammatory hearsay purpose, among others, of showing that the defendants' relationship was based on membership in a violent street gang that glorified weapons and violence. Because the list and drawings fell within no exception to the hearsay rule, the admission of this evidence for the truth of its contents and implied statements was prejudicial, reversible error.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at a hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) For purposes of the hearsay rule, a "statement" is broadly defined as "oral or written verbal expression" or "nonverbal conduct . . . intended . . . as a substitute for oral or written verbal expression." (Evid. Code, § 225.) An out-of-court statement that is offered to prove, not the truth of the facts expressly stated, but the truth of the facts implied by the statement, is also hearsay. (*People*

v. Maki (1985) 39 Cal.3d 707, 712-713; *People v. Garcia* (2008) 168 Cal.App.4th 261, 287.)

Hearsay is inadmissible unless it qualifies under some exception to the hearsay rule. (*People v. Douglas* (1990) 50 Cal.3d 468, 514, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933; *People v. Garcia* (2008) 168 Cal.App.4th 261, 289, quoting *People v. Morgan* (2005) 25 Cal.App.4th 935, 943 ["While the ultimate fact the statement is offered to prove is not the matter stated, the truth of the implied statement is a necessary part of the inferential reasoning process"].) A drawing, when taken as evidence of an *implied statement* to prove the truth of its contents, is hearsay. (*In re D.L.* (1975) 46 Cal.App.3d 65, 69.)

Here, the list and drawings were hearsay because the jury was allowed to use them as proof of the truth of implied incriminatory propositions regarding Wilson and Pops. In that regard, this case closely resembles *People v. Lewis* (2008) 43 Cal.4th 415, 496-499, where this Court held it was error to admit drawings discovered at an apartment where the defendant was living, and where some of the drawings had the defendant's name on them, because there was no evidence the defendant had made or adopted[43] the drawings.

The drawings depicted a cartoon caricature of a cat along with

---

[43] Defense counsel preemptively refuted the only arguably applicable exception – that the list and drawings were adoptive admissions. (8RT 809-813.) A statement by someone other than the defendant is admissible as an adoptive admission if the defendant, "with knowledge of the content thereof, has by words or other conduct manifested his adoption [of] or his belief in its truth." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 498, quoting Evid. Code, § 1221.) Neither of these requirements was met here.

money bags, a sawed-off shotgun, the name "Bopete" and the initials "WSF." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 496.) "Bopete" was the defendant's nickname and "WSF" referred to a Los Angeles gang. An officer testified that the defendant had the word "Bopete" and the initials "WSF" tattooed on his arms. (*Ibid.*) The trial court admitted the drawings and the officer's testimony interpreting them, over the defendant's relevancy, prejudice and hearsay objections, based on the prosecution's argument that the drawings had been found where the defendant was living and that his name on the drawings was "an indication of ownership." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 496.)

This Court addressed only the hearsay argument, finding it had merit and obviated the other claims. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 497.) The Court concluded that the drawings were hearsay that fell within no exception to the hearsay rule. The Court rejected the prosecutor's argument that the drawings were an "admission" by the defendant because there was no evidence that the defendant had created the drawings. (*Id.* at p. 498.) The Court also rejected the alternative theory that the drawings were adoptive admissions because there was no evidence that the defendant, by words or conduct, manifested or adopted a belief in their truth. (*Id.* at p. 498.) The Court reasoned:

> That is because there was no evidence that defendant agreed with the message Detective Graves said the drawings were meant to convey. Moreover, defendant's mere possession of the drawings bearing his nickname, Bopete, was not sufficient to support admissibility under Evidence Code section 1221. [Citation omitted.] Without such evidence of words or conduct, there was no way for the jury to determine whether the drawings simply represented the artist's fantasy, or whether they were an assertion of fact. As such, the drawings were inadmissible against defendant.

(*Id.* at p. 499.)

Similarly here, the mere presence of the closed tablet in Wilson's apartment, even though it included writings with his nickname along with almost 30 other nicknames, was insufficient to support admissibility under the admission or adoptive admission exceptions to the hearsay rule. No other hearsay exception was remotely applicable. As such, the list and drawings were inadmissible hearsay.

The prosecutor never disputed that, if offered for the truth of their contents, the list and the drawings were inadmissible. Rather, the prosecutor argued that the evidence was offered for a limited, nonhearsay purpose serially described as: (1) circumstantial evidence of the possession of guns by the defendants (8RT 824); (2) evidence connecting Pops to Wilson's residence and associating him with Wilson (12RT 1464); (3) evidence of the relationship between Pops, Wilson and Pops's brother (14RT 1897); (4) evidence of the relationship between Barnes and the others (14RT 1898); (5) corroboration of Barnes's testimony (14RT 1898); (6) evidence that Barnes and the others were members of the same gang, represented by the Y.M.O. tattoo on the arm firing the Tech Nine (14RT 1898); (7) circumstantial evidence of the relationship to the members and to the location (14RT 1902); and (8) indicia of gang activity at the location (14RT 1902). Of these varied uses, the only one which arguably constituted nonhearsay was to link Pops and Wilson with each other, which was undisputed in any case.

Whether evidence is offered as circumstantial evidence as opposed to direct evidence does not determine whether it constitutes inadmissible hearsay. (See 4 Mueller & Kilpatrick, Federal Evidence (3d ed.) § 8.17; *United States v. Jefferson* (10th Cir. 1991) 925 F.2d 1242, 1252-1253;

People v. Morgan (2005) 125 Cal.App.4th 224, 229, citing 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2004) § 1.20, p. 16 [faulting the use of circumstantial-evidence rationale to circumvent the hearsay rule].)

A hearsay statement may be admissible if it is offered not for its truth, but to prove a pertinent connection between the persons involved. (See, e.g., *United States v. Mazyak* (5th Cir. 1981) 650 F.2d 788, 792 [letter addressed to individuals on vessel containing contraband was not admitted for its truth, but was relevant for the limited purpose of linking the individuals to the vessel and to each other].) However, merely characterizing an out-of-court statement as circumstantial evidence of association or connection does not make the evidence admissible. (See *United States v. Sanchez-Lopez* (9th Cir. 1989) 879 F.2d 541, 554-555 [error to allow witness to testify to a telephone conversation where the statement had no probative value apart from improper purpose of establishing the truth of what was said]; *United States v. Ocampo* (2d Cir. 1981) 650 F.2d 421, 427-428 [error to let the prosecution connect defendants on the basis of documents in one defendant's apartment describing drug transactions coupled with testimony interpreting the documents].)

Where an out-of-court statement is admitted for the limited purpose of linking individuals and premises, the prescribed practice is to excise the contents to avoid the possibility of misuse of the evidence and prejudice. (*United States v. Mazyak, supra*, 650 F.2d at p. 792.) For the limited, nonhearsay purpose of showing a connection between Pops, Wilson and the apartment, the only relevance of the tablet was its presence in Wilson's kitchen and the bare fact that the tablet allegedly included the defendants' nicknames and drawings of Pops. These, moreover, were the only

foundational facts established at the Evidence Code section 402 hearing. Nevertheless, neither the prosecutor nor the jury was restricted to the use of only these facts for the specified limited purpose.

Instead, the prosecutor was allowed to explore the contents of the list and the drawings to corroborate and expand the testimony of one of his shakiest witnesses, Larry Barnes. With respect to the list, the prosecutor was permitted to elicit from Barnes that the roster of nicknames represented the ranked positions of members of a group, "Y.M.O.," and then to urge the jury to convict based, in part, on the "*gang list* with Nut in position No. 1, Bird in position No. 3 and Smurf [Barnes] in position No. 18." (28RT 4510, italics added.)

Barnes also was allowed to describe the contents of the drawing, People's Exhibits No. 68, 34-C, depicting only a forearm shooting a gun. (14RT 1961.) Barnes testified, over a hearsay objection, that the letters on the forearm, "Y.M.O.," were the initials of the "Young Mafia Organization," to which he, Pops and Wilson belonged. (14RT 1962.) The prosecutor then directed Pops to stand and show the jury his right and left forearms, at which point Pops's trial counsel stipulated that "Y.M.O." was tattooed on both of Pops's arms. (14RT 1962-1963.)

The testimony regarding Y.M.O. was irrelevant hearsay. Neither the tattoos themselves nor their meaning had any relevance to the charged shootings. No witness described either shooter as having tattoos of any kind. No gang expert, nor other witness, testified that the carwash shootings were gang-related. Nevertheless, the prosecutor was permitted to use the drawing of the unidentified forearm as an implied hearsay assertion that Wilson and Pops were members of a gang that glorified violence and weapons like those used in the shootings – specifically, a Tech Nine.

(25RT 2509.)

Again over objection, Barnes was led by the prosecutor through the details of People's Exhibit No. 34-A, a blow-up of a drawing of an individual, a vehicle and rims. (14RT 1957.) Barnes was allowed to testify that the vehicle was "Nut's [Pops's] car," and that the rims were IROCs. (14RT 1957.) The content of this drawing, as opposed to the fact of its presence in Wilson's apartment, had no incremental probative value whatsoever except as an implied hearsay assertion that Pops possessed the Camaro and IROC rims at the time of the carwash shootings.

Even if offered only as corroboration of Barnes's testimony, the contents of the drawing were still inadmissible hearsay. There is no hearsay exception for the use of an out-of-court statement by anyone other than the witness, much less an unidentified person, for corroboration of a witness's testimony. Here, the drawing was only corroborative of Barnes's testimony regarding Pops's possession of the Camaro and the IROCs, if the factual assertions expressed by the drawings were found to be true.

In sum, for the permitted, nonhearsay purpose for which the tablet was admitted – i.e., linking Wilson and Pops – the only pertinent, hence admissible, evidence was limited to the *bare facts* that: (1) the tablet was located in Wilson's apartment; (2) the tablet contained a list which included Wilson's and Pops's nicknames; and (3) the tablet contained two drawings of Pops. Further, these were the only facts adduced at the 402 hearing.

Beyond the existence of these three facts, nothing about the list and drawings was admissible under the court's limiting ruling. The inadmissible content should have been excised to prevent irrelevant, unreliable and unduly prejudicial inferences. Other names on the list and the supposed "rankings" should have been deleted. Moreover, because the

drawings could not effectively be redacted, they should have been excluded in their entirety. But, instead of redacting or excluding this evidence, the court allowed the prosecutor to delve into the details of the list and drawings for demonstrably improper hearsay purposes: first, as implied assertions of gang affiliation, propensity for violence, and possession of the types of weapons used in the carwash shootings; and second, as corroboration of other witnesses' incriminating testimony. No foundation was laid and no hearsay exception was offered for any of these prohibited uses. As a result, the court abused its discretion and committed prejudicial error.

D. The Erroneous Admission of the List and Drawings Violated Wilson's Confrontation Rights Under the Due Process Clause of the Federal and State Constitutions.

Defense counsel objected to the admission of the list and drawings as a violation of both defendants' confrontation rights. (14RT 1901; 20RT 3100-3104.) In the wake of *Crawford v. Washington*'s categorical limitation of the confrontation clause to testimonial hearsay, this claim no longer lies under the Sixth Amendment, but rather under the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, section 15 of the California Constitution.[44] (*Crawford v.*

---

[44] In *Crawford, supra*, 541 U.S. 36, the United States Supreme Court overruled the long-standing precedent of *Ohio v. Roberts* (1990) 448 U.S. 56, which conditioned compliance with the confrontation clause on the sufficiency of the indicia of reliability supporting the hearsay statement either under a firmly rooted exception to the hearsay rule or by particularized guarantees of trustworthiness. Instead of the governing, more flexible reliability test, the Court adopted a narrow, historical approach that limited the reach of the confrontation clause to testimonial hearsay. (*Crawford*, 541 U.S. at pp. 53-54; see also *Washington v. Davis*

(continued...)

Washington (*Crawford*) (2004) 541 U.S. 36; see *White v. Illinois* (1992) 502 U.S. 346, 364 (conc. opn. of Thomas, J., joined by Scalia, J.) ["Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them"].) As the high court affirmed in *Whorton v. Bockting* (2007) 549 U.S. 406, the *Crawford* rule did not "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." (*Id.* at pp. 420-421, internal quotation marks omitted, original italics; see also *People v. Winson* (1981) 29 Cal.3d 711, 717 [recognizing that absence of proper confrontation calls into question ultimate integrity of fact-finding process].)[45]

Crawford further "'recognized that if the statement at issue is nontestimonial, the rules of evidence, including hearsay rules, apply.'" (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 173, quoting *Crawford*, *supra*, 541 U.S. at p. 68.)

Under the California Evidence Code, all exceptions to the hearsay rule are expressly enumerated and defined. The state recognizes no residual hearsay exceptions. (Compare Fed. Rules Evid, rule 807(2011)[46].) As

---

[44](...continued)
(2006) 547 U.S. 813, 821.)

[45] Wilson's due process claim is not forfeited. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

[46] Federal Rules of Evidence, Rule 807 (Residual Exception) sets forth the circumstances under which a hearsay statement may be admitted even if the statement is not specifically covered by a hearsay exception. These include that "(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact;
(continued...)

such, the legislature has effectively determined that any hearsay statement that does not fall within one of the numerous, specific exceptions to the hearsay rule is presumptively unreliable. If such a statement is then admitted for its truth and without confrontation, the due process clause is implicated.

The due process clause applies with particular force to this case where the prosecution's key witnesses were shown to have serious credibility problems when confronted on cross-examination. (See *infra*.) Thus, the prosecutor set out to circumvent Wilson's fundamental confrontation rights, as well as the court's limiting ruling, by impermissibly using the tablet's contents – insulated from cross-examination – for their truth and utmost prejudicial value. Here, the list and drawings do not even meet minimal due process reliability standards, much less the heightened standards applicable to capital cases. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

As used by the prosecutor to show gang membership and to connect Wilson and Pops to the pictorial glorification of violence and weapons, as well as to the shootings themselves, the evidence was highly significant, inflammatory, and utterly devoid of indicia of reliability. The identity of the "author" of the evidence was never disclosed.[47] As such, it was

---

[46](...continued)
(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice." (Fed. R. Evid., rule 807(a).)

[47] The record reflects that the prosecutor made no effort to identify the owner or preparer of the tablet. (See 8RT 716-717.) Indeed, it served
(continued...)

impossible to determine the actual motivation for making the list and drawings or the accuracy of the representations contained therein. Nothing showed that either Pops or Wilson participated in the creation of the list and drawings, adopted them, or even knew of their existence. Wilson and Pops thus had a compelling interest in probing the circumstances surrounding the creation of this evidence to negate the highly prejudicial inferences urged by the prosecutor throughout the trial.[48]

Accordingly, the court's erroneous admission of unreliable hearsay violated Wilson's right to confront and cross-examine witnesses as guaranteed by the due process clause.

E. The Erroneous Admission of the List and Drawings in Violation of Wilson's State and Federal Constitutional Rights Was Prejudicial Where the Evidence Linking Wilson to the Carwash Shootings Was Not Strong.

The erroneous admission of the list and drawings violated Wilson's right to due process of law under the Fourteenth Amendment to the United States Constitution and article I, section 13 of the California Constitution. Also violated was Wilson's right to confrontation under the Fifth and Fourteenth Amendments to the United States Constitution and article I,

---

[47](...continued)
the prosecutor's interest to have the list and drawings admitted as ambiguous hearsay, subject to his own interpretation, rather than through a live witness, whose motives and reliability could be tested by cross-examination.

[48] Because the tablet's contents did not fall within any firmly rooted hearsay exception and had no particularized guarantees of trustworthiness, they would have failed the now disapproved *Ohio v. Roberts*, *supra*, 448 U.S. 56 test for compliance with the confrontation clause. Irrespective of the test, moreover, adversarial testing was essential in this case to fairly assess the reliability of this prejudicial evidence.

section 15 of the California Constitution.

When, as here, a federal constitutional violation has occurred, the conviction must be reversed unless the error can be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In Wilson's case, this standard cannot be met. Indeed, even under the lesser standard for an error of state law, it is "reasonably probable" that a result more favorable to Wilson would have been reached had the trial court correctly excluded the list and drawings. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecution's case against Wilson was far from overwhelming. The case rested on unreliable identifications, inconclusive physical evidence and, most unfairly, the prejudicial spillover of the considerably stronger evidence linking Pops to the carwash shootings and to other gang-related violence. The prosecutor exploited the erroneous admission of the list and drawings – going far beyond the limited purpose, albeit still erroneous, for which the evidence was admitted – to inflame the jury and mask the deficiencies in his proof of Wilson's guilt.

Christopher Williams, Randy Bowie, and Anthony Brown were the prosecution's identification witnesses. On cross-examination, Williams admitted lying at the preliminary hearing; Bowie called Wilson's lawyer a "fool" and claimed not to remember, among numerous other things, testifying at his own trial. Brown avoided cross-examination entirely by not showing up in court.

Bowie's identification of Pops and Wilson was the centerpiece of the prosecution's case. Yet, apart from Bowie's asserted certainty about his selections, all objective circumstances leading up to and surrounding his identifications, as well as his demeanor during cross-examination, cast

doubt on his reliability. Bowie's opportunity to observe the driver of the Honda was limited in time and disrupted by the arrival of his co-workers. His focus, moreover, was directed to the guns, whose type, size and position he described with great accuracy from the outset. In contrast, when Bowie met with a police sketch artist, he could not describe the driver with any detail and the artist was unable to create a single sketch.

Almost three weeks after the shootings, Bowie was shown a series of photo-spreads. He only selected a photograph of Pops after the array had been reduced from 20 to two photographs. Still later, Bowie was shown a sixpack of photographs from which he selected Wilson. By the time Bowie made his selections at the live lineups, he had selected Wilson and Pops in separate photo lineups and had seen Pops in a Camaro with IROC rims. Thus, it was Bowie's repeated exposure to Pops and Wilson during identification procedures, as well as other contacts, rather than his limited observations of the suspects, that accounted for the certainty of his identifications at trial.

Brown's testimony also was significant to the prosecution's case because it allowed the prosecutor to argue that a second witness had picked Wilson as the driver. However, contrary to the prosecutor's argument, Brown did not pick Wilson at the live lineup. In fact, Brown picked no one, just as he picked no one when he was shown a sixpack containing a photograph of Wilson.

As Brown explained in his testimony, Wilson was the only person in the lineup with the same complexion as the driver, and facial complexion was all that Brown could see of that person. (19RT 3074-3075; Exh. 56.) At the preliminary hearing, Brown still could not positively identify Wilson as the driver, repeating only that Wilson's light complexion best fit the

description because Brown had "only seen him [the driver] from the rear view and glanced at the front view." (19RT 2991.) Williams similarly testified at trial that Wilson had the lightest skin of the participants in the live lineup. (13RT 1819 ["he's lighter than all the rest of the guys I see. [H]e is the brightest"].)

Thus, rather than reinforcing Bowie's identification, Brown's and Williams's testimony undermined it by disclosing that Wilson was selected because he was the most light-skinned person in the lineups.

Apart from the problematic identifications, the balance of the evidence against Wilson tying him to the shootings was no more than guilt by association with Pops, the members of Y.M.O., and the alleged gang hangout. The evidence of that association was the list of names in the tablet located in Wilson's residence and Larry Barnes's testimony regarding the list. Other than their presence in the kitchen on the day of the search, the drawings in the tablet – Pops posing in front of his Camaro and IROC rims, Pops holding a Glock, and a disembodied, tattooed arm firing a Tech Nine – had nothing to do with Wilson. Wilson was not depicted in any of the drawings, and he had no Y.M.O. tattoo on his arms.

Nevertheless, the prosecutor was allowed to elicit testimony and argue that the jury could not acquit if it considered the drawings and the list – the little telltale things – as proof of guilt, not merely association. None of the evidence located during the search, including the 9 millimeter bullet and the news clipping, pointed unequivocally to Wilson's involvement in the car wash shootings. All of the materials lacked Wilson's fingerprints, and all could have been left by any other members of Y.M.O. who, according to the prosecutor, were using Wilson's apartment as a hangout. And none of these materials was identified as belonging to or made by

Wilson.

Because the jury was given no meaningful limiting instruction by the court, it very likely accepted the prosecutor's concluding invitation to convict Wilson based on the items found in his residence – particularly the "gang" list and the drawings of Pops. These drawings did not demonstrate a relationship between Wilson and Pops since Wilson is nowhere in them. Rather the drawings were, under the court's and prosecutor's interpretation, expressions of a gang culture that glorified weapons and violent acts – specifically the carwash shootings.[49] As such, the chief prejudice of admitting this evidence was the spillover of these inflammatory conjectures

---

[49] Although it discussed the prosecutor's clearly impermissible and inflammatory argument that Pops's 'muscle pose" in the drawing of him with the Camaro and IROC rims showed he was proud of, impliedly, the carwash murders, the court took no actual remedial action. (27RT 4461.) The court agreed that the drawing(s) had not been admitted for the prosecutor's stated purpose, but expressed the belief that the argument was also based on other evidence. (27RT 4461.) The prosecutor agreed. (27RT 4461.) There was no such evidence in the record. The preceding argument by the prosecutor was about the IROC rims, concluding with the statement that Pops was proud of the *rims*. (27RT 4460.) Defense counsel did not object.

Defense counsel objected to the "muscle pose" argument, however, because it implied that the "it" of which Pops was proud was not the Camaro or the rims, but the crime itself.

The court then reminded the prosecutor that the evidence was admitted for a limited purpose. The prosecutor continued with his argument.

The offending argument was not stricken and the jury was not admonished to disregard it. Of course, as argued above, the more fundamental problem here is that the drawing was even shown to the jury, especially when the prosecutor blew it up for greater impact. Thus, even if the prosecutor had not made the prohibited argument, it had already invited the jury to draw the same inference by its deliberate misuse of the evidence.

from Pops to Wilson, not the reverse.

Hence, it cannot be shown that the "guilty verdict actually rendered in *this* trial was surely unattributable to the error" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics in original). Moreover, a review of the evidence establishes a reasonable probability that a more favorable result would have been reached in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Therefore, the judgment against Wilson must be reversed under both state and federal standards.

//

//

7.

JUROR NO. 9 COMMITTED PREJUDICIAL MISCONDUCT BY INTENTIONALLY CONCEALING DURING TRIAL HER PRIOR EXPERIENCE AS A DEATH PENALTY JUROR, THOUGH SHE REMEMBERED IT DURING TRIAL AND HAD BEEN ASKED TO DISCLOSE IT DURING VOIR DIRE.

A. Introduction

Appellant Byron Wilson filed a motion for a new trial based on the discovery after trial that a seated juror – Juror No. 9 – concealed that she sat on another death penalty jury before sitting in this case. Juror No. 9 claimed that she failed to disclose her prior experience as a capital juror because she simply forgot about it. But as research by the Capital Jury Project teaches, virtually no one forgets being a death penalty juror, let alone a 35 year old like Juror No. 9. Sponsored by the National Science Foundation, the Capital Jury Project interviewed several hundred capital jurors from seven states including California. During the interviews, jurors often commented that being "a capital juror was a 'truly memorable experience,' something they 'would *never forget*.'" (Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) Ind. L.J. 1043, 1085, 1086, fn. 221, italics added.) Indeed almost every juror interviewed remembered being a capital juror; over 99 per cent even remembered jury selection. (*Id.* at p. 1086.)

That Juror No. 9 did *not* forget the unforgettable, but instead intentionally concealed it, is shown by the fact that she was repeatedly prompted to remember her prior capital jury experience by the court, the court's jury questionnaire, counsel, and the other prospective jurors. Beginning with voir dire, she was constantly reminded that this is a death

penalty case, and that her prior experience as a death penalty juror would be of paramount concern to the court and the parties, *were she to disclose it.* And as if to dramatically make the point for Juror No. 9 alone, the first prospective juror struck by the defense was someone just like Juror No. 9, a woman who had been an alternate in a death penalty case. Nevertheless, despite being asked to disclose the experience on the court's questionnaire, Juror No. 9 failed to reveal that she too had been a death penalty alternate juror because, as implausible as it sounds, Juror No. 9 said she forgot she was a capital juror. And the trial court believed her.

The court also found that Juror No. 9 did not have a duty to speak up and correct her mistake when she remembered her past experience during trial. Despite the fact that Juror No. 9 represented under penalty of perjury that her questionnaire answers were accurate and complete, and even though she realized during trial they were not, the court found Juror No. 9 had no obligation to speak up during trial because "nobody told her [to] bring it up." On the contrary, Juror No. 9 had a duty to bring it up. And because she did not, but chose instead to conceal her prior capital jury service, bias is implied, misconduct is shown, and Wilson is entitled to a new trial because his jury was not fair and impartial with Juror No. 9 on it.

B. Factual Background

The Court's Jury Questionnaire

At the beginning of jury selection, the court instructed the prospective jurors to stand and take an oath under penalty of perjury. The clerk of the court declared to prospective jurors as follows: "You, and each of you, do understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as trial jurors in the

matter pending before this court and that failure to do so may subject you to criminal prosecution." (9RT 966.) The reporter's transcript reflects a unanimous assent on the part of prospective jurors to their understanding and agreement that an inaccurate and untruthful answer might be a crime: "The prospective jurors responded in the affirmative." (9RT 967.)

After explaining the nature of the case and the charges and introducing the parties and counsel, the court informed prospective jurors that it would provide a written questionnaire for each prospective juror to complete. Their answers would assist the court in determining the "ability to be a fair juror on this case." (9RT 977.)

Next the court stressed the need for complete answers: "I want you to take your time filling it out. Think about the questions, think about the answers you're going to give, because to the extent that you rush through this and give us brief or inconclusive answers, we're going to have to follow up on it with a lot of questions. [¶] If you're complete and fully explain your answers, there will be very little need to follow up with you as far as any follow-up questions. [¶] Does everybody understand that?" (9RT 978.)

The first sentence of the questionnaire set forth its purpose: "to obtain information regarding your qualifications to sit as a juror in a pending criminal case." (7CT 1838.) The second paragraph let prospective jurors know that, except for their phone numbers, their answers would not be confidential but would be "part of the Court's public record." Consistent with the court's spoken words in the courtroom and the first paragraph, the second paragraph reiterated that answers would be used "to assist in selecting a qualified jury." (7CT 1838.)

Juror No. 9 answered the court's questionnaire, the front page of

which emphasized with underscoring that her answers "must be completed under penalty of perjury." (7CT 1838.) In capital letters, the questionnaire further instructed: "PLEASE GIVE *COMPLETE ANSWERS* UNDER OATH." (*Ibid.*, italics added.) On the last page of the questionnaire, Juror No. 9 signed her named under the following words, in bold, capital letters: "**I DECLARE UNDER PENALTY OF PERJURY THAT THE FORGOING ANSWERS ARE TRUE AND CORRECT, AND COMPLETE.**" (7CT 1860.)

Juror No. 9 was 35 years old. (7CT 1839.) She did not take any medication that would affect her ability to concentrate on or follow the evidence. Nor did she have any type of physical disability or problem that might make it difficult for her to sit as a juror and to give the case her full and complete attention. (7CT 1853-1854.)

Juror No. 9 studied Business Administration and English at college and was currently enrolled. One of her favorite pastimes was reading, especially fiction. She also read the newspaper, specifically the business section. (7CT 1842, 1844.)

Juror No. 9 worked at a law firm as a "docket clerk." (7CT 1840-1841; 9RT 1015.) Her responsibilities were to "maintain the firm's calendar for local offices," to "research legal codes [and] case info." and to "read and interpret rules of the court." (7CT 1840.) Her current job was her favorite. She "enjoy[ed] the day to day challenges of researching cases & court rules." (7CT 1841.)

Under a five-page section of the questionnaire entitled, "ATTITUDES TOWARD CAPITAL PUNISHMENT," Juror No. 9 was asked 27 questions about her views on the death penalty. (7CT 1855-1859.) In the preface to the death penalty questions, the court informed Juror No. 9

that "one of the possible sentences for a person convicted of the charges the prosecution has filed is the death penalty. [T]he Court must know whether you could be fair to both the prosecution and the defense on the issue of punishment IF YOU REACH THAT ISSUE." (7CT 1855.)

Juror No. 9 supported the death penalty and thought it should be enforced. (7CT 1855.) She "agree[d] somewhat" with the statement, "Anyone who intentionally kills another person should ALWAYS get the death penalty." (7CT 1858.)

The court's questionnaire inquired into Juror No. 9's prior "legal/courtroom experience." (7CT 1846.) Question 40A asked: "If you have *ever* been a juror in the past, please provide the following information." (*Ibid.*, italics added.) The question provided enough lines and blank spaces for Juror No. 9 to give answers for four cases where she had been a juror. The question inquired about the year of the case, whether it was civil or criminal, the charges or type of case, and whether a verdict was reached. The question provided an example: a 1985 criminal shoplifting case. Juror No. 9 answered that in 1992, she had been on a jury in a civil personal injury case. She listed no other cases. (*Ibid.*)

Voir Dire

Juror No. 9 was part of the first group of prospective jurors brought into the courtroom for voir dire. (10RT 1125, 1155.) So was Juror No. 12, who would eventually be the first prospective juror struck by the defense. (10RT 1150, 1242.)

The judge addressed the jurors and acknowledged that "some of the questions probably could have been better worded" and "there may have been some questions that confused some of you." Consequently, the court told prospective jurors that it would allow counsel to do some follow-up

questioning to clarify matters. (10RT 1125-1126.) The court asked prospective jurors to pay attention to the follow-up questions because the jurors might have similar problems in answering some of the questions on the questionnaire. (10RT 1127.)

Next the court referred to the "many questions about the death penalty" on the questionnaire. Then, in order to provide the jurors with some background on the law that might apply in this case, the court instructed the prospective jurors on California criminal and death penalty law, including factors a through k of Penal Code section 190.3. (10RT 1127-1134.)

Following the court's death penalty instructions, defense counsel engaged in voir dire by focusing almost exclusively on prospective jurors' views about the death penalty. (10RT 1155 [Wilson's counsel: "pretty much all the questions have been concerning the death penalty"].) Indeed, during defense counsel's one hour of voir dire, the words death penalty were spoken 34 times. (10RT 1116, 1134-1189.) And when two prospective jurors disclosed that they had previous experience as jurors in murder cases, defense counsel pursued the matter by asking whether the cases involved the death penalty; the prospective jurors responded that they did not. (10RT 1138, 1160.)

Proceeding generally in reverse seat number order, defense counsel examined Juror No. 12 moments before questioning Juror No. 9. (10RT 1150-1152 [No. 12]; 10RT 1155-1157 [No. 9.].) Defense counsel began examining Juror No. 12 by noting that the juror had "done this before." (10RT 1150.) When Juror No. 12 filled out her questionnaire and was asked to disclose the same information as Juror No. 9, Juror No. 12 wrote that she had been a juror in a death penalty case. (6CT 1634.) During voir

dire Juror No. 12 said in the presence of the court, counsel, and other prospective jurors – including Juror No. 9 – that she had been an "alternate" juror in a death penalty trial, and as such she had not been involved in jury deliberations. Nevertheless, it seemed to her that based on questions by the jury, there was a lot of confusion by the jurors on how to determine the penalty and how the mitigating circumstances were weighed. (10RT 1151.)

Juror No. 12 confirmed that she did not want to be a juror in a death penalty case again. Nonetheless, she said that she would do it again because she would have no choice. Juror No. 12 explained that although there was nothing "so traumatic" that she could not go through it again, it was "just not a pleasant experience." (10RT 1150-1151.) Based on one of Juror No. 12's answers on the questionnaire, defense counsel asked her if there was some emotional testimony during the death penalty trial where she was an alternate juror. She responded: "Very. Oh, it was horrible . . . . It was very horrible. And a lot of the jurors were crying, including myself. It was very horrible." (10RT 1152.)

Before moving on to Juror No. 9, Wilson's counsel asked Juror Nos. 11 and 10 a few questions each, solely relating to the death penalty. Just before turning to Juror No. 9, counsel acknowledged that almost all questions up to that point were about the death penalty. (10RT 1154-1155.)

Each question Wilson's counsel asked Juror No. 9 involved the death penalty. Defense counsel asked Juror No. 9 about considering evidence of Wilson's background if the trial reached a penalty phase, and about making the choice between life imprisonment without the possibility of parole and the death penalty. (10RT 1155-1157.)

During his part of voir dire, the prosecutor also asked Juror No. 9 questions relating to the death penalty. In line with Juror No. 12's

comments regarding the emotional nature of penalty phase testimony, the prosecutor remarked to Juror No. 9 that the penalty phase is "obviously . . . an emotional time for everybody." He then asked Juror No. 9 whether she would listen to the emotional evidence and evaluate it before deciding the appropriate penalty for herself. Juror No. 9 replied that she could. Juror No. 9 further declared that she could impose the death penalty if appropriate. (10RT 1211-1212.)

The first group of prospective jurors left the courtroom while the court briefly heard challenges for cause. The first group then returned to the courtroom for peremptory challenges. (10RT 1241.)

Juror No. 12 was the first prospective juror struck by the defendants, and they used a joint peremptory challenge. (10RT 1240, 1242.) Juror No. 12 was the only prospective juror who revealed in Juror No. 9's presence that she had been a juror in a death penalty case. (10RT 1150-1231.) And Juror No. 12 was struck by the defense in Juror No. 9's presence. (10RT 1212, 1231-1232, 1241-1242.)

Wilson did not exercise all of his peremptory challenges. (11RT 1372.) His jury included four alternates. (4CT 926.)

Posttrial Interviews with Juror No. 9

In two posttrial interviews with defense counsel, Juror No. 9 revealed that she had been an alternate juror in a death penalty case before this case. As defense counsel recounted in a declaration filed with the court, Juror No. 9 told counsel near the end of a face-to-face interview "that she really wanted to get this experience behind her because it seemed to be lingering on and on, and she had been through this experience before." (6CT 1518.) Juror No. 9 then stated that she had "'been on a death penalty case before.'" (6CT 1519.)

At the eventual hearing on Wilson's motion for a new trial based on Juror No. 9's alleged misconduct, the court asked Wilson's counsel to recall what Juror No. 9 had said when she first revealed her previous duty as a death penalty juror. Counsel recollected that Juror No. 9 was asked if she would sign a declaration about their conversation to submit to the court. Juror No. 9 responded that "she really wanted to get this experience behind her because she had been through it before." (39RT 6341.)

A few days after the face-to-face interview with Juror No. 9, counsel phoned her. Juror No. 9 repeated in the call that she had been a juror in a death penalty case, but then she added that she had been an alternate juror. Juror No. 9 told defense counsel that it was difficult to remember all the details because it had been 10 to 15 years since the death penalty case. Juror No. 9 said the trial was possibly in Compton. Lastly, Juror No. 9 stated that she did not think that it was a death penalty case, but rather she thought it was a murder case where the defendant was a juvenile and the penalty was "LWOP." She did not stay around for the verdict. (6CT 1519.)

Juror No. 9's Jury Records

Following the interviews, defense counsel obtained a court order for Juror No. 9's jury service records. (6RT 1523-1524.) According to records from the jury commissioner, Juror No. 9 served on two juries from 1985 through 1999 – a trial in January 1993 and Wilson's trial, which is roughly consistent with Juror No. 9's questionnaire answers where she disclosed a 1992 personal injury trial. (6CT 1538; 7CT 1846.) The jury commissioner was not required to keep records for more than three years and was unable to confirm any service by Juror No. 9 before 1985. (6CT 1538.) Juror No. 9 would later testify that the death penalty case she served on was around 1984. (39RT 6338.)

Wilson's Written Motion for New Trial

On March 16, 2000, Wilson filed a motion for new trial on the ground that Juror No. 9 committed misconduct by intentionally concealing during voir dire her prior service as a juror in a special circumstance murder trial, either a trial involving the death penalty or one involving a non-death special circumstances murder with a juvenile defendant. Wilson cited as authority Penal Code section 1181, subdivision 3 (the court may grant a new trial when a juror has been guilty of any misconduct by which a fair and due consideration of the case has been prevented) and *In re Hitchings* (1993) 6 Cal.4th 97, 111, 120 ("'Concealment by a potential juror constitutes implied bias justifying disqualification,'" quoting *People v. Morris* (1991) 53 Cal.3d 152, 183-184). Wilson based his motion in part on the anticipated testimony of Juror No. 9, while noting that two prospective jurors "were peremptorily challenged by the defense – apparently on the basis of the death penalty attitudes." (6CT 1553-1556.)[50]

---

[50] Many prospective jurors were questioned about prior jury service. When such service was shown to involve the death penalty, as was the case with Prospective Juror No. 12 (Juror No. 3057), that individual was peremptorily challenged. (6CT 1624; 10RT 1242.) All other prospective jurors whose questionnaire revealed that they had served on a jury in a homicide case were questioned about whether the death penalty was involved. Prospective Juror No. 0770 revealed in the questionnaire that he had been a juror on two homicide cases. (6CT 1642.) This person was questioned about whether any of those cases involved the death penalty, (10RT 1160-1161) and the defense exercised a joint peremptory challenge against the juror. (11RT 1298; see 6CT 1625 [explaining that when excused the juror was in Seat 7].) Juror No. 3480 revealed that he too had been a juror on a murder case. Pops's counsel excused this juror. (11RT 1358; see 6CT1625 [explaining that when excused Juror No. 3480 was in (continued...)

Juror No. 9's Testimony at the Motion-for-New-Trial Hearing

On March 24, 2000, two months after her unsworn conversations with defense counsel, Juror No. 9 testified under oath at a hearing on Wilson's motion for a new trial based on her alleged misconduct. Juror No. 9 was the sole witness. Consistent with earlier rulings rejecting arguments that defense counsel should be allowed to examine jurors, the court denied Wilson's motion to grant his "counsel an opportunity to ask Juror #9 questions about prior jury service." Instead the court ruled that only it would ask Juror No. 9 questions. (6CT 1530, 1535; 39RT 6262; 39RT 6261-6265, 6336-6337].) The court also denied Wilson's counsel's request to ask Juror No. 9 follow-up questions. Instead, the court allowed counsel to suggest questions at sidebar. (39RT 6336.)

Excluding pleasantries, Juror No. 9's sworn testimony consists of about one page of transcript. At the outset the court informed Juror No. 9, "the reason I've asked you to come in this morning is that, apparently, one or more of the attorneys talked to you recently about your answer on the questionnaire about prior jury service." (39RT 6337.) In response to the

---

[50](...continued)
Seat 14].) Juror No. 9677 revealed on the jury questionnaire that he had been a juror on a murder case. (7CT 1655.) The defense used a joint peremptory challenge to remove this juror. (11RT 1301; see 6CT 1625 [explaining that when excused Juror No. 9677 was in Seat 4].) Juror No. 7980 also revealed on his questionnaire that he had been a juror on a case involving a drive-by shooting. (7CT 1664.) He was questioned about whether the shooting involved a homicide. (10RT 1263.) It did not. (10RT 1264.) Juror No. 7980 became Juror No. 3 on Wilson's jury (22CT 5773) and served as the jury foreperson. (See 6CT 1626.) Finally, Juror No. 0467 revealed that he had been on a murder case. (7CT 1669.) He was questioned and it was learned that this case did not involve the death penalty. (10RT 1138.) He sat on the jury as Juror No. 2. (22CT 5773.)

court's questions, Juror No. 9 recounted what she told defense counsel: "I served as an alternate in a death penalty case." The death penalty case was in "'84-ish, something like that," and she listened to all the evidence. Juror No. 9 repeated that she was an alternate juror in the death penalty case and confirmed that as an alternate, she was not substituted in for one of the twelve jurors that started deliberations. (39RT 6338.)

Juror No. 9 explained that she failed to list her prior death penalty jury service on the court's questionnaire because, "I had just forgotten about it." (39RT 6339.) Juror No. 9 acknowledged that she had served on a total of three juries – the prior death penalty case, a personal injury case in 1992, and this case. (39RT 6340.)

The court asked Juror No. 9 when she first remembered having been a juror in the prior death penalty case. She responded: "Let's see. I don't know exactly when. I can't pinpoint time frame. It was not at the time that I filled out the jury questionnaire because it was lengthy. I was trying to get through it. I just didn't recall it at that time. It could have been months into it or weeks into it and I can't really say when." The court asked whether she remembered the previous death penalty case before or after she started hearing the evidence in this case. Juror no. 9 answered: "It was after. Maybe three or four weeks into it." (39RT 6342.)

The voir dire questions to other prospective jurors about their prior jury service did not jog Juror No. 9's memory of her service in the death penalty case. Next Juror No. 9 was asked: "When it came back to you during the presentation of evidence, did you have in mind at that time that you had been asked about that on the questionnaire?" She responded: "I didn't even remember it or recall every question that was on the questionnaire." (39RT 6343.)

The court asked Juror No. 9 this final question: "when you did recall it during the presentation of evidence, did you think that that was something you should report to the court or you just didn't think about it?" Juror No. 9 answered: "I just really honestly didn't think about it." (39RT 6343.)

Counsel's Argument and the Court's Ruling

In arguing Wilson's new trial motion to the court, Wilson's counsel stated that had he known about Juror No. 9's prior jury service on a death penalty case, he would have challenged her for cause, and failing there, he would have exercised a peremptory challenge against her: "Death penalty service was *way beyond* [service on a murder case]. Prior jury service on a death penalty case was an automatic peremptory challenge on that juror if we could not establish cause to get that person off." (39RT 6386, italics added; see also 40RT 6415 ["we would have peremptored her off because of her death penalty experience"].) Counsel feared that a juror with Juror No. 9's capital jury experience would engage in comparative analysis and that the juror would be more blase about the life or death penalty decision, having been through the process once before. (39RT 6387.) Such jurors would have had a "been there, done that" attitude about the process. (39RT 6388.) As reflected by the fact that the first prospective juror struck by the defense – Juror No. 12 – had been an alternate juror in a death penalty case, counsel argued that they would have had these concerns with Juror No. 9 even though she had been an alternate in the case because she still had gone through the penalty phase testimony and likely had some conclusions about whether the defendant in the prior case deserved the death penalty. (39RT 6390-6391.)

Counsel further argued that the question on the court's questionnaire clearly obligated the juror to reveal her prior experience as an alternate.

(39RT 6393-6394.) The call of the question was for jury experience, not for experience where the juror actually deliberated. (*Ibid.*) It was not likely that she had forgotten the service because service on a death penalty jury is something that even lay people remember for a lifetime. (40RT 6409.)

Counsel also pointed out that had Juror No. 9 revealed her prior service, he would have been able to question her about the likelihood that she would compare Wilson's case with her prior one; if she stated that she could not guarantee that she would not compare the two cases, then the defense would have had grounds to challenge her for cause. The fact that she did not reveal that she had previous death penalty jury service when she remembered it during trial showed that she intentionally kept this service from the court, which was evidence of her bias. Counsel urged that Juror No. 9's failure to reveal the service had to be taken in context: she had gone to college; she worked at a law firm where she looked at the meaning of various laws; and she swore to tell the truth on her jury questionnaire. (40RT 6405, 6407, 6411.)

The prosecutor argued that Juror No. 9 forgot about sitting through a death penalty trial because of its lack of importance to her, or as the prosecutor put it, "it was of *such minor consequence in her* life that she just forgot about it." (40RT 6433, italics added.)

The trial court denied Wilson's motion for a new trial. (40RT 6438.) Based on Juror No. 9's answer to the one question the court asked about her failure to disclose her prior capital jury experience on the court's questionnaire (39RT 6339 ["Was there some reason you didn't mention this other case?"]), the court found that Juror No. 9 was "very credible," and "that she was honestly in the position where she just honestly forgot about it. Based on the questioning that took place, she certainly didn't conceal it."

(39RT 6384; 40RT 6434, 6436.)

The court, however, did *not* believe the otherwise "very credible" Juror No. 9 when she testified under oath that she had previously served on a death penalty jury. According to the court, Juror No. 9 "hopped all over the place about whether it was even a murder case, then when she came in here suddenly it was a death case." (40RT 6424.) The court compared Juror No. 9's sworn testimony with defense counsel's declaration that on two occasions, Juror No. 9 said she sat on a death penalty jury, but also told defense counsel over the phone while not under oath that it was a murder case, the defendant was a juvenile, and the penalty was "LWOP." The court concluded that "since there is no way of verifying it from the jury commissioner, because they don't have records of her sitting on any such case, I'm just not in a position to resolve it." (40RT 6434-6435; see 6CT 1519.) In finding so, the court did not mention that Juror No. 9 also testified that during Wilson's trial, she remembered her prior service on a capital jury. Thus, those occasions when she told defense counsel about her previous death penalty jury duty were not the first two times she had thought about it. (39RT 6342.)

Next the court assumed for the sake of argument that Juror No. 9 sat on a death case. The court found it significant that she was an alternate 15 or 16 years before. The court agreed with the prosecutor's argument that Juror No. 9 forgot about her previous service because it was of such minor consequence in her life. The court then distinguished lawyers and judges from jurors: "Our world revolves around cases and we put a lot more importance on them than other people and they are very significant parts of our lives. I know probably none of us is probably ever going to forget this case, but for someone who sat as an alternate juror and who didn't have to

make that awesome decision as to whether or not to render a verdict of death, I certainly can easily see her forgetting that." (40RT 6433, 6435, italics added.)

Furthermore, the court found that Juror No. 9 was under no obligation to inform the court of her prior service when she remembered it during Wilson's trial because, the court believed, she had not been told to come forward: "nobody told her, you know, if some time during the course of the trial you think of something you forgot on voir dire, bring it up. [¶] So I don't find it particularly significant that during the trial she remembered it and didn't tell us." (40RT 6436.)

Accordingly, the court concluded that Juror No. 9's failure to disclose her prior service on a death penalty jury – first on the court's questionnaire, then during voir dire, and finally at trial – did not demonstrate actual bias on her part. Citing *In re Hamilton* (1999) 20 Cal.4th 273, the court denied Wilson's motion. (40RT 6437.)

C. Legal Standards

A criminal defendant has a federal and state constitutional right to an impartial jury, in which no member has been improperly influenced and each member decides the case solely on the evidence before it. (*In re Hamilton*, *supra*, 20 Cal.4th at pp. 293-294.) "[D]uring jury selection the parties have the right to challenge and excuse candidates who clearly or potentially cannot be fair. Voir dire is the crucial means for discovery of actual or potential juror bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully. A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*Id.* at p. 295, citations and internal quotation marks omitted.)

A juror's concealment of material facts on voir dire may be intentional (dishonest) or unintentional (mistaken or inadvertent). Courts do not accord the same effect to each, however. (*People v. Wilson* (2008) 44 Cal.4th 758, 823.)

A juror's intentional concealment of material information on voir dire establishes substantial grounds for inferring that the juror was biased and prejudged the case. (*In re Hitchings* (1993) 6 Cal.4th 97, 120, citing *People v. Morris* (1991) 53 Cal.3d 152, 183-184 ["Concealment by a potential juror constitutes implied bias justifying disqualification"]; *People v. Wilson*, *supra*, 44 Cal.4th at p. 823 [intentional concealment of material information by prospective juror may constitute implied bias justifying disqualification or removal].)

"[T]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code sections 1089 and [former] 1123 that he is unable to perform his duty." (*People v. San Nicholas* (2004) 34 Cal.4th 614, 644, citations and internal quotation marks omitted, brackets in original.)

Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are ordinarily matters within the discretion of the trial court. (*People v. San Nicholas*, *supra*, 34 Cal.4th at p. 644.)

D. Juror No. 9 Committed Misconduct by Intentionally Concealing Her Prior Service on a Capital Jury When She Remembered It During Trial.

It is undisputed that during trial, Juror No. 9 remembered her prior service on a death penalty jury. Yet, by choosing not to disclose it, she intentionally concealed it from the court and the parties. The trial court

found no misconduct on her part, however, because no one told her to disclose her prior service if she remembered it during trial. (40RT 6436.)

The court was mistaken. As explained in detail below, Juror No. 9 was effectively told to disclose her prior service if she remembered it later because the court's questionnaire asked her to disclose it, the questionnaire told her to provide accurate and complete answers, and she represented that her answer about her prior service was accurate and complete. When Juror No. 9 realized during trial that she had sat on a capital jury before, an important matter pertinent to her qualifications to serve on Wilson's jury, the questionnaire imposed on Juror No. 9 the duty to correct her incomplete and inaccurate questionnaire answer. In addition, whether or not the questionnaire expressly told Juror No. 9 to disclose her prior service when she remembered it during trial, she had the duty to disclose this critical information, which was highly relevant to Wilson's constitutional right to a fair and impartial jury. Therefore, Juror No. 9's intentional concealment of her previous service on a capital jury constituted misconduct, which manifested implied bias against Wilson and justified Juror No. 9's disqualification as a juror. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 823.)

"Voir dire is critical to assure that the Sixth Amendment right to a fair and impartial jury will be honored. 'Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141, quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) The "basic premise" of voir dire examination is that it "should include all questions necessary to insure the selection of a fair and impartial jury." (*Id.* at p. 143.)

This Court has advised trial judges to closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards of Judicial Administration to ensure that all appropriate areas of inquiry are covered in an appropriate manner. (*People v. Holt* (1997) 15 Cal.4th 619, 661.) "[T]o insure the selection of a fair and impartial jury" in a criminal case, one appropriate area of inquiry, as determined by the Judicial Council, is prior jury service in a criminal case. (Cal. Stds. Jud. Admin., §§ 8.5 (a)(2), (b)(10).)

Thus, the trial court asked prospective jurors in its questionnaire whether they had served on a criminal case. Specifically, the court asked if each prospective juror had "ever been a juror in the past," and offered an example of the information sought by the court: a 1985 criminal shoplifting case. (7CT 1846.)

Although she was aware that this is a criminal case, would later admit to having served as a juror in a criminal case, and presumably read the court's criminal case example, Juror No. 9 answered that she had only served in a civil case. (7CT 1838, 1846, 1855; *People v. Prince* (2007) 40 Cal.4th 1179, 1214 [presuming prospective jurors read and comply with jury questionnaire directions].)

When the trial court stated that no one told Juror No. 9 to bring up something she forgot on voir dire, the court may have had in mind an express instruction from the bench. Nevertheless, a fair interpretation of the jury questionnaire signed by Juror No. 9 under penalty of perjury shows that the questionnaire itself obligated Juror No. 9 to bring up any important matter she may have omitted from her answers, but then later recalled. And because the interpretation of a written instrument is a question of law, as here where extrinsic evidence is unnecessary to its interpretation, this Court

may independently review the questionnaire for its meaning, without deference to the trial court's apparent understanding of what the questionnaire required. Consequently, this Court should conclude that the questionnaire required Juror No. 9 to inform the trial court of any information she later recalled that made her answers true and complete. (*Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1170.)

Before prospective jurors filled in their questionnaires, the court instructed them on the need for *complete* answers. The court advised the prospective jurors to take their time, think about the questions, not rush, provide "complete" answers, and "fully explain" them. As a matter of caution, the court even asked prospective jurors if they understood the court's advice. (9RT 978.)

To underscore the seriousness of their undertaking, the court also made sure that prospective jurors understood that inaccurate or untrue answers could be a crime. (9RT 966.) The court further required prospective jurors to understand and agree under penalty of perjury that the questions asked of them concerned their qualifications to serve as jurors. (9RT 966-967.) Thus, prospective jurors reasonably understood that their answers could disqualify them as jurors in this matter.

The juror questionnaire in this case reflects that it is an official court document that impressed on prospective jurors the need for completeness, accuracy, and truthfulness. At the top of the first page of the questionnaire are the words, "Superior Court of the State of California." Although it is well known to members of the legal community that those words are used with virtually every paper filed with a superior court clerk's office, to a prospective juror the questionnaire would seem just as it is, a court communication with the questions those of the court. The bottom of the

first page implies as much where it requests a juror's phone number for use by the court and ensures that the phone number would remain confidential. (7CT 1838.) That a prospective juror would understand the questionnaire was a communication from the court was made plain by the fact that the judge's clerk distributed the questionnaire to prospective jurors and the judge explained its purpose. (9RT 962-963, 976-977.)

The first sentence of the questionnaire prominently states its purpose: "to obtain information regarding your qualifications to sit as a juror in a pending criminal case." The second paragraph reaffirmed the questionnaire's purpose: "to assist in selecting a qualified jury." (7CT 1838.) Thus, by page one of the questionnaire, the court had clearly informed prospective jurors that the purpose of providing answers on the questionnaire was to determine whether a prospective juror was qualified to serve as a juror in this case, and by implication, not qualified to sit as a juror in this case.

Consistent with the court's verbal advice, the questionnaire loudly proclaimed the requirement that answers must be complete. On the front page, it emphasized with underscoring that answers "must be completed under penalty of perjury." (7CT 1838.) In bold capital letters, the questionnaire further instructed: **"PLEASE GIVE *COMPLETE ANSWERS* UNDER OATH."** (*Ibid.*, italics added.) Finally, on the last page of the questionnaire were the following words, set forth entirely in bold, capital letters: **"I DECLARE UNDER PENALTY OF PERJURY THAT THE FORGOING ANSWERS ARE TRUE AND CORRECT, AND COMPLETE."** (7CT 1860.) The court could not have done more to emphasize to prospective jurors the importance of providing complete and truthful answers on their questionnaires.

Juror No. 9 indicated her understanding of the requirement that the questionnaire be completely filled in first by swearing an *oral* oath under penalty of perjury that her answers would be accurate and truthful (9RT 967), and then by swearing a *written* oath under penalty of perjury that her answers would be "true and correct, and complete." (7CT 1860.) Jurors are presumed to be intelligent and capable of understanding instructions, including as noted above, jury questionnaire directions. (*People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Prince*, *supra*, 40 Cal.4th at p. 1214 .) Nothing about Juror No. 9 rebutted this presumption. She was a 35-year-old, college-educated woman who worked in a law firm as a docket clerk, where she researched legal codes and interpreted rules of court, a challenge she enjoyed. (7CT 1839-1844.) With this background, Juror No. 9 gave every indication that she understood and accepted the court-imposed duty to make her questionnaire answers accurate and complete, while acknowledging at the same time that her answers could disqualify her as a juror.

In *People v. Prince*, *supra*, 40 Cal.4th 1179, the defendant argued on appeal that the trial court should have granted his motion for a change of venue. As part of its analysis, this Court "presume[d] that potential and seated jurors did not read or watch news reports concerning the case against defendant that may have been disseminated during jury selection and the ensuing trial, because the jury questionnaire directed potential jurors not to expose themselves to news coverage for the duration of their service." (*Id.* at p. 1214.) *Prince* was a capital case where the defendant was convicted of six counts of first degree murder. (*Id.* at p. 1189.) From jury selection through the penalty phase, the trial must have been quite lengthy. Yet this court presumed that for the length of the trial, the jury did not read or watch

news reports about the case because the jury questionnaire directed jurors not to expose themselves to news coverage. Similarly, based on the directions of the questionnaire in this case, this Court may fairly presume that jurors understood they had the duty to correct material mistakes made on their questionnaires.

In *People v. Carter* (2005) 36 Cal.4th 1114, the trial court failed to administer the oath of truthfulness to prospective jurors at the beginning of voir dire. Thus, nobody told the prospective jurors that they had to answer truthfully the questions at voir dire. But each prospective juror had previously filled out a questionnaire and signed it under penalty of perjury, which "undoubtedly impressed upon the prospective jurors the gravity of the matter before them and the importance of being truthful." (*Id.* at p. 1177.) "In view of the virtual certainty that these prospective jurors understood that they were required to answer truthfully the questionnaires, we reasonably may infer that the same prospective jurors similarly understood that they were required to respond truthfully to the questions posed during the voir dire examination – much of which was essentially a followup to the prospective jurors' answers given in response to the questions set forth in the questionnaires." Therefore, the Court concluded, "the jury understood that it was *required* to answer truthfully the questions posed during the voir dire examination." (*Ibid.*, italics added.)

Like the prospective jurors in *Carter*, Juror No. 9 filled out a questionnaire and signed it under penalty of perjury. And like the *Carter* prospective jurors, this undoubtedly impressed on Juror No. 9 the gravity of the matter before her and the importance of being truthful.

In view of the virtual certainty that Juror No. 9 understood she was required to answer truthfully the question on the questionnaire about her

prior jury service, this Court may reasonably infer that Juror No. 9 understood she was required to correct her incorrect answer when she thought about her prior jury service later during trial. And the fact that Juror No. 9 chose not to amend her earlier answer shows that she intended to conceal her prior capital jury service when she remembered it during trial.

This conclusion is not defeated by any finding by the trial court. Although the court expressly found credible Juror No. 9's explanation that she did not conceal anything on her questionnaire (40RT 6434 [Court: "I did find her credible, and I think I said so the day that she was here, and found that she had honestly failed to give the answer"]), the court made no similar finding with respect to Wilson's claim that Juror No. 9 concealed her prior capital jury service at the point when she remembered it during trial. The court had no reason to make a finding with respect to Juror No. 9's credibility at that point, because the court found instead that she had no duty to speak up in any case. (40RT 6436 [Court: "nobody told her, you know, if some time during the course of the trial you think of something you forgot on voir dire, bring it up. So I don't find it particularly significant that during the trial she remembered it and didn't tell us"].) Thus, her credibility was simply not a part of the court's analysis with respect to Wilson's claim that she had a duty to speak up and correct her earlier mistake, even though no one told her to bring it up.[51]

---

[51] After testifying that she remembered her prior capital jury experience during Wilson's trial, Juror No. 9 was asked and answered these two final questions: "When it came back to you during the presentation of evidence, did you have in mind at that time that you had been asked about that on the questionnaire?" Juror No. 9: "I didn't even remember it or

(continued...)

Penal Code section 1120 supports this conclusion. It provides: "If a juror has any personal knowledge respecting a fact in controversy in a cause, he or she must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact that could be evidence in the cause, as of his or her own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his or her discharge as a juror." Under section 1120, the Legislature has codified its view that a juror's personal knowledge of a disputed fact may implicate a defendant's constitutional right to a fair trial because the juror, "originally thought to be unbiased, actually cannot be fair and impartial" due to the juror's "knowledge respecting a fact in controversy." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 840.) Thus, under section 1120, a juror is expected to know, without being expressly told, of his or her obligation to "bring it up" to the court. Indeed, she must declare it in open court. (See, e.g., *Larios v. Superior Court* (1979) 24 Cal.3d 324, 327-328 [deliberating juror triggered section 1120 when he "passed the trial judge a note asking if it were

---

[51](...continued)
recall every question that was on the questionnaire." "Did you think that – when you did recall it during the presentation of evidence, did you think that that was something you should report to the court or you just didn't think about it?" Juror No. 9: "I just really honestly didn't think about it." (39RT 6343.) The court's ruling did not address Juror No. 9's penultimate answer. Thus, the court made no credibility finding regarding Juror No. 9's assertion that she did not remember the questionnaire asking about prior jury experience. As for Juror No. 9's final response, the court's ruling implies that Juror No. 9 had no duty to correct her incorrect questionnaire answer unless she was told to do so.

possible to consider information which was not submitted at trial"].)

Similarly, Juror No. 9 was expected to know of her obligation to declare to the court what she remembered during Wilson's trial, in order to correct her earlier mistake. Indeed Juror No. 9 had a greater obligation to bring it up because she had earlier promised under penalty of perjury – twice – to make her answers complete, accurate, and true, and specifically to tell the court of each time she had previously been a juror. Furthermore, to impress upon prospective jurors the need to be sure their questionnaire answers were correct, Juror No. 9 and the others were subject to criminal prosecution if the answers were not. Simply as a matter of common sense and practicalities, a prospective juror would likely prefer to correct a mistake on a questionnaire than leave oneself exposed to criminal prosecution.

In addition, as an officer of the court, Juror No. 9 had a duty to correct her mistake. Almost 100 years ago, the United States Supreme Court recognized that jurors are officers of the court while they hold that position. (*McDonald v. Pless* (1915) 238 U.S. 264, 266.) Relying on this recognition, Justice Cardozo compared sworn jurors to attorneys in *Clark v. United States* (1933) 289 U.S. 1, where the Court affirmed a juror's criminal contempt conviction for falsely answering voir dire questions "affecting her qualifications as a juror." (*Id.* at pp. 6, 12.)

Here, too, Juror No. 9 incorrectly answered a voir dire question affecting her qualifications as a juror. And similar to the juror in *Clark*, whom the Court there viewed as an officer of the court like an attorney, Juror No. 9 "must submit to like restraints." (*Clark v. United States*, *supra*, 289 U.S. at p. 12.) For example, as an officer of the court, a lawyer must not allow untrue statements to the court to remain uncorrected, even though

the lawyer is unaware they are false when first presented. (*Olguin v. State Bar* (1980) 28 Cal.3d 195, 199 [although lawyer does not know at time that fabrications are false when presented, continuing to assert their authenticity after learning of falsity violates duty not to mislead court].) Juror No. 9 continued to act as a qualified juror while knowing that she provided an incorrect answer affecting her very ability to qualify as a juror. As an officer of the court, Juror No. 9 had a duty to correct her mistake.[52]

In *United States v. Furlong* (7th Cir. 1952) 194 F.2d 1, the appellate court addressed whether a juror should have informed a court during trial that she had read about one of the defendants in the newspaper. Although the Seventh Circuit recognized that it might be too much to ask a lay person to realize her duty in this respect, the court nonetheless opined, "obviously, if she had forgotten the incident until after she became a juror and she then recalled it, it was her duty to inform the court of her remembrance." (*Id.* at p. 5.)

Juror No. 9's circumstance is akin to a prospective juror who, during voir dire, reviewed the names of potential prosecution witnesses listed in a jury questionnaire, did not recognize the name of a police officer with whom the prospective juror had an unfortunate encounter in a traffic stop, and then as a seated juror recognized the officer when the officer later

---

[52] Juror No. 9's duty to correct her mistake is consistent with California law in a different context. "Although a duty to disclose a material fact normally arises only where there exists a confidential relation between the parties or other special circumstances require disclosure, where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. One who is asked for or volunteers information must be truthful . . . ." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 201, citation omitted.)

testified. Should the juror inform the court of the belated recognition, even though no one expressly informed the juror to do so? Clearly, if *unbiased juror* is to have meaning, the answer is yes.

In sum, so long as a juror may be replaced by an alternate juror, that is, so long as trial lasts, the juror has a duty to correct any material misstatements made during voir dire. Contrary to the trial court's apparent view, that duty does not expire once the prospective juror has sworn under penalty of perjury that all voir dire statements are true, correct and complete.

Accordingly, when Juror No. 9 remembered during trial that she had served before on a death penalty jury and she chose not to disclose this to the court, she violated her duty to provide true, correct and complete voir dire answers, an ongoing duty she expressly accepted when she took an oral oath to tell the truth and signed her questionnaire under penalty of perjury, and a duty from which she was not relieved while trial proceeded. And by failing to disclose her prior service on a capital jury, Juror No. 9 intentionally concealed it, constituting implied bias against Wilson and warranting Juror No. 9's disqualification as a juror. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 823.) The trial court erred by denying Wilson's motion for a new trial based on Juror No. 9's misconduct.

E. Juror No. 9's Presence on Wilson's Jury Was a Structural Defect that Requires a New Trial; If Not, Prejudice Has Not Been Rebutted.

The Sixth Amendment guarantees a criminal defendant a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Wilson's right to a fair trial. (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 (en banc).) Therefore, the presence of a biased

juror cannot be harmless and requires a new trial without a showing of actual prejudice. (*Id.* at p. 973, fn. 2.) Like a judge who is biased (see *Tumey v. Ohio* (1927) 273 U.S. 510, 535), the presence of a biased juror introduces a structural defect not subject to harmless error analysis. (*Ibid.*) As this Court has affirmed: "If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler* (1997) 16 Cal.4th 561, 579.) Hence, Juror No. 9's presence on Wilson's jury warrants a new trial.

Assuming that Juror No. 9's concealment of information about her prior jury service only raised a presumption of prejudice (*People v. Carter*, *supra*, 36 Cal.4th at p. 1208), such presumption has not been rebutted. First, the presumption is particularly strong in a death penalty case. (*In re Stankewitz* (1985) 40 Cal.3d 399, 402.) Second, the issue on which she concealed information was critical to her ability to fairly evaluate the evidence the defense presented at the penalty phase. (See *People v. Blackwell* (1987) 191 Cal.App.3d 925, 931 [prejudice from juror concealment not rebutted because the concealment went to juror's ability to assess issues central to the case].) As defense counsel argued below, it is human nature to compare levels of culpability in determining the appropriate penalty. Wilson's counsel was at a serious disadvantage because they had no means to answer evidence to which only Juror No. 9 was exposed. Finally, Juror No. 9 deliberately failed to reveal critical information, strongly suggesting a secret agenda and actual bias against Wilson. (See *In re Hitchings*, *supra*, 6 Cal.4th at p. 121 [presumption of

prejudice where juror actively concealed information on voir dire was unrebutted where it was likely that the juror prejudged the case].) The prejudice is not rebutted, and reversal is required.

//

//

8.

THE TRIAL COURT'S FAILURE TO ADEQUATELY INQUIRE INTO MULTIPLE INSTANCES OF JUROR MISCONDUCT REQUIRES A REMAND FOR A FULL EVIDENTIARY HEARING ON WILSON'S MOTION FOR A NEW TRIAL.

Posttrial investigation revealed numerous instances of possible juror misconduct during penalty phase deliberations at Wilson's trial. First, there was the possibility that a juror had switched his vote from life to death and violated the court's instruction to give his individual opinion about the penalty. Second, it appeared that one juror brought into the jury room emotional outside information regarding killings in Atlanta. This information could have been the determining factor in holdout jurors' switching votes from life to death. Third and fourth, there were indications that jurors improperly discussed evidence of the cost of life imprisonment and that one juror voted for death, and urged holdout jurors to do the same, simply because the defendants had killed. At no point did the trial judge permit defense counsel to do a full investigation of this misconduct. Instead, the court held a truncated hearing, calling a few jurors and limiting the questioning. Even when confronted with new information showing additional, more serious misconduct, the court refused to allow any investigation at all.

The trial court's failure to investigate the possible misconduct violated Wilson's rights to trial by a fair and impartial jury, to a judge tasked with the responsibility of assuring the defendant a fair trial, to the effective assistance of counsel, to due process and to a reliable penalty determination. The abbreviated inquiry also denied Wilson's right to a full and fair opportunity to develop his new trial motion and deprived him of due process of law. (U.S. Const., 6th, 8th, 14th Amends; Cal. Const., art. I,

§§ 15, 16, 17.) The matter should be remanded with instructions that the court conduct a full hearing where Wilson is permitted to call and examine jurors with possible knowledge of juror misconduct.

A. Posttrial Jury Investigation Uncovered Numerous Instances of Misconduct.

1. Background – Difficult Penalty Phase Deliberations

Penalty phase deliberations began on Tuesday, July 27, 1999. (5CT 1343.) On Wednesday, July 28, when deliberations continued, there were indications that they were difficult. That morning, Juror No. 10[53] sent in a note that he had "time constraints." (5CT 1349.) No. 10 wrote that there were people on the jury who were simply wasting time because they did not want to go back to work: "[S]ome jurors are deliberately trying to string this out because they have unlimited time and are not ready to return yet. This is very unfair to the three of us that's retired." (35RT 5973; 21CT 5705.) This juror was upset because he had airline tickets for August 2. (*Ibid.*) After that note, the jury foreperson, Juror No. 3,[54] sent out a note that the jurors had made progress but were exhausted and asked to be excused for the rest of the day (21CT 5706), which request the trial court granted. (5CT 1349.)

The jury deliberated again beginning on Thursday morning. (35RT 5971.) There was more trouble: Juror No. 3 sent out a note stating that the jury was deadlocked, after several open and closed ballots. (21CT 5708; 35RT 5978.) In open court, the foreperson reported that at first they were fluctuating back and forth, but now they were "to the point where we can't

---

[53] Juror No. 10 had been assigned identification number 980401998. (22CT 5773.)

[54] Juror No. 3 had been assigned identification number 980457980. (22CT 5773.)

change any more minds." The foreperson agreed when the judge asked a leading question as to whether there had been some progress during deliberations. (35RT 5979 [Court: "But there has been some progress during your deliberations?" Foreperson: "Yes, your Honor."].) The jury was split nine to three for one defendant, and five to seven for the other. (35RT 5980, 5984.) Unsolicited by the court, Juror No. 10 also submitted a note stating that he "should be able to resolve the matter [about the airline ticket date] in the jury room." (22CT 5709.)

Deliberations continued on Friday, July 30, 1999. That afternoon, Juror No. 10, not the foreperson as might be expected, sent a note to the judge that "some progress is being [made]. However, we are still deadlocked." (22CT 5710.) Later, the judge brought Juror No. 10 into court. No. 10 reported that he could deliberate until August 2 despite his airline troubles and still be fair. He also noted that the same people were "pretty set," but they were making progress. (35RT 6022.) The jury was excused at 1:30 p.m. (5CT 1372.) On Monday, August 2, 1999, the jury resumed deliberations at 1:30 p.m. (6CT 1374.) At some point that day, Juror No. 10 sent the judge a note about his travel problems. He had been able to work out a deal with the airline over the weekend: "(In the event I'm unable to travel on Aug 2) I can have the same discounted rate however I would have to wait seven (7) days before I can travel." (22CT 5770; 36RT 6034.) At 1:42 p.m. the jury signaled to the court that they had reached a verdict. (6CT 1374-1375; 36RT 6042-6043.)

2. Initial Contacts With Jurors – Post August 2, 1999

After the penalty phase verdict, counsel for Pops contacted some jurors by telephone. (4CTSupp 2.) In those conversations, the jurors

revealed possible instances of misconduct. Juror No. 7[55] told counsel that on the Friday prior to the verdict (July 30, 1999), Juror No. 6 was one of the jurors voting for life without the possibility of parole. (*Ibid.*) Juror No. 6 told No. 7 that her mind was changed to vote for death "when she viewed the incident involving Mark Orrin Barton on television. He was the stock trader who killed 12 people and then shot himself on July 29, 1999." (*Ibid.*) She said that she thought what Barton did was horrible, and she thought that he deserved the death penalty. When she compared Barton with the defendants, she thought that the defendants should get death. (*Ibid.*) According to Juror No. 7, Juror No. 6 could not see a difference between this case and Barton's. (4CTSupp 3.) Juror No. 7 also told counsel that Juror No. 12 also changed his mind from life to death *after* No. 6 said that she had changed her vote because of the shootings in Atlanta. (4CTSupp 3.) Juror No. 7 indicated he was willing to talk with counsel again. (*Ibid.*)

3. The Court's "No Contact Order" – August 23, 1999

Counsel wished to speak with Juror No. 7 again, in part to talk with her about the emotional impact the Atlanta evidence had on Juror No. 6. (4CTSupp 3.) However, no one from the defense ever got a chance to talk with No. 7 again. On August 23, 1999, the trial court ordered that counsel not contact the jurors: "The Court makes this order because it has been notified that jurors in this case have been contacted by counsel." The judge cited *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, as authority for the order. (6CT 1451.) Later, the Court explained that it had been contacted by a juror who complained about being contacted. (37RT 6056.)

In a pleading filed October 4, 1999, counsel explained that because of the order it had been unable to confirm the information from Juror No. 7

---

[55] Juror No. 7 had been assigned identification number 983851503. (22CT 5773.)

about Juror Nos. 6 and 12. (4CTSupp 3.) Counsel petitioned for access to the jurors, arguing that they had the right to contact the jurors to do an investigation on the ground that there was a reasonable possibility that misconduct had occurred.[56] (*Ibid.*) In a hearing on October 8, 1999, counsel requested that the *Townsel* order be lifted and that the defense be permitted to speak to any of the jurors who indicated a willingness to talk. (37RT 6064.) The trial court denied defense counsel's request. (37RT 6076.) Instead, rejecting a defense argument that bringing jurors to court would intimidate them (37RT 6066), the trial court ruled that the two jurors would testify. (37RT 6075.)

4. Juror Nos. 6 and 7's Testimony – October 22, 1999

On October 22, 1999, Juror No. 7 testified about what happened during deliberations. (37RT 6100-6127.) On Friday (July 29), the vote was 9-3 as to Wilson and 11-1 as to co-defendant Pops.[57] (37RT 6102-6103.) Immediately upon reconvening on the afternoon of August 2, 1999, the jurors took a poll which resulted in a unanimous verdict of death as to Wilson and co-defendant Pops. (37RT 6103-6104.) He stated that there was no discussion before the vote. (37RT 6113.) After the vote, the jurors decided to talk about what had changed their minds. Juror No. 7 testified that Juror No. 6 said "that the Atlanta shooting influenced her as far as [it] changed her mind as far as thinking that they deserved the death penalty and [it] made her take a closer look at the case that she was on." (37RT 6106.)

Juror No.7 recalled Juror No. 12 admitting at some point in the week

---

[56] The petition for juror access was filed by counsel for Pops. Wilson's counsel joined the request on October 8, 1999. (37RT 6048.)

[57] Although Juror No. 7 was not asked whether she was one of the hold-outs, later information (from Juror No. 1) revealed that No. 7 voted for life for Wilson and was back and forth on penalty for Pops. (6CT 1562.)

prior to the verdict that whichever way the vote went he would not hold out. Juror No. 7 also testified that No. 12 said the following:

> THE WITNESS [Juror No. 7]: Okay. He [Juror No. 12] stated himself that either way he would not hold out. He felt that life imprisonment was a severe enough punishment, but if the entire jury voted for the death penalty, he would not hold out as far as life imprisonment. He would agree to death.
>
> MS. JONES [Pops's counsel]: And at what point did he say that?
>
> THE WITNESS: He said that prior to the deliberations on Monday. He said that in the prior week.
>
> MS. JONES: Did you understand him to be saying that he would go whichever way the majority went?
>
> THE WITNESS: Pretty much. That was the impression I got.

(37RT 6111-6112.)

Upon further questioning the juror also stated: "I believe [No.12's] statement was if it ever came to eleven to one and he was the only holdout he would not hold out. He would not hold up the jury and hold out. He would go ahead and agree to what the decision was." (37RT 6117.) Juror No. 7 denied his previous statement that Juror No. 12 changed his mind about whether to vote for life *after* Juror No. 6 made statements about Atlanta. (37RT 6113.) Juror No. 7 could not say whether No. 12 was refusing to exercise his independent judgment. (37RT 6119.) However, when the Court asked Juror No. 7 a leading question, No.7 answered "Yes" to the Court's assertion that Juror No. 12 "appeared to be actively analyzing the issues pro and con." (37RT 6120.) No. 7 also mentioned that he spoke to No. 6 and with several other jurors about the hearing on misconduct. (37RT 6125.)

Juror No. 6[58] testified after Juror No. 7. She admitted that she heard something in the news about the Atlanta murders the week prior to the final vote. (37RT 6151.) She confirmed that she was one of the jurors who changed her position over the weekend, and that she had previously been a holdout for life. She recalled that the first thing they did on August 2 was take a vote and it was unanimous for death. (37RT 6141.) She did not think there was a discussion of the Atlanta shootings at that time. (*Ibid.*) She also testified that she explained to the other jurors why she changed her mind. However, she asserted that she could not recall what she said or the explanation she gave the other jurors as to why she changed her mind. (*Ibid.*) She stated that she had said something about the Atlanta shootings, "that I remember hearing something about it on the news and about how somebody can just go in there and just, you know, kill innocent people, that had nothing to do with what he was feeling. Something to that effect. I'm not sure quite what my words were." (37RT 6141.) She got emotional about this – these kinds of things made her sad. (37RT 6144.) She also testified: "Well, I'm a very emotional person so, I guess, anything that's – every time that something like that happens, I guess, I get, you know – I think about it and I guess I sometimes tend to dwell on it a little bit. I do. I think about it. I think it's kind of sad that these things happen." (37RT 6144.)

However, she stated that she was not impacted on Monday (the day of the final vote). (37RT 6218.) She could not recall whether during deliberations in the penalty phase she discussed the Atlanta shooting. (37RT 6152.) Nor was she able to recall why she brought up the Atlanta shooting. (37RT 6153.) Trial counsel asked the judge to inquire whether

---

[58] Juror No. 6 was assigned the identification number 980429219. (22CT 5773.)

she considered bringing her exposure to the Atlanta murders to the attention of the court. However, the judge refused. (37RT 6146.) He also refused to let counsel follow up with No. 6 about Juror No. 7's statement that the Atlanta shootings influenced her to vote for the death penalty. (37RT 6147.)

On November 3, 1999, counsel filed a motion to interview the remaining jurors. (4CTSupp 7-11[59].) Counsel argued that No. 12's statements, assuming he made the statements attributed to him, showed that he violated the court's order to give his individual opinion about the penalty. (4CTSupp 9.) Counsel also pointed out that there was conflicting information from Juror Nos. 6 and 7 about what Juror No. 6 said about the Atlanta shootings and that they needed to talk to other jurors to clear this up. (4CTSupp 10.) At a hearing following the testimony (on November 5, 1999), defense counsel objected that because they had never been allowed to interview Juror No. 6, they could not get the information they needed to answer the questions about her possible misconduct. The courtroom forum made it impossible to probe to get information. (38RT 6200.)

5. December 3, 1999 – Juror No. 12's Testimony

Juror No. 12 testified on December 3, 1999, with the trial judge doing the questioning. Prior to this testimony, defense counsel asked that the order forbidding them from contacting jurors be lifted. The court denied the request. (39RT 6247.) Later, just before Juror No. 12 was brought in, counsel sought permission to pose questions to the juror, without limitation on subject or admissibility, on the grounds that since the court had denied access to the jurors, this was their one and only

---

[59] The written motion was filed by Pops's attorneys. (4CT Supp 7-11.) Wilson's counsel joined the request on November 5, 1999. (38RT 6210.)

opportunity to pose questions to the jury. (39RT 6261-6262.) The trial court denied the request. (39RT 6262-6263.)

Juror No. 12's account of the events during jury deliberations did not correspond to that of the other jurors. Juror No. 12 testified that on Friday, July 30, the jury stood in a vote of nine to three for death as to each defendant. (39RT 6267.) He was one of the three holdouts. (39RT 6268.) When they came back the next Monday in the afternoon, they took a vote right away. He recalled that the vote was in writing. There were no deliberations about the vote. (*Ibid.*) They were still nine to three after the vote. (39RT 6268.) This contradicted the testimony of the other jurors that the vote was unanimous. They talked after the first vote. (39RT 6269.) Juror No. 12 testified that at some point: "I said that if I were the only hold out I would go with the death penalty, rather than be alone, if it came out eleven to one." (*Ibid.*) He testified that he said that he would go with the majority because he was "influenced by the expressed feelings of the majority," and because of "the heinousness of the crime," especially considering the pictures of the slain men. Referring to those pictures, he said: "[a]nd I could see where this was – how others felt about it and I didn't want to be alone in my feelings." (*Ibid.*) There was then a leading question from the court about what happened next:

> THE COURT: You're not saying you just went along with the others.
>
> JUROR NO. 12: No.

(*Ibid.*) Without the call of a question from the court, Juror No. 12 then stated: "No. I listened carefully to what – and I was especially listening to the two that changed their votes . . . and the reasons why." (39RT 6239-6240.) He stated that the jury went carefully over the testimony to figure out how it fit into the guilty verdicts. (39RT 6240.) Juror No. 12 agreed

that the other two holdouts changed their minds, but he did not recall why, other than that he thought that all three of them were influenced by the cold-blooded nature of the killings and the fact that aggravation outweighed mitigation. (39RT 6271.)

When asked a second time about when Juror No. 12 said that he did not want to be the lone holdout vote, No. 12 stated that he did not recall when he said it. Then in response to the court's leading question – "So you could have said it Monday or it could have been the previous week? – the juror followed the court's lead by replying, "It could have been, yes." (39RT 6276.) After the final twelve to zero vote for death, Juror No. 12 did not recall a discussion about why people changed their minds, other than that they were satisfied that they deliberated. (39RT 6277.) Juror No. 12 did not recall any discussion about the Atlanta shootings. (39RT 6278.)

After No. 12's testimony, counsel asked the court to rescind the order that they could not talk to other jurors, arguing that the trial court should not have made the order in the first place. (39RT 6281.) The trial judge stated he would send letters to jurors asking whether they would make themselves available to counsel for an interview. (39RT 6304; 6CT 1511.) At a hearing on January 14, 2000, it was revealed that the court was able to contact all but one of the jurors. The judge's clerk related that he could not contact No. 11. He stated that a friend of No. 11's said that No. 11 was out of town. (39RT 6309, 6315.) The trial court denied Wilson's request for information about the friend so that the defense could contact the friend and No. 11. The court offered that there had been nothing so far in the case that showed that No. 11 had committed any misconduct.[60] (39RT 6317-6318.)

---

[60] Counsel for Pops incorrectly identified No. 11 as the juror who sent in the note stating that the other jurors were "dragging their heels."

(continued...)

6. Interview of Juror No. 1 – March 1, 2000

Counsel for Wilson and co-defendant Pops both spoke with Juror No. 1[61] on March 1, 2000. (6CT 1562 [counsel's declaration].) Juror No. 1 had additional information about what happened with Nos. 6 and 12. She told them that on the Friday before the verdict, Juror Nos. 6 and 12 were voting for life for both defendants. Juror No. 7 voted for life for Wilson and was back and forth for life for co-defendant Pops. On the day the jury returned its verdict, prior to any deliberations, the jurors took a vote, which was unanimous for death for both defendants. After the vote, the jurors asked No. 6 why she changed her vote. She said that the Atlanta shootings made her realize that she had to put her personal beliefs aside. (6CT 1562.) She said that she became emotional over Atlanta because of the loss the families of the deceased must have felt – the shooting made her "realize that she was feeling sympathy for the loss that the families of Pops and Wilson would feel if she voted for death." (*Ibid.*) No. 12 said that he could vote for life or death. He was comfortable with either one. If everyone voted for death, he would be comfortable with that. If everyone voted for life, he would be comfortable with that. (6CT 1567.)

According to Juror No. 1, Juror No. 10 told jurors that where he came from, if you kill someone then you are killed. If someone steals, then a hand is cut off. He voted for death. One of the jurors, either No. 10 or No. 11, asked why should the defendants sit in jail while we pay for it. After that interview, counsel asked if Juror No. 1 would sign a declaration. (6CT 1563.) Several attempts were made to contact her. (*Ibid.*; 6CT 1540.) Ultimately, the juror indicated she did not want to have any more contact

---

[60](...continued)
(39RT 6917.) This was not No. 11. It was Juror No. 10. (5CT 1359.)

[61] Juror No. 1 was assigned the number 983851503. (22CT 5773.)

with the case. (6CT 1563.) Counsel requested that Juror No. 1 be required to testify and that the sentencing proceedings be continued so that the investigation could continue. (6T 1561, 1564.)

7. Motions and Additional Objections

On February 29, 2000, Pops filed a motion for new trial (joined in by Wilson), set for hearing on March 24, 2000, on the grounds that Juror No. 12 went along with the majority in violation of his obligation to weigh the evidence. Alternately, Juror No. 12 relied on Juror No. 6's statements about the Atlanta killings, which were not in evidence at the trial, also in violation of his oath. (6CT 1545-1550; 39RT 6375.) Counsel again objected to the trial court's refusal to let anyone from the defense team speak to the jurors, noting that the court's leading manner in questioning Juror No. 12 had predictably caused the juror to deny misconduct, thus tainting his answer. It was clear that without this question "the juror was unable to stand on his own." (6CT 1548.) As to Juror No. 6, counsel argued that she relied on the events of the Atlanta shooting, which were not in evidence, in violation of the defendants' right to a fair trial. (6CT 1548.)

At the March 24, 2000 hearing, counsel pointed out that Juror No. 1 had important information about the issues other jurors had testified about. Juror No. 1 contradicted what Juror No. 12 had previously said about whether he would vote for death depending upon what others did. (39RT 6352.) Juror No. 1 also provided information about the Atlanta shootings, which Juror No. 6 said "caused the juror to change her mind." Finally, Juror No. 1 had information about other possible misconduct, i.e., information about possibly improper statements Juror No. 10 made that in his country, people who killed other people were killed, and information that one of the jurors mentioned that he did not think society should pay for the defendants' being in prison. (39RT 6352-6253.)

The trial judge denied the request for continuation of the sentencing, stating that he believed that the remarks from No. 10 or No. 11 were only passing comments, and that if there was additional information to be had about the juror then the defense attorneys would have brought it up.[62] (39RT 6372.) The court did not want to drag in a reluctant juror. (*Ibid.*)

The court did not rule on this motion for a new trial. (39RT 6375 [Pops's counsel reminding court that it had not "actually ruled on it"]; Wilson's counsel, "we would be joining on *that* motion for new trial," (italics added)].) Although at the next hearing date on April 7, 2000, the court stated, "I'm prepared to deny all the motions," the court's comment did not refer to this motion for a new trial. (40RT 6438.) As reflected in the court's April 7 minute order, the court's comment referred to two other motions for a new trial that were argued on April 7. (6CT 1525; 7CT 1682, 1694 ["Defense motion for new trial, based on allegation regarding Juror Number Nine, is argued and denied. Defense motion for new trial, based on allegation that jurors deliberated individually over a weekend, despite the jury's admonition, is denied"].)

B. The Right to a Fair Trial Required That the Court Conduct an Adequate Inquiry into Wilson's Allegations of Jury Misconduct.

1. The Trial Court's Duties

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant in state court a fair trial by a panel of impartial, indifferent jurors who reach a verdict based on the

---

[62] The request was made as part of a motion by Pops to continue the proceedings. Wilson joined in the request on March 24, 2000. (39RT 6346.) Counsel for Wilson also made a written application for a continuance on the grounds that additional investigation was needed. (6CT 15396CT 1539.) In a declaration accompanying that request, he included information about Juror No. 1's refusal to meet with counsel. (6CT 1540.)

evidence developed at the trial and not from extraneous sources. Calm and informed judgment by jurors is essential to a fair trial as well. (*Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 551; *Turner v. Louisiana* (1965) 379 U.S. 466, 471-473.) Because a criminal defendant in California is entitled to be tried by 12 impartial and unprejudiced jurors, and any verdict must be unanimous, a conviction cannot stand if even a single juror has been improperly influenced by extraneous sources. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

When the defense presents evidence only discovered posttrial that demonstrates a strong possibility that prejudicial juror misconduct has occurred, the trial court should exercise its discretion and hold an evidentiary hearing to resolve any material, factual disputes. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) In exercising its discretion to conduct an evidentiary hearing, the court also has discretion to permit the parties to call jurors to testify at such a hearing. (*People v. Avila* (2006) 38 Cal.4th 491, 604, citing *People v. Hedgecock* (1990) 51 Cal.3d 395, 419.)

2. The Trial Court's Failure to Insure That Allegations of Misconduct Were Adequately Investigated Was an Abuse of Discretion.

After receiving evidence showing a strong possibility of juror misconduct, the trial court held an evidentiary hearing to investigate Wilson's allegations. Nevertheless, the court abused its discretion in failing to examine enough jurors, especially Juror No. 1, while at the same time prohibiting Wilson from calling any jurors, to resolve the truth or falsity of the allegations. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 809; *People v. Avila*, *supra*, 38 Cal.4th at p. 604; see *People v. Cowan* (2010) 50 Cal.4th 401, 506-507 [during trial, court has sua sponte duty to conduct "adequate inquiry" when court possesses information that might constitute good cause to remove juror]; *People v. Adcox* (1988) 47 Cal.3d 207, 253 [during trial

"ultimate responsibility [is] upon the court to make [an] inquiry" when "alerted to facts suggestive of potential misconduct"]; *People v. Burgener* (1986) 41 Cal.3d 505, 520 [during trial "once the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged"]; *id.* at p. 519 ["an inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist"]; see also *People v. Staten* (2000) 24 Cal.4th 434, 465 [addressing defendant's posttrial assertion that court erred in failing to order an evidentiary hearing to investigate possible jury misconduct].)

The trial court knew that Juror No. 6 had brought in information about the Atlanta shootings right around the time when there were jurors holding out for life. A juror commits misconduct by receiving information – not part of the evidence at trial – obtained from extraneous sources. (See, e.g., *People v. Danks* (2004) 32 Cal.4th 269, 303-304 [unsolicited comments received by juror from juror's pastor during deliberations, juror's conversation with her pastor, and introduction of Bible passages to jury room, all constitute misconduct].) Furthermore, a jury's verdict must be based upon the evidence presented at trial, not on extrinsic matters. (*People v. Wilson* (2008) 44 Cal.4th 758, 820.)

There was no evidence of the Atlanta shooting presented at Wilson's trial, so consideration of the information would have been improper. The trial judge also had evidence that there was a significant possibility that another one of the jurors, Juror No. 12, had changed his vote because of the improper information. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 829; *People* v. *Martinez* (1978) 82 Cal.App.3d. 1, 21.) This should have suggested to the judge that what No. 6 did was prejudicial. As such, the

trial judge should have conducted an inquiry to find out whether there was a connection between No. 6's bringing the information about the Atlanta shootings into jury deliberations and the possibility that the holdout jurors were put under inappropriate pressure to switch their votes.

The trial judge also knew that there was a distinct possibility that Juror No. 12 ultimately failed to deliberate and decide the case for himself based solely upon the evidence, as he had been instructed. (29RT 4799-4800 ["Both the people and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. *Each of you must decide the case for yourself*" (italics added)]; 35RT 5953 ["you must now determine which of these penalties shall be imposed on each defendant"]; 35RT 5954 ["Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law and exercise your discretion conscientiously, and reach a just verdict"]; 35RT 5963-5964 ["It is now your duty to determine *which of the two penalties*, death or life in confinement in the state prison for life without the possibility of parole, shall be imposed on each defendant," (italics added)]; CALJIC Nos. 8.84, 8.84.1, 8.88, 17.40].)

It is misconduct for a juror to disregard a court's instruction. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425 ["by violating the trial court's instruction not to discuss defendant's failure to testify, the jury committed misconduct"]; *People v. Hord* (1993) 15 Cal.App.4th 711, 721, 725 [juror misconduct to violate court's instructions both by commenting on defendant's not testifying and his sentence]; *People v. Hill* (1992) 3 Cal.App.4th 16, 34 [disregarding court's instruction not to discuss penalty or punishment constitutes juror misconduct].)

In *People v. Wilson* (2008) 43 Cal.4th 1, a juror admitted "that she

would go along with the other 11 jurors if they all agreed on a position, even if she strongly disagreed with them." (*Id.* at p. 26.) This Court affirmed the juror's discharge, while quoting *People v. Engelman* (2002) 28 Cal.4th 436, 442 ("juror who proposes to reach a verdict without respect to the law or the evidence" is subject to discharge) and *People v. Williams* (2001) 25 Cal.4th 441, 463 (juror is subject to discharge when he or she violates "basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law"). (*People v. Wilson*, *supra*, 43 Cal.4th at p. 26.)

Like the juror in *People v. Wilson*, *supra*, 43 Cal.4th at p. 26, Juror No. 12 said that he would go along with the other jurors if they all agreed on a position, whether that position was life or death. According to Juror 7, Juror No. 12 "felt that life imprisonment was a severe enough punishment, but if the entire jury voted for the death penalty, he would not hold out as far as life imprisonment." Furthermore, Juror No. 7 pretty much understood No. 12 "to be saying that he would go whichever way the majority went." (37RT 6111-6112, 6117.) As Juror No. 12 told the court, "I didn't want to be alone in my feelings, in my opinion." (39RT 6269.) And if Juror No. 1's report was accurate, that Juror No. 12 said in essence that he would go along with the other 11 regardless of the actual penalty (6CT 1567), then Juror No. 12 would have violated the court's instruction to return a judgment of death only if No. 12 was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (35RT 5965-5966.) A juror who is comfortable with life *or* death, as Juror No. 1 reported Juror No. 12 saying, necessarily fails to follow the court's instruction to find that aggravating circumstances outweigh mitigating circumstances before voting for death. (6CT 1567.)

If true, Juror No. 12's disregard of multiple instructions was clear misconduct. Juror No. 12 would obviously have been in violation of his oath sworn as a juror, and his misconduct would have been grounds for a new trial. (Pen. Code, § 1181 [new trial authorized where verdict decided by chance or by any "means other than a fair expression of opinion on the part of all the jurors"].)

The testimony of the jurors was a poor substitute for the interviews the attorneys were asking to do, at least given the manner in which the trial judge conducted the proceedings. In fact, the testimony given by the three jurors (Nos. 6, 7 and 12) did not clear up the facts – it just confused matters. There were numerous conflicts in the testimony. First, there were contradictory statements about what Juror No. 6 said about the Atlanta murders. Juror No. 6 said that she knew in her mind that the defendants deserved the death penalty, but she did not want to do it until she saw the Atlanta murders in the news, suggesting that it was not anything about the Atlanta murders that changed her mind and that she wanted the death penalty all along. (37RT 6218.) However, Juror No. 7 said that Juror No. 6 said that it was *because* of the Atlanta murders that she realized that the defendants needed to get the death penalty. (37RT 6106.) Second, there was a question about when Juror No. 6 talked about the Atlanta murders. Was it before or after the final vote for death? This was an important issue because there were holdouts for life. Juror No. 6 denied making the statements on Monday the day the vote was taken, suggesting that she made them on the previous Friday or earlier, when there were still holdouts. (37RT 6141.) No. 7 remembered that they were made on the day of the vote. (37RT 6106.) Juror No. 12 did not remember that they were made at all. (39RT 6278.)

There were also important contradictions about when the final vote

took place and what was said. Both Juror Nos. 6 and 7 said that there was only one vote on Monday and that was unanimous for death. (37RT 6103-6104; 37RT 6141.) However, Juror No. 12 said that there were two votes: at the first vote on Monday, there still was a split on the penalty. (39RT 6267.) There was a second vote and then only after the final decision were there discussions about what had changed people's minds. (39RT 6268.) Clarity about the timing of the vote was critical to the misconduct issue because such was needed to resolve whether No. 6 had talked about the Atlanta murders before the final vote and thus possibly improperly influenced the outcome. The timing issue was also critical to clear up whether No. 12 voted for death because he feared being the only vote for life. Juror No. 7 testified that No. 12 said that he would not be the only holdout. (37RT 6111-6112.) However, if there was no discussion before the vote, then it was less likely that No. 12 would have voted for death as the only holdout since he would not have known that there were still holdouts. However, if there was a discussion before the final vote, as No. 12 testified (39RT 6269), then there was a possibility that he voted to avoid hanging the jury. In any case, the record shows that there were contradictions that needed to be resolved. Yet, the trial judge permitted no additional jurors to be called.

The trial court's obligation is to conduct an inquiry sufficient to determine the facts in dispute. (See *People v. Burgener*, *supra*, 41 Cal.3d at pp. 518-519.) However, the manner in which the court conducted the questioning of the jurors made the facts less, not more, clear. For example, with Juror No. 12 the main issue was whether he deliberated according to his oath, or threw up his hands and went with the majority. Instead of asking open-ended questions to explore what happened, the judge asked a leading question that signaled to the juror that the judge wanted him to say

that there was no way that he simply voted to go along with others. (39RT 6268.) After that question with the "right" answer, or at least the answer the court appeared to want, the details of what happened with Juror No. 12 could not be cleared up without doing further investigation. In any case, the court should not have relied simply on Juror No's 12 denial. Indeed, this Court has recognized that a juror's "general proclamation of fairmindedness [is] untrustworthy." (*People v. Williams* (1981) 29 Cal.3d 392, 410; see also *United States v. Brantley* (5th Cir. 1984) 733 F.2d 1429, 1440 ["a juror's denials of misconduct are an insufficient basis upon which to reject a claim of misconduct"].)

Later, the judge had additional information from the defense interview of Juror No. 1 showing that even more had gone wrong in the deliberations. Juror No. 1 had important contradicting information about Juror No. 12, for instance. She said that No. 12 said that he thought that either verdict was fine with him, depending upon what others did. This completely undercut what Juror No. 12 said in his testimony, suggested that he misrepresented what had happened in deliberations, and created a material dispute which the trial court had the obligation to resolve. (*People v. Yeoman* (2003) 31 Cal.4th 93, 163.) It makes no difference that the trial judge had previously gathered evidence about No. 12's behavior. If there is additional information about misconduct which casts a different light on the misconduct, the trial court has a duty to investigate, regardless of what previous investigation has been done. (*People v. Castorena* (1996) 47 Cal.App.4th 1051, 1057-1067.)

The court's given reason for not requiring Juror No. 1 to come into court and testify, i.e., that it did not want to drag her into court when she was reluctant to have anything else to do with the case (39RT 6372), was inadequate. The trial court clearly had the authority to require No. 1 to

come to court, whatever bad feelings she might have about it. (See *People v. Tuggles* (2009) 179 Cal.App.4th 339, 387 [court has authority to subpoena jurors to testify about misconduct].) Given that authority, whether or not Juror No. 1 was reluctant to come forward, her statements made it clear that her presence was necessary to resolve the issues about misconduct. She could have shed light on when Juror No. 6 made the statement about the Atlanta shootings and what effect it appeared to have on the deliberations, particularly on the holdouts. No. 1 also related the strange statement that No. 6 stated that she had to "put her personal beliefs aside" when she read about the Atlanta murder. (6CT 1562.)

More importantly, the information provided by No. 1 shows that there was possible significant misconduct during deliberations and gave all the more reason for the judge to have a comprehensive hearing about the misconduct. According to No. 1's information, there were one and possibly two jurors who appeared to argue for death based on impermissible factors – which they discussed in the jury room. According to No. 1, the jurors talked about the costs of incarceration. Such cost is not an aggravating circumstance to be considered by the jury in determining penalty since it is irrelevant to the sentencing decision. (*Spaziano v. Florida* (1984) 468 U.S. 447, 461-462 [questions of cost or deterrence are for the legislature not the jury]; *People v. Thompson* (1988) 45 Cal.3d 86, 132.) As in the case of Juror No. 12, it is misconduct for a juror to disregard a court's instruction. (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.) Thus, it is clearly misconduct to consider the cost of incarceration in deliberations about the death penalty, where as here, the court expressly instructed the jury not to consider "the monetary cost to the State of . . . maintaining a prisoner for life." (39RT 6353, 6372; 6CT 1394, 1561-1564, 1572; see *People v. Loker* (2008) 44 Cal.4th 691, 750 [affirming trial court holding that it was juror

misconduct to discuss the costs of the death penalty but finding misconduct harmless].) This was serious misconduct that needed further investigation.

Additionally the information from No. 1 made an inquiry into No. 10's behavior necessary. No. 1 said that No. 10 mentioned during deliberations that in his country those who kill are killed. It would have been improper for No. 10 to have been on the jury if he believed that those who kill should be killed. (*People v. Lewis* (2006) 39 Cal.4th 970, 1006 ["A prospective juror may be excused if his views would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and oath.' [citations]"].) The remark suggests that No. 10 was a biased juror who concealed his unwillingness to consider mitigation during voir dire. "A prospective juror's misstatement or concealment on voir dire of a material fact by itself undermines the selection and empanelment of unbiased jurors, and thus the Sixth Amendment right to an impartial jury, and constitutes misconduct." (*People v. Tate* (2010) 49 Cal.4th 635, 672.) Moreover, a juror's receipt of extraneous law, in this case the law of another country, is misconduct. (*People v. Marshall* (1990) 50 Cal.3d 907, 950.)

The new incidents the interview with Juror No. 1 uncovered, as well as the light she shed on what was happening with Nos. 6 and 12 (especially viewed in the context of difficult penalty deliberations), required a hearing because the defense had made a prima facie showing that there was a "strong possibility that there was misconduct" (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 163; *People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 380), and disputed facts (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 415). It would have been a simple matter to have No. 1 and No. 10 come to court. Instead of focusing on the information No. 1 presented, the court cited No. 1's reluctance and the attorneys' failure to already have previously uncovered

the information. Given the magnitude of the issues before the court, this was improper and a clear abuse of discretion, when the court's duty was to conduct whatever investigation was needed to protect Wilson's right to a fair trial.

The trial judge appears to have believed that he could not ask questions about what went on in the jury room because it was an improper inquiry into the jurors' thought process, which would be inadmissible under Evidence Code section 1150, subdivision (a).[63] However, the trial court was incorrect. It is clear that jurors may always testify to overt acts; this includes evidence of statements. (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.) In *People v. Perez* (1992) 4 Cal.App.4th 893, 908, the Court of Appeal held that evidence of a jury discussion of an improper topic is an overt act subject to judicial review, provided that it is not directed at the subjective reasoning process of an individual juror. (See *Tramell v. McDonald Douglass Corp.* (1984) 163 Cal.App.3d 157,172 [juror comments during deliberations regarding effect of attorney fees and income taxes on damage award "is overt conduct, objectively ascertainable"].) In this case, as pertains to Juror No. 6's statements about Atlanta, it was misconduct to bring this into the jury room, particularly if she was doing this to pressure other jurors. Statements made during deliberations about

---

[63] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Defense counsel submitted briefing on why the statute was not violated by discussion of the impact of the Atlanta shootings on other jurors. (4CTSupp 11-21.)

the cost of life without possibility of parole and the reasons other countries have capital punishment were also misconduct. The evidence that these extraneous considerations were brought into the jury room was what the jurors said about these things. This is not evidence about the effects of the statements on jurors.

In addition, the statement that Juror No. 12 would go along with the majority was evidence of his intention to disregard the court's instructions to give his considered opinion and decide the case only by consideration of the evidence. (CALJIC No. 17.40; 29RT 4799.) This has nothing to do with thought process. Such evidence would also not be barred by section 1150.

Whatever question there might have been about whether the defense had established the necessity for further inquiry into the misconduct should have been resolved in favor of the inquiry. Citing one juror's irritation at being contacted by the defense, the trial judge refused to allow the attorneys to have any contact with the jurors, thus preventing them from conducting an independent investigation. Under *Townsel v. Superior Court*, *supra*, 20 Cal.4th 1084, 1094, the trial court does have the discretion to limit the attorneys' contact with jurors. But in order to contact those jurors, counsel need to show no good cause beyond a simple desire to interview for lawful purpose jurors who consent. (*Id.* at p. 1097.) Nevertheless, the trial judge denied counsel's request to go back to the jurors they talked with, instead, requiring that the jurors come to court and give testimony. Since the court made the hearing a substitute for a defense investigation, any doubts about whether a hearing was needed should have been resolved in favor of a hearing where any juror who could give information about the misconduct was called to testify. (See *People v. Barton* (1995) 37 Cal.App.4th 709, 717 [erroneous denial of request for juror information harmless because trial

court held evidentiary hearing where eleven jurors called to testify].)

C. Remand Is Proper for a Full Evidentiary Hearing and Investigation into Wilson's Juror Misconduct Claims.

In this case, there was enough evidence before the court to require a thorough evidentiary hearing on Wilson's motion for a new trial because Wilson's allegations, if true, created a strong possibility that at least one of the jurors had committed serious misconduct. As shown above, the trial court failed to conduct an investigation adequate to resolve the issues. Thus, the court abused its discretion by failing to examine more jurors, by failing to adequately examine the jurors who did testify, and by prohibiting Wilson from calling any jurors, to resolve the truth or falsity of his allegations. Under these circumstances, Wilson is entitled to a remand for a full evidentiary hearing on his motion for a new trial so the trial court can adequately investigate Wilson's juror misconduct claims.

In *People v. Tuggles*, *supra*, 179 Cal.App.4th 339, the defendants moved for a new trial based on alleged juror misconduct. On appeal they contended that the trial court impermissibly thwarted their attempts to fully investigate the alleged misconduct by denying them access to the jurors' personal contact information. The appellate court found that the lower court abused its discretion by concluding that it had no power to order jurors to appear at a posttrial hearing to investigate the defendants' misconduct allegations. (*Id.* at p. 387.)

Because criminal defendants have a federal constitutional right to a jury trial free from juror misconduct, *Tuggles* reviewed the trial court's error for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24. In light of the lower court's erroneous belief that it had no discretion to subpoena jurors, the appellate court assumed "that defendants presented a credible *prima facie* showing that there had been 'misconduct of a serious

nature.'" (*People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 387, quoting *People v. Hedgecock*, *supra*, 51 Cal.3d at p. 419.) Nevertheless, even with this assumption, the court concluded that the error was harmless beyond a reasonable doubt because remand would be "futile" and "useless." The court analyzed the defendants' claims and found that, notwithstanding the trial court's error, "at the hearing on their motion for new trial, defendants received a *full evidentiary hearing* regarding their allegations of misconduct," and they "alleged no juror misconduct apart from that actually addressed at the hearing." (*People v. Tuggles*, *supra*, 179 Cal.App.4th at pp. 387-388, italics added.) Hence, the court's error was not prejudicial. (*Id.* at p. 388.)

Here, the court's error was prejudicial because it failed to provide Wilson with the *full* evidentiary hearing required to adequately address the juror misconduct allegations that would have given the court grounds for a new trial. For example, "very reluctant" Juror No. 1 would have been an important witness who could have supported every juror misconduct allegation by Wilson. Her absence from the hearing was not made unnecessary by the testimony of the only jurors who testified – Juror Nos. 6, 7, and 12 – and who did not speak about the allegations that jurors discussed both the costs of incarceration and the death penalty law in a juror's homeland, improper subjects for jurors to discuss during deliberations. (6CT 1563.)

As shown above, the trial court had good reason to believe that there had been substantial misconduct on the part of possibly four jurors: there were plausible allegations that No. 10 or No. 11 brought in improper considerations of the cost of incarceration; No. 10 brought in considerations about the death penalty in another country; No. 12 had gone along with the majority to avoid being the lone hold out; and Juror No. 6 improperly

brought into the deliberations evidence of the Atlanta shootings. A full evidentiary hearing on these allegations could have provided the lower court a sound basis to grant Wilson's motion for a new trial. Accordingly, the matter should be remanded to the trial court for a full evidentiary hearing on Wilson's motion for a new trial where he is permitted to subpoena jurors, especially Juror No. 1, to testify regarding his juror misconduct allegations. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 420-421; *People v. Tuggles*, *supra*, 179 Cal.App.4th at p. 387.)

In addition, remand may be appropriate because the trial court did not rule on *this* motion for a new trial. (39RT 6375; 40RT 6438; 6CT 1525; 7CT 1682, 1694.) The second sentence of Penal Code section 1202 provides: "If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial." In *People v. Braxton* (2004) 34 Cal.4th 798, this Court granted review to address certain issues relating to section 1202. *Braxton* held in part that when a trial court has refused or neglected to hear a defendant's new trial motion, a defendant may forfeit a claim to the section 1202 remedy by acquiescing in the trial court's failure to hear the new trial motion. *Braxton* further concluded: "A reviewing court may, in appropriate circumstances, prevent a miscarriage of justice by remanding the matter to the trial court for a belated hearing and ruling on the defendant's new trial motion." (*Id.* at p. 805.) Because Wilson did not acquiesce in the trial court's failure to rule on his new trial motion and the circumstances are appropriate here, a limited remand is justified.

Braxton noted that "where the court, through inadvertence or neglect, neither rules nor reserves its ruling . . . the party who objected must make some effort to have the court *actually rule*." (*People v. Braxton*,

supra, 34 Cal.4th at p. 813, citations and internal quotation marks omitted; italics in original.) Here, defense counsel did precisely as *Braxton* requires. She made some effort when she reminded the court that it had not actually ruled on Pops's motion for a new trial. (39RT 6375 ["Your honor, in addition, there was a motion for new trial that I filed dated February 29th and you haven't actually ruled on it"].) Wilson's counsel then emphasized the court's failure to actually rule when he added that Wilson joined in *that* motion for a new trial. (39RT 6375.) But the court still did not rule.

Even more important, as shown, the circumstances here make a remand appropriate. In addressing the question of when it is appropriate to remand under section 1260 when a trial court has not ruled on a new trial motion, *Braxton* "conclude[d] that when, as here, a trial court has refused to hear a defendant's new trial motion, and the appellate record is insufficient to permit a reviewing court to determine as a matter of law whether the proposed motion was meritorious, the reviewing court may remand the matter to the trial court for a belated hearing of the new trial motion, absent a showing that a fair hearing of the motion is no longer possible." (*People v. Braxton*, *supra*, 34 Cal.4th at p. 818.) Here, the appellate record is insufficient because the trial court failed to adequately investigate Wilson's misconduct allegations.

For example, at the March 24, 2000 hearing, counsel pointed out that Juror No. 1 had important information about the issues other jurors had testified about. Juror No. 1 contradicted what Juror No. 12 had previously said about whether he would vote for death depending upon what others did. (39RT 6352.) Juror No. 1 also provided information about the Atlanta shootings, which Juror No. 6 said "caused the juror to change her mind." Finally, Juror No. 1 had information about other possible misconduct, i.e., information about possibly improper statements Juror No. 10 made that in

his country, people who killed other people were killed, and information that one of the jurors mentioned that he did not think society should pay for the defendants' being in prison. (39RT 6352-6253.)

Both Wilson and Pops sought to continue the sentencing because additional investigation was needed, especially with respect to Juror No. 1. (39RT 6346; 6CT 1539-1540, 1561 ["The grounds for continuance are: Juror #1's presence is necessary for the purpose of testifying regarding possible juror misconduct"].) The trial court denied the request for a continuance, while noting that it did not want to drag in a very reluctant Juror No. 1. (39RT 6372.)

Accordingly, in light of the insufficient appellate record caused by the trial court's inadequate investigation, this Court should remand the matter to the trial court with instructions to conduct a full investigation into juror misconduct and permit Wilson to subpoena jurors to testify. In the event a fair hearing is no longer possible due, for example, to a dimming of memories or unavailability of jurors, then the trial court should grant Wilson a new penalty trial. (*People v. Braxton*, *supra*, 34 Cal.4th at p. 820 ["If after remand the trial court determines either that the new trial motion is meritorious, or that a fair hearing of the new trial motion is no longer feasible for one reason or another, the defendant must receive a new trial"].)

//

//

9.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the bedrock principle at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *In re Winship*, *supra*, 397 U.S. at p. 363.) Jury instructions violate these constitutional requirements if there is a reasonable likelihood that the jury understood them to allow conviction based on proof insufficient to meet the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.83. (5CT 1169-1184, 1210.) These instructions violated the above principles and thereby deprived appellant Byron Wilson of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing Wilson to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v.*

Louisiana, *supra*, 508 U.S. at p. 275.)

Wilson recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for this Court to reconsider those decisions and in order to preserve the claims for federal review, if necessary.[64]

A. The Instructions on Circumstantial Evidence – CALJIC Nos. 2.01 and 8.83 – Undermined the Requirement of Proof Beyond a Reasonable Doubt.

The jury was given two interrelated instructions – CALJIC Nos. 2.01 and 8.83 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (5CT 1169 [sufficiency of circumstantial evidence – generally]; 5CT 1210 [special circumstances – sufficiency of circumstantial evidence – generally].) These instructions, addressing different evidentiary issues in almost identical terms, advised Wilson's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (5CT 1169, 1210.) These instructions informed the jurors that if Wilson reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating

---

[64] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions similarly will be deemed "fairly presented" by an abbreviated presentation. Accordingly, Wilson more fully presents the claims in this argument.

Wilson's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)[65]

First, the instructions compelled the jury to find Wilson guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to convict Wilson based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (5CT 1169.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally-mandated one.

Second, the circumstantial evidence instructions required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Wilson

---

[65] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§ 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (5CT 1169, 1210.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instructions had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find Wilson guilty of first degree murder and the special circumstance true unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found Wilson's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instructions, the jury was required to convict Wilson if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instructions thus impermissibly suggested that Wilson was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused

has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find Wilson guilty and the special circumstance true on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21.2, 2.22, 2.27, and 2.51 Also Vitiated the Reasonable Doubt Standard.

The trial court gave five other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), and 2.51 (motive). (5CT 1179, 1180, 1183, 1184.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[66]

The jury was instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of

---

[66] Although defense counsel failed to object to these instructions, Wilson's claims are still reviewable on appeal. (See fn. 2, above, incorporated here by reference.)

> 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.

(5CT 1184.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to Wilson to show absence of motive to establish that he was not guilty, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient]; see *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase inclusio unius est exclusio alterius could mislead a reasonable juror as to the scope of an instruction]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [failure to instruct on effect of a reasonable doubt as between any of the included offenses resulted in erroneous implication that rule requiring finding of guilt of lesser offense applied only as between first and second degree murder]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

CALJIC No. 2.21.2 also lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in

one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (5CT 1179.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(5CT 1180.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence

standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (5CT 1183), was likewise flawed. The instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find Wilson guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated Wilson's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each challenged instruction violated Wilson's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC No. 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that

dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

D. Reversal Is Required.

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated Wilson's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491

U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of Wilson's guilt was weak for all of the reasons previously discussed. Because these instructions distorted the jury's consideration and use of circumstantial evidence and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, Wilson's judgment must be reversed in its entirety.

//

//

10.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT WILSON'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Wilson briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, Wilson requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses

charged against Wilson, Penal Code section 190.2 contained 21 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Wilson's Constitutional Rights.

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 6CT 1385.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide – facts such as the victim's age, defendant's age, motive for the killing, and method, time, and location of the killing. For example, from the outset the prosecutor in this case argued that "a line was crossed" due to the aggravating circumstances of the crime, making death the only just decision. (35RT 5842.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not

required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death on no basis other than that the particular set of circumstances surrounding the crime were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Wilson is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Wilson urges the court to reconsider this holding.

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

1. Wilson's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In

conformity with this standard, Wilson's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (6CT 1385, 1395.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 530 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270 now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. To impose the death penalty in this case, Wilson's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 6CT 1395.) Because these additional findings were required before the jury could impose the death sentence, *Apprendi, Ring, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Wilson is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Wilson urges the Court to reconsider its holding in *Prieto* so that California's death

penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Wilson contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected Wilson's claim that the Due Process Clause and the Eighth Amendment each requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Wilson requests that the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and Wilson is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Wilson's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that

life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (6CT 1385, 1395), fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Wilson is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Wilson's death verdict was not premised on unanimous jury findings.

a. Aggravating Factors

To impose a death sentence, when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty, violates the Sixth, Eighth, and Fourteenth Amendments. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to

aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Wilson asserts that *Prieto* was incorrectly decided, and applicaiton of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate

the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Wilson asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Wilson's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 6CT 1391.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by Wilson (31RT 5083-5084) and devoted a considerable portion of its closing argument to the alleged offense (35RT 5855, 5873-5874).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be

made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Wilson is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

Whether to impose the death penalty on Wilson hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (6CT 1396.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear

to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Wilson urges this Court to reconsider that ruling.

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole.

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated Wilson's right to due process of law.

(See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Wilson submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The instructions violated the sixth, eighth and fourteenth amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left

with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Wilson's jury was told in the guilt phase that unanimity was required in order to acquit Wilson of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Wilson's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The penalty jury should be instructed on the presumption of life.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at

the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Wilson's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) Nevertheless, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Wilson's Right to Meaningful Appellate Review.

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Wilson's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Wilson of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right

to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Wilson urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Wilson's Constitutional Rights.

1. The use of restrictive adjectives in the list of potential mitigating factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see CALJIC No. 8.85; § 190.3, factors (d) and (g); 6CT 1385-1387) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Wilson is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The failure to delete inapplicable sentencing factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Wilson's case – factors (e) and (f). The trial court failed to omit those factors from the jury instructions (6CT 1386), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Wilson asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential Mitigators.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the jury's appraisal of the evidence. (40CT 1385-1387.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Wilson's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate Wilson's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, Wilson asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed,

i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Wilson urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause.

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.406.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any findings to justify the defendant's sentence. Wilson acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms.

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Wilson urges the court to reconsider its previous decisions.

//

//

11.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Even if this Court finds that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of both guilt and penalty phase proceedings, compels the conclusion that Wilson was denied a fair trial at both phases, and warrants reversal of the judgment of conviction and sentence of death because the state will not carry its burden of proving that the cumulative effect of the errors was harmless beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; see *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Riggs* (2008) 44 Cal.4th 248, 330; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where

there are several substantial errors, "their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Cooper v. Fitzharris* (9th Cir.1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)

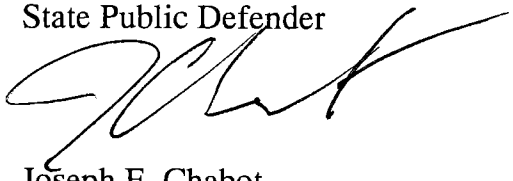
CONCLUSION

For the reasons stated, the judgment must be reversed in its entirety.

DATED: February 7, 2013

Respectfully Submitted,

Michael J. Hersek
State Public Defender



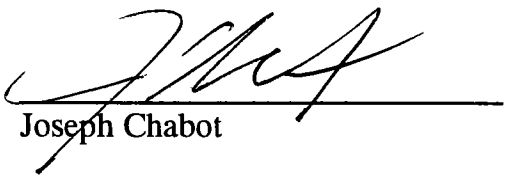
Joseph E. Chabot
Supervising Deputy State Public Defender

Attorneys for Appellant
Byron Wilson

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Joseph Chabot, am the Supervising Deputy State Public Defender assigned to represent appellant, Byron Wilson, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 94,342 words in length excluding the tables and certificates.

Dated: February 8, 2013



Joseph Chabot

DECLARATION OF SERVICE

Re: *People v. Aswad Pops & Byron Wilson* No. S087533

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in envelopes addressed respectively as follows:

Byron Wilson, #P-76622
CSP-SQ
4EB10
San Quentin, CA 94974

Marilee Marshall
523 W. Sixth St., Suite 1109
Los Angeles, CA 90014

Doug Wilson
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013

Tina Sandidge
Habeas Corpus Resource Center
303 Second Street, Ste. 400 South
San Francisco, CA 94107

Each envelope was then, on February 8, 2013, sealed and deposited in the United States mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 8, 2013

Glenice Fuller