IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent
vs.
KARL HOLMES, HERBERT McCLAIN
and LORENZO NEWBORN
Defendant and Appellant

AUTOMATIC APPEAL
Supreme Court
No. S058734

Los Angeles County
Court No. BA092268

/

APPELLANT KARL HOLMES' OPENING BRIEF

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

Karen Kelly
State Bar No. 118105
P.O. Box 6308
Modesto, CA 95357
209 552 0988

Attorney for Appellant
Karl Holmes

TABLE OF AUTHORITIES

FEDERAL CASES

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent vs. KARL HOLMES, HERBERT McCLAIN and LORENZO NEWBORN Defendant and Appellant _____/	No. S058734 Los Angeles County Court no. BA092268

APPELLANT KARL HOLMES' OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code §1239.)[1] The appeal is taken from a judgment which finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On March 15, 1994, the Los Angeles County District Attorney filed an indictment charging appellant, Karl Holmes, co-appellants, Lorenzo Newborn and Herbert McClain and later-severed co-defendants, Aurelius Bailey and Soloman Bowan as follows:

Count I alleged that on October 31, 1993, defendants willfully murdered

---

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

Stephen Coates (a.k.a. Coats) (section 187(a)); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)); and that the murder was intentionally committed while lying in wait (section 190.2(a)(15)). (3 CT 631-642.)

Count II alleged that on October 31, 1993, defendants willfully murdered Reggie Crawford (section 187(a)); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)); and that the murder was intentionally committed while lying in wait (section 190.2(a)(15)). (*Ibid.*)

Count III alleged that on October 31, 1993, defendants willfully murdered Edgar Evans) (section 187(a)); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)); and that the murder was intentionally committed while lying in wait (section 190.2(a)(15)). (*Ibid.*)

Counts I, II, and III further alleged the special circumstance allegation of

multiple murder (section 190.2(c)(1)). (*Ibid.*)

Count IV alleged that on October 31, 1993, defendants willfully attempted to murdered Antwaun Ayers (sections 664 and 187); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)). (3 CT 631-642.)

Count V alleged that on October 31, 1993, defendants willfully attempted to murdered Lawrence Ayers (sections 664 and 187); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)). (*Ibid.*)

Count VI alleged that on October 31, 1993, defendants willfully attempted to murdered Kenneth Coates (a.k.a. Coats) (sections 664 and 187); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)). (*Ibid.*)

Count VII alleged that on October 31, 1993, defendants willfully attempted

to murdered Antone Prince (sections 664 and 187); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)). (*Ibid.*)

Count VIII alleged that on October 31, 1993, defendants willfully attempted to murdered Lloyd Summerville (sections 664 and 187); that the offense was a serious felony (section 1192.7(c)(1)); that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)); that Newborn, Bailey, and Holmes personally used a handgun (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)). (*Ibid.*)

Count IX charged Herbert McClain alone with the October 28, 1993 attempted murder of Robert Price (sections 664 and187); that the offense was a serious felony (section 1192.7(c)(1); that McClain personally used a firearm (section 12022.5(a)) and for that reason, the offense was a serious felony (section 1192.7(c)(8)) and that a principal used a handgun (section 12022(a)(1)). (3 CT 631-642.)

Count X alleged defendants committed the crime of conspiracy to commit murder (sections 182(a) and 187) and that in the commission of the offense, a principal was armed with a handgun (section 12022(a)(1)). (*Ibid.*)

As to Count X, the following overt acts were alleged:

1. That Newborn, Bailey, McClain, Bowen and Holmes met at Huntington Memorial Hospital and discussed retaliation for the murder of Fernando Hodges. (3 CT 641)

2. That during that discussion, an unnamed coconspirator in the presence of Newborn, Bailey, McClain, Bowen and Holmes said, "Let's go get the guns." (*Ibid.*)

3. That at Huntington Memorial Hospital, a decision was made by Newborn, Bailey, McClain, Bowen and Holmes to target Crip gang members. (*Ibid.*)

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

5. That on October 31, 1993, at approximately 10:30 p.m., Newborn, Bailey, McClain, Bowen and Holmes caravanned in four cars to the area near the intersection of Emerson and Wilson streets, and parked their cars in order to ambush numerous individuals believed to be Crips. (*Ibid.*)

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

7. That Newborn, Holmes, and Bailey shot and killed S. Coates, Crawford, and Evans, shot A. Ayers, L. Ayers, and Prince and shot at Summerville and K. Coates while Bowen and McClain waited in getaway cars. (*Ibid.*) [2]

On June 20, 1995, the trial court granted the prosecution's motion that Newborn be tried with McClain and Holmes. (4 CT 999.) On July 17, 1995, the trial court granted the prosecution's motion to sever Bailey and Bowen. (4 CT

---

[2] At the close of its case in chief, the prosecution moved to strike overt act two and McClain's name from overt act one. (32 RT 3333, 41 RT 4310-4311.)

1124.) [3]

On July 20, 1995, appellants' Newborn, McClain and Holmes' trial began with jury selection. (4 CT 1129.) After jury selection was completed, the court granted appellants' motion that all objections include both state and federal grounds. (5 CT 1271; 14 RT 1053.) At appellants' request, the court further "deemed all counsel join in any objection." (32 RT 3317.)

On October 10, 1995, the prosecution called its first witness. (5 CT 1272.) The prosecution rested on November 14, 1995. (6 CT 1426.)

On November 15, 1995, the defense cases began. (6 CT 1429.) On November 28, 1995, the prosecution presented evidence in rebuttal. (6 CT 1454.) On December 4, 1995, appellant Holmes' motion to reopen his case in defense was granted. (6 CT 1458.)

On December 7, 1995, jury deliberations commenced. (CT 1461.) On December 22, 1995, after more than 30 hours of deliberations and after requested readback of testimony and clarification of instructions, the jury found appellant Holmes guilty of the murder, attempted murder, and conspiracy counts. The jury found the lying in wait and multiple murder special circumstances, personal firearm use allegations, and overt act #3 true. The jury found the arming allegations not true. (CT 1611-1621, 1696-1702.) Co-appellants Newborn and

---

[3] The trial court's denial of appellants' motions to sever charges and/or defendants is discussed below.

McClain were also found guilty of the murder, attempted murder and conspiracy charges. The special circumstance allegations were found true as to each. As to Newborn, the jury found the personal firearm use allegations not true. As to McClain, except for Count IX, the jury found the personal firearm use allegations not true. The jury found overt act #3 as to both Newborn and McClain. (CT 1590-1610, 1683-1695.)[4]

The penalty phase opening statements and evidence commenced on January 22, 1996. The prosecution presented its penalty phase evidence through January 26, 1996. (7 CT 1829-1836.) On January 29 and 30, 1996, appellants presented their penalty phase evidence. (7 CT 1837-1839.) On January 31, 1996, the parties presented argument and the court instructed the jury. (7 CT 1853.)

On February 8, 1996, the jury indicated that it was unable to reach a unanimous verdict as to any defendant. Jurors were excused for the day and ordered to continue deliberations the next day. (CT 1862.) On February 9, 1996, the jury informed the court that after numerous votes over six days, they were unable to reach a verdict as to any defendant. (7 CT 1863.) The trial court declared a mistrial as to the penalty phase only. (CT 1888.)

---

[4] Having struck overt act two during trial, overt act 4 "That at Pasadena Avenue and Blake Street, on October 31, 1993, unnamed coconspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip" was renumbered overt act 3. (3 CT 641.)

On March 15, 1996, the prosecution indicated that it would retry the penalty phase. (7 CT 1909.) On March 23, 1996, the court relieved McClain's counsel Harris for medical reasons. (7 CT 1924.) On March 28, 1996, substitute counsel (Richard Leonard) was appointed for McClain. (7 CT 1927.)

On April 9, 1996, the court granted McClain's motion to proceed in *pro per.* Substituted counsel Leonard was appointed as advisory counsel. Over objection of Holmes and Newborn commencement of the re-trial penalty phase was continued. (7 CT 1981.)

On August 13, 1996, retrial of the penalty phase began with jury selection. (8 CT 2085.) On October 3, 1996, the prosecution began presentation of its penalty phase evidence. (8 CT 2138.) On October 15, 1996, the defense began presentation of its penalty phase evidence. (8 CT 2251.) On October 21, 1996, the parties presented argument. (8 CT 2270.) On October 22, 1996, the jury was instructed. Jury deliberations commenced that afternoon. (8 CT 2275.) On October 23, 1996, the jury's request for testimony and evidence from the prior trial was denied. (8 CT 2276, 2277.)

On October 30, 1996, the jury returned verdicts of death as to each appellant. (8 CT 2275-2284, 2290-2291.)

On January 21, 1997, the court denied appellants' motions to set aside the verdict, for a new trial and their application for modification of verdict under section 190.4(e). (8 CT 2351.) The court pronounced judgment, sentencing

appellant to death for each special-circumstances murder. (9 CT 2369-2376, 2404-2405.) McClain and Newborn received similar death sentences. (9 CT 2384-2385, 2396-2397.)

INTRODUCTION TO FACTUAL SUMMARY

At approximately 7:00 p.m. on October 31, 1993, Halloween Night, Fernando Hodges, was shot outside the Community Arms apartments in Los Angeles County, California. Paramedics found Hodges lying in the area of the basketball courts. He had multiple gunshot wounds. Hodges was allegedly associated with P-9's street gang and the initial focus of police investigation was with the Raymond Avenue Crips, a rival street gang.

Hodges was taken to Huntington Memorial Hospital where he later died. At the hospital several people gathered. A security guard called by the prosecution speculated that these people were friends, family and fellow gang members of Hodges. The prosecution argued grand jury testimony, admitted as impeachment, supported its theory of motive – revenge.

About the same time as the shooting, 13 year old, Stephanie Robinson, was hosting a Halloween party for her friends. The party started sometime 7:30 p.m. Brothers, Stephan and Kenny Coates, brothers Antwaun and Lawrence Ayers, Reggie Crawford, Edgar Evans, and Lloyd Summerville, and others attended Stephanie's party.

Stephanie had everyone leave the party by 10:00 p.m. The victims left the

party together with some other friends. Some of them planned to go to Stephen Coates' house. On the way they stopped to play with pay phones located at a market. It was here that a car nearly hit Reggie as he stood near the curb.

The group spit up with the victims proceeding toward Stephan Coates' house. Gunshots, which the surviving victims at first mistook for firecrackers, rang out. When it was over, Steven Coates, Reggie Crawford and Edgar Evans were dead. Antwaun and Lawrence sustained gunshot wounds but survived.

The shootings and deaths of 13 and 14 year old boys prompted public outcry and garnered intense publicity. Per Pasadena's mayor, the reaction was almost universally, "It could have been my child. It could have been my street." (10 CT 2660.) What happened on Halloween night 1993 was something that touched people of Pasadena as few things had. (*Ibid.*)

The prosecution had little evidence of appellant's involvement in the alleged conspiracy to seek revenge by killing Crips or in the shootings. Appellant's relationship with Fernando Hodges or any of his codefendants, including severed defendants Bowen and Bailey was not substantial. Although he conceded he was at Huntington Hospital following the shooting of Hodges, there was no evidence that appellant spoke to any other defendant or was involved in any agreement to avenge Fernando's Hodges' death. With only the testimony of a convicted felon who received monetary and other benefits for his testimony and the unbelievable eyewitness testimony of two individuals, both with

admitted disabilities which affected their ability to perceive, recall, and relate the events of the evening, the prosecution ultimately relied on emotion and fear as a substitute for proof beyond a reasonable doubt. Numerous errors contributed singularly and cumulatively to deny appellant his constitutional rights to due process and to a fair trial and require reversal of appellant's convictions and his sentence of death.

STATEMENT OF THE FACTS

A. Prosecution's case at the Guilt Phase

1. Fernando Hodges Death [5]

The prosecution theorized the murder of Fernando Hodges provided the motive for the Halloween killings.

a. Medical Personnel and Law Enforcement Testimony

At 7:17 p.m., on October 31, 1993 (Halloween), paramedic Aleta Bergstrom and her partner Chuck Legg were dispatched to the Pasadena, California apartment complex, "The Community Arms." (14 RT 1138-1139.) [6] When they arrived at the complex, Bergstrom was told by police to wait outside the apartment gates until it was safe to enter. (14 RT 1139.)

After waiting four or five minutes, Bergstrom proceeded to the basketball court area where Fernando Hodges lay dying of multiple gunshot wounds. (14 RT 1141 1143.) Hodges was taken to Huntington Memorial Hospital. (14 RT 1145.)

When the ambulance carrying Hodges arrived at Huntington Memorial, it entered on the east side of the hospital. Family members and other visitors enter the hospital from an entrance on the south side of the building. Bergstrom could see people arrive in the parking lot across from the ambulance entrance. These

---

[5] Although Hodges, Willie Mc Fee and the instant cases' victims' shootings all occurred on Halloween, for clarity only the children victims' shootings on Wilson are referred to as the Halloween shootings.

[6] Bergstrom also testified in the case against Hodges' alleged killers Green and Leagons. (RT 1151.)

young men and women appeared to be upset. Paramedic Bergstrom thought they "accompan[ied]" her patient or were his friends or family members. (14 RT 1145, 1148.)[7]

Because Hodges' shooting was suspected to be gang-related, hospital security was notified. (14 RT 1146.) It was routine procedure to notify hospital security that friends and family would be arriving in all incidents where the injury was serious -- not only where the injuries were gang-related. (14 RT 1150.)

At 7:38 p.m., Huntington Memorial Hospital Security Officer Robert Taylor received radio notice of Hodges' shooting. Taylor proceeded to the emergency room. (15 RT 1189-1191.) When Taylor arrived in the emergency room, other officers, but no crowds related to the Hodges' shooting were present. Between 7:41 p.m. and 7:45 p.m., Taylor was assigned to wait by the triage desk near the public lobby. Within 10 to 15 minutes, what appeared to Taylor to be family members and friends came in asking about Hodges and attempting to gain access to him. (15 RT 1192-1193.) Within another 5 minutes, a second group of people began arrive. These individuals stayed outside the hospital and were spoken to by the friends and family who had come into the hospital. (15 RT 1194.) According to Taylor, an older person (perhaps in his forties) seemed to be in charge. He seemed to Taylor to be "the focal point" of the conversations

---

[7] Bergstrom personally observed only three or four people but was told that more arrived later. (RT 1146.)

between the crowd from inside the hospital and those people waiting outside. (15 RT 1194.) The group seemed to come to this person "for some direction or guidance, possible orders; and they dispersed and left." (15 RT 1215.)[8]

Taylor estimated the total number of people he believed involved in some way with Hodges to be between 20 and 30. Some of these people wore loose clothing. Some had hooded sweatshirts. Some wore what Taylor described as "regular" clothes. Taylor could not see the faces of the people in hooded sweatshirts and others who were too far away. (15 RT 1195.) Taylor thought it was unusual that the people outside did not come in. He speculated "it [was] like they were there for another purpose." (15 RT 1196.)

Taylor was not interviewed regarding his observations until just before trial. Nearly two years after the Hodges killing, when he was asked to identify individuals from pictures, he could not do so. [9] The week after the crimes, Taylor saw pictures of suspects to the Coates, Crawford and Evan's killings and speculated those crimes were connected to Hodges. Taylor did not recognize any of the pictures of suspects in the local newspaper. (15 RT 1200-1201, 1206-1207.)

This same night, Huntington Memorial Hospital Security Officer Horace Carlyle worked a rotating shift. (15 RT 1244-1245.) Referring to a log of security

---

[8] The hospital had security cameras that were inoperable. (15 RT 1248.)

[9] Taylor did select a picture of someone who looked familiar but he could not say whether the person he selected was there that night. (RT 1220, 1223.)

officer activity, Carlyle testified that security had received notification of a gunshot wound patient at 7:38 p.m. At 7:42 p.m., the information was updated to indicate the victim was probably gang-related. An 8:45 p.m. notation indicated that although there was a crowd due to the victim and family and friends in the waiting room, the situation was under control. (15 RT 1246, 1250-1251.) Carlyle recalled the crowd was large. Family members were agitated and upset and attempted to get into the treatment area. (15 RT 1251.) For patient safety, everyone was told to wait until they could be identified. (15 RT 1251-1252.)

Carlyle noted two groups of people. One appeared to him to be gang affiliated; the other "normal." (15 RT 1252-1254.) Because the hospital is "neutral territory," Carlyle did not pay particular attention to the physical characteristics of the people. Carlyle thought the "gang" related group left by 9:00 p.m., or a little later. (15 RT 1255-1256.) [10] After the fact, Carlyle speculated the gathering of the people outside the hospital might be related to the Coates, Crawford and Evans killings. (15 RT 1257-1258.) Like Taylor, Carlyle did not report these suspicions to the police. (15 RT 1200-1201, 1258.) When shown pictures shortly before the beginning of the trial, Carlyle could not identify any of the individuals depicted. (15 RT 1276.)

---

[10] During this time of the night, Carlyle was called away from this area of the hospital to perform other duties. (15 RT 1266-1268, 1272.)

Pasadena Police Department Detective Derrick Carter [11] was called to the Community Arms to assist in the investigation of Hodges' shooting. (14 RT 1152, 1156.) According to Carter, Hodges was associated with the P-9 street gang and he suspected members of the rival Raymond Avenue Crips were responsible for Hodges' shooting. (14 RT 1160-1162.)[12]

b. Lay Witness Testimony

Convicted felon, former Pasadena Denver (Devil) Lanes (PDL)[13] associate and informant Mario Stevens, had heard from defendant McClain that the Crips were responsible for Hodges' death. (25 RT 2620-2621.) At trial, from pictures, Stevens identified defendants McClain, Newborn, and Holmes, severed defendants Aurelius Bailey, and Solomon Bowen, and others as associated with the rival P-9 street gang. (25 RT 2547, 2550-2552, 2580-2582, 2584.)

Stevens allegedly had known appellant Holmes since Holmes was in grammar school. There Holmes was known as "Boom." (25 RT 2579.)

During the evening hours of Halloween, 1993, Lachandra Carr was at her

---

[11] At the time of the crimes, Carter was assigned as a "gang violence specialist." (14 RT 1153.) The parties stipulated that he qualified as an expert in the area of Pasadena gangs. (14 RT 1159-1160.)

[12] During his testimony, Carter identified an number of individuals, some in gang poses, from prosecution photographs including Hodges and Newborn as being associated with P-9. Carter was also asked whether he knew a number of persons and whether they were associated with P-9. Appellant's picture was not among those shown to Carter. (14 RT 1161-1172, 1176, 1177, 1178.)

[13] PDL is a allegedly a gang related to the Bloods – a long time rival of the Crips. (25 RT 2546.)

grandmother's house with Anedra Keaton and Latoya Carr. (18 RT 1801-1803.) Sometime between 6:00 and 7:00 p.m., Lachandra paged her boyfriend Solomon Bowen. Bowen did not return the page, but within 20 to 30 minutes, arrived at Lachandra's grandmother's house. (18 RT 1806-1808.) Bowen didn't own a car at the time. He arrived in a white Bonneville which Lachandra had seen him drive before. (18 RT 1809.)

Bowen told Lachandra that Fernando Hodges had been killed and that he was going to the hospital. When Lachandra said that she did not want to go to the hospital, Bowen dropped her off and left her at his home. (18 RT 1811-1812.)[14] Lachandra described Bowen and Hodges as good friends. (18 RT 1813.) While at Bowen's house, Lachandra talked on the phone, including several times with Bowen, and watched T.V. (18 RT 1815.) Lachandra did not see Bowen again until the next morning. (18 RT 1816.)

Lachandra heard about the Halloween shootings that night when her mother told her she had heard it on her police scanner. Lachandra knew Stephan Coats' mother and sister. (18 RT 1817, 1831, 1832.)

Lachandra was questioned several times by police, particularly about Bowen's whereabouts the night of the killings. (18 RT 1818, 1821.) Lachandra

---

[14] Contrary to her trial testimony, Lachandra testified before the grand jury that she was at Huntington Hospital and that while there she saw Bowen, Newborn, Bailey, and Holmes. According to her trial testimony Bowen told her who was there when he called. (18 RT 1838-1839, 1857.)

testified that she told police what she thought they wanted to hear so that they would leave her alone. Lachandra told police that that Bowen told her he was in the car; he wasn't the driver; that he did not shoot the kids, and had no idea that that was going to happen. (19 RT 1822-1823l, 1834.)[15]

2. The Halloween Shootings

a. Family and Victim Witness Testimony

Stephanie Robinson's thirteenth birthday was October 31, 1993 -- Halloween. (15 RT 1236.) Among the people who attended her party were the brothers Stephan and Kenny Coates, Edgar Evans, Reggie Crawford, brothers Lawrence and Antwaun Ayers, Antone Prince, and Lloyd Summerville. (15 RT 1240-1241.)

Stephan and Kenny Coates, Edgar Evans, Reggie Crawford, Lawrence and Antwaun Ayers, Antone Prince, and Lloyd Summerville left the party at about 9:40 p.m. [16] (15 RT 1291, 1463.) The group made a couple of stops along the way home. One stop was at George's Market. There, some of the boys played a game on the pay phone and Reggie was almost hit by a car. (15 RT 1291-1292, 16 RT 1463-1464, 1483, 18 RT 1755, 19 RT 1978, 20 RT 2010.)

Reggie Crawford had been standing on the corner and walking in the street

---

[15] Lachandra also told police that Bowen never told her anything and that she just had a feeling about this. Lachandra had heard a lot about the case on the street and in the news media. (19 RT 1858, 1867.)

[16] Reggie Crawford wore a black bandana on his head. Antwaun Ayers had a blue on in his pocket. (15 RT 1300, 16 RT 1466, 18 RT 1757.)

when the car carrying four or five Hispanic males turned the corner and almost hit him. Reggie jumped back up on the curb and raised his palms up or waved his hands and said "What's up?" The people in the car did not respond. Following that car were two or as many as five additional cars which were "packed full" of Black males. (15 RT 1292-1296, 16 RT1464, 19 RT 1979, 20 RT 2012.) Lloyd Summerville described one of the cars as a Cadillac and one car as a Maxima. (15 RT 1310-1311.)[17] Robert Nolden described the first car as a red compact and the second as a tan two-door. (19 RT 1980, 1994, 20 RT 2012.)[18] Kenny Coates saw some of the people in the cars throw P-9 gang signs. (31 RT 3231, 3258.)

Within about three minutes, the friends continued to walk home. (15 RT 1297.) Some of the group split off. (19 RT 1982, 20 RT 2014.) Lloyd Summerville, Stephan and Kenny Coates, Edgar Evans, Reggie Crawford, Lawrence and Antwaun Ayers, and Antone Prince continued to walk together.

Stephan and Kenny Coates' mom, Deborah Bush and aunt Brenda Bush, were driving home with Stephan and Kenny's sister, also named Stephanie, when they spotted the boys walking. (16 RT 1489-1491, 18 RT 1759, 25 RT 2629.)

---

[17] In earlier testimony before the grand jury, Lloyd did not remember one of the cars was a Maxima or that the males in the cars were Black. The latter information Lloyd Summerville learned from his friend Mickey. (15 RT 1325-1326.)

[18] Robert Crawford did not recall telling the police that the first car was a red Nissan and the second a tan Cadillac. (16 RT 1995.)

Stephan and Kenny talked to their mom at her car, then she left. A bit later, one of Reggie's friends drove up. All the of group went to her car to talk, then she left. (15 RT 1298-1299, 16 RT 1467, 1484, 1491, 18 RT 1759.)

As the group continued to walk, Kenny Coates heard the words "Now, Blood." Shots rang out. (31 RT 3248, 3250.) Lawrence Summerville heard sounds coming from the bushes and ducked down. When he looked out he saw sparks coming from the bushes. The boys thought what they saw and heard were fireworks. Lawrence quickly realized that no one would play with fireworks that close to Stephan's head. (18 RT 1759.) Antwaun Ayers realized the fireworks were actually gunshots when he saw Stephan Coates and Reggie Crawford fall. (16 RT 1472-1473.) Kenny saw Eddie Evans holding his stomach. He heard him say "Mama." (31 RT 3251.)

Deborah Bush had pulled into her driveway, but not yet gotten out of her car when she heard the gun fire. She ran to the front of her house. When she realized the boys were not home, she ran back to the direction of the shots and where they had been walking. (16 RT 1493-1494.) Fearing the worst, Brenda Bush tried to hold her sister back. It was then that Brenda saw two cars traveling very fast. One car was red and the other silver, white or beige. The first car was the larger of the two. Brenda could tell only that there were people in the car. She was unable to see how many or give any further descriptions. (25 RT 2631-2634.)

Lloyd Summerville began to run. (15 RT 1300-1302, 1304.) He jumped a gate into a yard of a residence and hid behind a bar-b-que pit. Antwaun Ayers followed him, but jumped another gate. Antwaun told Lloyd that he had been shot. (15 RT 1302-1303, 16 RT 1472-1473.) Lawrence Ayers ran to a hiding place. (18 RT 1761.)

When the shooting stopped, Lawrence Ayers came out and called to see where everyone was. The shooting started again and Lawrence was hit in his left calf by gunfire. Before he returned to his hiding place, Lawrence saw a person in a light-colored top standing on the sidewalk. (18 RT 1762-1763.) Kenneth Coates did not see any faces, but saw someone tall with braids and someone else short and husky without a lot of hair. (31 RT 3255, 3266.) Antwaun Ayers saw a beige large American car drive away and told police at the time that it was driven by a 19-20 year old Black male. (16 RT 1487-1488.)[19]

Within a few minutes, police and paramedics arrived on the scene. (16 RT 1496.)

Stephan Coates died of multiple gunshot wounds. (16 RT 1496, 18 RT 1765, 23 RT 2366, 28 RT 2900.) Edgar Evans died of a gunshot wound to the chest. (21 RT 2121.) Reggie Crawford died from a gunshot wound to the chest. (22 RT 2881, 2883, 2886.) Antwaun Ayers had been shot in the hand. Lawrence

---

[19] Antwaun took his own bandana and took Reggie's from Reggie's head and hid them in a bush. Antwaun did not tell the police about the bandanas. (16 RT 1475, 1485.)

Ayers had been shot in the leg. Antone Prince had been shot in the thigh. (RT 15 1321-1322, 16 RT 1477-1478, 19 RT 1987, 20 RT 2017.)

b. Eyewitness Testimony

At approximately 10:00 p.m., Lillian Gonzales and her boyfriend Gabriel Pina took Pina's dog for a walk. (22 RT 2218-2219, 25 RT 2636.) Both saw cars speeding up the street. Gonzalez saw two at first -- Pina saw one. Another set of two cars followed. Both agreed that there were four cars total. (22 RT 2221-2222, 25 RT 2639-2640.) [20] Pina described the cars as "newer imports." The first was a modified dark green, bluish two-door, which resembled a Toyota MR2. This car had tinted windows, was lowered and had specialty rims. The second and fourth cars were both white. The second was a four-door and the fourth a two-door. The third was a black hatchback Honda CRX.[21] (25 RT 2642, 26 RT 2725-2726, 2729, 2732-2734.)[22]

At least two of the cars pulled up against the curb, turned off their headlights and according to Gonzales, "honked their horn, calling some other people that were walking out of a driveway." (22 RT 2224.) Pina saw between 10

---

[20] When Pina testified at trial he had the transcriptions of his taped statements and prior testimony on his lap. (25 RT 2641.)

[21] Pina testified on direct but he did not mention that to police when interviewed that the third car could have been a black Honda Civic. Pina sometimes described the second car as a four-door and others as a two-door. (26 RT 2726-2727, 2734.)

[22] Pina's descriptions of the individuals and the cars became more detailed at each telling of the story. Pina explained that as time went on he remembered more and "key[ed] in on key things." (See 26 RT 2737-2740, 2744-2750.)

and 15 people. (25 RT 2654.)[23] Gonzales heard the driver say "Come on. Let's go. Hurry up." Pina heard "Hey, Come on." A name was mentioned but Pina did not pay attention. Gonzales saw five or more Black males come from the driveway. One of them was dressed all in white and could have been wearing a costume. (22 RT 2229, 25 RT 2655.) She was not wearing her glasses and she did not pay any attention to their faces. (22 RT 2225.)

Everyone got into the cars. Pina first told police that one of the men had to crouch down to get into a car, but testified that he realized at trial that he was mistaken. (26 RT 2727.) Shortly after the cars left, both Pina and Gonzales heard gunfire. (22 RT 2231, 25 RT 2656, 2658.) Pina heard "a little gun and a big gun." Within four or five seconds of the gunfire stopping, Gonzales saw a Black male wearing a trench coat and carrying a gun get into a Nissan Sentra. (22 RT 2233.)[24] Pina noticed two or three people running around a corner house and into some parked and waiting cars. (25 RT 2659.) One of the people Pina saw he later picked out of a photographic line-up. [25] This person, identified by the prosecutor as Holmes, jumped into a white four door vehicle.[26] (25 RT 2661.)

---

[23] Pina originally told police he saw four men coming out of a residence. (26 RT 2705-2709.)

[24] At the time she made these observations, Gonzales wore glasses but did not have them on. (22 RT 2239.)

[25] Exhibit 17-A, photograph no. 2, which allegedly says K. Holmes. (25 RT 2653, 2660.)

[26] Pina described the car as similar in color and in the shape of the back, as People's Exhibit 21. (25 RT 2661.)

Pina heard yelling. He and Gonzalez got in their car and went to the crime scene. (25 RT 2662.) Pina identified defendant McClain as the driver of the first vehicle that had passed him before the shots rang out. (25 RT 2663-2664, 26 RT 2697, 2755-2756, 2758.)

Roger Boon was with Kimberly Rea at a friend's house passing out candy when he heard shooting about a block and one-half down the street. Boon heard gunshots and both saw the muzzle flashes. (18 RT 1769, 1771, 1772, 21 RT 2177.)

Boon had several years training with firearms. Based on that experience he identified a series of rapid semi-automatic gunshots followed by a slow-timed shots from a second weapon; likely a revolver. Boon heard 12 gunshots altogether. (18 RT 1772-1774, 1795.)

Within less than a minute, Boon and Rea noticed headlights driving toward them. Boon motioned to his friends to go inside the house. (18 RT 1774-1776, 21 RT 2183.) Boon and Rea saw two cars pass. The first was a foreign car, possibly a 1989 Nissan 240 or a 240ZX. It may have been maroon or dark red. The second was also a foreign car, probably a Toyota or Nissan. Boon first described it as four door a passenger model, then recalled it was a two-door. It was light gray, white, or two-toned. (18 RT 1778-1780.) When shown People's Exhibit no. 21, Boon remarked that the car in that photograph fit the design and the shape of the car he described as the second car. (18 RT 1781.) Rea thought

the second car could have been a tan or silver four door Toyota. (22 RT 2188.) To Rea, People's Exhibit no. 21 looked very similar to the second car. (22 RT 2189.)[27]

Boon saw five people in the first car and two in the second. (18 RT 1782.) The driver of the first car appeared to give a thumbs up sign as he passed. (18 RT 1783, 22 RT 2187.) Boon was not able to identify any of the people in the cars. (18 RT 1798.)

As Boon turned back to his friends, he heard people shouting and screaming down the street. Boon and Rae drove down to where the shooting had occurred where he saw the victims. (18 RT 1786-1787, 22 RT 2190.)

Some time between 10:00 and 10:30 p.m., Joe Colletti heard gunfire while watching TV. When he first looked out his window, he saw nothing. When he returned to look out a short time later, he heard voices and footsteps and observed 4 to 6 people walking to a car. Some of the people got into another, smaller car parked around the corner. Colletti had the "impression" they were all male. One of the wore white or a very light color which could possible been a costume. (19 RT 1902-1911.)

Colletti's neighbor, Jessica Ramirez, saw two parked cars. One was green; the other was black. There were several people standing outside the cars with the doors open. Ramirez heard a female voice. (23 RT 2285-2287, 2290.)

---

[27] The car in People's Exhibit 21 was a Ford Tempo GL. (22 RT 2203.)

Although she could tell that the people were arguing, the only thing she heard was "Hurry up." (23 RT 2288.) Three Black males in dark clothing walked around the corner and the others left in the cars. (23 RT 2289 2294.) After she lost sight of the men, she heard either fireworks or gunshots. (23 RT 2290.)

At approximately 10:15 p.m., James Mathias was driving in the area of the shootings when he saw four cars traveling so rapidly around a corner that he thought they might hit him. The cars were full of young Black males. One wore a sports jacket. He did not notice anyone in light colored clothing. Three of the cars were foreign like a Camry, Sentra, or an Accord. All were dark colored. One was an IROQ or a Z28. When he saw a story in the paper that said four cars were seen leaving the scene, he put the time together with when he had seen four cars. (20 RT 2000-2006.)

Janet Takacs heard the shots fired. At first she believed them to be firecrackers. Afterward she heard a chain link fence rattle and someone say that they had been shot. When she looked out outside, Takacs saw a young Black male leaving her front yard. Takacs called 911. (29 RT 3072-3077.)

c. Photographic and Other Identifications

Pina and Gonzalez were interviewed at the scene within an hour of the shootings. (26 RT 2739.) Pina told a uniformed officer that although they had not seen the shooting, they saw things before and after. A detective took their contact information. Sometime between 1:00 and 2:00 the next morning Pina

was taken to the station where he was questioned by detectives. When asked if he would recognize any of the individuals he saw again, Pina responded that he saw them but really did not pay attention. Pina's descriptions were not detailed and conflicted with later testimony. (26 RT 2687, 2689-2691, 2705, 2737-2750, 2763.)[28]

On November 4, 1993, Pina returned to the police station to view car books or pamphlets and to give a description of the first two vehicles. (26 RT 2751.) At this telling, Pina described the second vehicle as a lowered white four-door Sentra with tinted windows. (26 RT 2752-2753.)

In late December 1993, Gabriel Pina noticed a picture on television.[29] That same day or the next, Pina went to the police station. He told the police that he had heard that they caught some people, that he had seen a picture on t.v. and he wanted to see if he could pick out the right person. When asked if he could give a physical description, Pina said "no" but that he would recognize him if he saw him again. Pina was shown a series of six-packs, loose photographs, and a picture from a newspaper at the police station. It was after being shown the newspaper photograph[30] that Pina identified Holmes and McClain. (25 RT

---

[28] Pina had a reading disability which he described as "getting stuck" on big words. (26 RT 2762.)

[29] Pina denied that he telephoned police and told them that he could identify two of the five suspects because after he had seen their pictures in a newspaper. (26 RT 2721.)

[30] Defense Exhibit J. (26 RT 2779.)

2663-2664, 26 RT 2697, 2755-2756, 2758.)

Pina identified Karl Holmes as the person he saw running after the shots had been fired when ran toward Pina and got into the second parked vehicle. (25 RT 2664-2665.)[31] Pina "locked into" blemishes he saw on the face of the second man, and when he saw Holmes at the grand jury hearing those blemishes "stood out." (26 RT 2764-2765.) [32] [33] The person Pina identified as Holmes was (at least) more than 100 feet or, according to his grand jury testimony, five homes and a cross-street in distance from Pina (and in the dark) when he saw him. (26 RT 2771-2772.)

The newspaper picture shown to Pina was of McClain.[34] When he was shown a six pack which contained a picture of McClain he told police he needed another view to be sure. (26 RT 2697, 2699.) Pina identified Herbert McClain as the person he had seen driving the lead car. Pina testified at trial that this individual leaned forward in the car, which is why he got a good look. This comment was not made to police or at the grand jury hearing. (26 RT 2666,

---

[31] Holmes was depicted in People's Exhibit 17-A-2.

[32] Pina said "In person I seen him. It was better than the picture." (26 RT 2764.)

[33] Pina conceded that he could not possibly have seen any one well enough to make an identification from the positions he marked on grand jury exhibits. (26 RT 2768-2770.)

[34] People's Exhibit no. 20-E may have been the newspaper picture shown to Pina. (26 RT 2700.)

2723, 2725, 2730.)[35] [36]

d. Informant Testimony Regarding Alleged Statements by Appellants

i. Testimony Regarding Holmes' Alleged Admissions

In December of 1993, Derrick Tate, a convicted felon, was visiting his cousin Terranius Pitts, also know as "T," at Pitt's home in Pasadena. There were a number of other people present, including appellant Holmes[37], who is also known as "Boom." Tate overheard Holmes say that he was a "gangster' and a "rider" and a killer. (15 RT 1347-1352. 1397.) According to Tate, Holmes also said something about wanting to get a hat that said "trick or treat." (15 RT1351.) Holmes said that "they was in some bushes," and "they jumped up and said 'trick or treat.'" (15 RT 1351.) That they had been riding around, looking for somebody. Holmes said that there were two other people with him and that the killing was in retaliation for Fernando Hodges death. (15 RT 1352-1354.) Even after Tate pointed out that the victims could have been his little cousins, Tate said that Holmes continued to brag about the killings. (15 RT 1409.)

Tate first gave this statement to custodial officers while facing criminal charges weeks after the shootings occurred. Tate had numerous felony convictions and he repeated his statement to Pasadena police officers Korpal and

---

[35] In court, Pina said McClain looked similar.

[36] McClain was depicted in People's Exhibit 17-B-5.

[37] DeSean Holmes testified in the matter. For clarification, De Sean Holmes will be referred to as "DeSean" and appellant Karl Holmes as "Holmes."

Uribe in hopes of staying out of prison. (15 RT 1355, 1359-1360, 1381-1382.) Tate testified that the officers were not able to help him out on his case, but he testified nonetheless "because of the kids." (15 RT 1360.)[38] Tate was aware that reward money had been offered. [39] At first Tate denied mentioning it to police, but later admitted that he had at least one discussion with police about getting some or all of the reward money. (15 RT 1360, 16 RT 1419-1420.)

During his January 5, 1994, conversation with police (Tate spoke to police again on January 20, 1994), Tate was shown a number of "six-pack" photographic arrays. Tate was asked by police to pick out Karl Holmes; which he did. (15 RT 1372-1374.) Tate selected a picture of appellant McClain as someone that he had seen but testified that Holmes told him McClain was not involved. (16 RT 1415, 1425.) Although Holmes had told Tate that McClain was not involved, McClain told him that he was thinking of turning himself in because he was tired of running. (16 RT 1429-1430) Tate testified that Holmes identified another of the other persons involved was Ernest Holly, also known as E-Dog. (16 RT 1426.)

In February of 1994, Tate was contacted by Holmes trial counsel Thomas

---

[38] Tate's motive to testify for the kids, was called into question when he admitted on cross-examination that he did not go to the police with this information but waited until he needed help with pending charges. (RT 1390-1391.)

[39] $40,000.00 reward money was announced in newspapers in December 1993. (26 RT 2718-2720, 71 RT 7155.)

Nishi. Although he did not recall most of the specifics of their conversation, Tate admitted that he told Nishi that everything he has told the detectives was a lie. (15 RT 1384.) [40] Tate later explained that he thought he would be safer if he told Nishi what he wanted to hear. (16 RT 1419.)

ii. Testimony Regarding Newborn's Alleged Admissions

a) Shooting at Willie McFee's

In the early evening of Halloween, 1993, Willie McFee [41] was at home having a bar-b-que with family friends. (23 RT 2369-2371.) Codefendant Newborn came to McFee's door asking for Wendell Jefferson, also known as Huck, [42] whose car he believed he saw out front. (23 RT 2374-2375, 24 RT 2448.) Jefferson and Newborn spoke outside. (23 RT 2376-2377.) McFee went out to speak to Jefferson and Newborn and saw that Bowen was outside too. (23 RT 2379.) Newborn wanted to know where Raymond Crip member, Dion, also known as Crazy D, lived. (23 RT 2380-2382.) Newborn told McFee that his friend had been killed. He was upset and crying. From the bulges in their waistbands,

---

[40] Tate later spoke to Nishi's investigator Bob Zink, who testified for Holmes' defense. (36 RT 3858.)

[41] At the time of his testimony, McFee had three or four felony convictions and was awaiting sentencing on a sales of cocaine case for which he could receive 6-10 years. The district attorney told McFee he would "mention something" to the sentencing judge after McFee testified in the Halloween case. (24 RT 2421-2426, 2476.) McFee told the district attorney that he was hoping for no time. (24 RT 2428.)

[42] Newborn may or may not have referred to Wendell Jefferson as his brother. (23 RT 2376-2377, 24 RT 2483-2484.)

McFee thought both Bowen and Newborn were armed. (23 RT 2383-2384.) McFee told Newborn that he was sorry about his friend, but that he did not gangbang and he did not know where Dion lived. (23 RT 2385, 2442.) When he was walking back into the house, McFee saw three or four guys wearing dark hooded clothing run down the street. Newborn was not among the men McFee saw running. McFee lost sight of the men when he went back into his house. (23 RT 2386-2387, 2391, 2394, 2397, 24 RT 2466-2467.)

McFee thought something was about to happen so he called a friend Michael Ray, to call Dion. While he was on the phone with Ray, he heard gunshots. (23 RT 2400-2402.) One shot was fired toward McFee's house. The bullet from this shot lodged in his air conditioner. Another series of shots seemed to be coming from Dion's. (23 RT 2403-2404, 24 RT 2471, 29 RT 3041.) McFee described this gunfire as cross-fire. In other words, it looked to him like people were shooting at each other. (23 RT 2406.) Charles Baker, McFee's cousin heard 30 to 40 rounds fired from three different weapons. (29 RT 3036-3038, 3045.)

b. In Custody Statements

DeSean Holmes, who, during his testimony, was represented by counsel, is appellant Karl Holmes' cousin. He began by identifying pictures of five people the prosecution thought was responsible for the Halloween shootings, including

the two severed defendants, Aurelius[43] Bailey and Solomon Bowen, as well as Fernando Hodges. (17 RT 1535-1538, 1590.)

In 1995, DeSean was in custody on a felony charge of burglary of Willie Mc Fee's[44] residence who he alleged was a narcotics dealer. (17 RT 1577-1579.)

While in custody, DeSean had conversations with codefendant Newborn regarding two shootings. [45] (17 RT 1540.) Newborn and DeSean Holmes were both housed in dorm 618 of the Los Angeles County jail between March 28, 1995 and April 4, 1995 and again between April 5, 1995 and April 10, 1995, and in dorm 628 of the Los Angeles County jail on May 16, 1995. (28 RT 2926.)

in September 1995, DeSean went to police with the conversation. DeSean wanted to be placed in protective custody. At DeSean's request, his probation was revoked and he was placed in protective custody. Just before the trial, DeSean was moved to a motel. (17 RT 1585-1586, 1593-1594.) [46] At DeSean's insistence, he entered into a written agreement with the district attorney that he would not be asked any questions about any one other than Newborn. (17 RT 1616.)

According to DeSean he and Newborn had three conversations. Danny Cooks was present at some or all of them. (17 RT 1597.) Newborn said that he

---

[43] DeSean referred to Aurelius Bailey as Duane Bailey.

[44] Mc Fee is De Sean's uncle. (17 RT 1576.)

[45] De Sean knew one of the victims, Reggie Crawford. (17 RT 1550.)

[46] At the time, De Sean was a witness in a shooting case. (17 RT 1592, 1693-1694.)

went to Willie McFee's house on Halloween night looking for his (Newborn's) brother Wendell. Newborn told DeSean that "he ended up shooting at the people he came with." Newborn said that he used a 9-millimeter Glock. (17 RT 1544, 1560, 1565, 1676.)[47]

With regard to the Halloween shootings, Newborn told DeSean that he was riding in the car with two others who shot Reggie, Edgar and Stephan. (17 RT 1569.) DeSean's testimony regarding Newborn's comments to him seemed to imply that Hodges had been told not to hang out at the Community Arms and that Bowen was driving a car that could implicate him in the shootings. (17 RT 1570.) Newborn said that "they" were in rental cars. (17 RT 1572.) More explicitly, that Bailey had a .38 caliber gun and that during the shootings, while running, Bailey bumped into somebody and bullets fell out of his gun. (17 RT 1571.)

Newborn told DeSean that the shootings were not his fault. He denied that he was at Huntington Hospital and said that he had a witness named Alisha who could testify to that fact. He was in a car that had traveled around the block when somebody in the car identified the boys on the street as Crips gang members. Newborn implicated Ernest Holly. Ernest Holly and Shawnee (La Shawn) Floyd told DeSean that the a .357 Holly used in the shootings ended up at Shawnee's house and that Newborn had taken his gun over to Terranius' house and took it

---

[47] The Glock Newborn allegedly used may have been the same weapon Torrence Brumfield allegedly testified Newborn took from him. (17 RT 1553, 1566.)

apart. (17 RT 1653-1654, 1737-1740.) [48]

Newborn told DeSean that he had a girl who would give him a false alibi and that when he got out of custody, Newborn was going to retaliate against everyone who had was a witness against him. (17 RT 1566-1567, 1572-1573, 1640-1641, 1643, 1648-1649.) DeSean identified the car in People's exhibit no. 21 as a rental car. The keys to the car were given to De Sean in November,1993 by Darryl Johnson and Felton. DeSean abandoned the car in mid-December. (17 RT 1626-1627, 1711.) According to Johnny Earl Brown, a sergeant with the Los Angeles County Sheriff, who was present during an interview with DeSean, Newborn told DeSean Holmes that Ernest Holly was responsible for the Halloween shootings; that "they" had disassembled a gun at Terranius Pitts' house; and that Newborn was present at McFee's when the gun battle took place. (30 RT 3099-3100.)

In 1993, Christopher Keeling was a Los Angeles County sheriff's deputy assigned to the custody gang unit of the correctional facility where codefendants Newborn and McClain were housed. (19 RT 1920-1922.) Although his relationship with Newborn was low-key and the two had a decent rapport, that changed when Newborn was moved from the general population to the adjustment center and then to administrative segregation for violating jail rules.

---

[48] Newborn told DeSean that Aurelius Bailey had a .38 caliber weapon which DeSean saw Bailey with before the killings. (17 RT 1731-1732.)

When Newborn questioned Keeling about the reason for the move, he denied that he had committed the jail violations then said "I'm not saying I'm not guilty for what I'm here for, but while I'm here I don't want to be caged up like I'm some animal." (19 RT 1923, 1930.) When Keeling had contact with Newborn three to five days later, Newborn angrily denied making the statement. He then explained that although he made the statement, that was not what he meant. (19 RT 1932-1933.)

iii. Testimony Regarding McClain's Alleged Admissions and Conduct

On September 12, 1992, McClain and Bowen were detained by Pasadena Police Officer Luis Banuelos at a gas station. (23 RT 2295, 2297.) Several live .38 caliber rounds were found in McClain's pants pocket. A .357 revolver and a Tec-9 9 millimeter were found on the gas station property. Bowen told Banuelos that the 9 millimeter was his. (23 RT 2298-2299.) The weapons were not returned. (23 RT 2301.)

The day after the Halloween shootings, then rival gang member Mario Stevens[49] had a conversation with McClain at apartment complex King's Manor.

---

[49] At the time of his testimony, Mario Stevens was serving a prison term for a probation violation following his conviction for sales of narcotics. Although he was facing five years in state prison, Stevens received credit for time served and probation in exchange for testifying before the grand jury. He had hopes of being placed in a half-way house, being relocated, getting a job, receiving living expenses and a portion of the reward money for his testimony at trial. (25 RT 2541-2542, 2548-2550, 2557-2559.) Moreover, amid his testimony, Stevens entered into a written agreement with police that if he testified at trial he was to

(25 RT 2544, 2555, 2564.) McClain told Stevens that "him and his homeys had...shot some Crips." [50] (25 RT 2545.) McClain also said that he "put in some work" on some Crips -- which Stevens took to mean "shoot" – because Crips killed Fernando Hodges. (25 RT 2554, 2567, 2600.) McClain said that he and the other shooters had on Halloween costumes.[51] McClain never said that he had shot children and he never said who the "homeys" were. (25 RT 2567-2569, 2579-2580.)

The day after Halloween, 1993, Troy Welcome and David Morris traveled by car to Morris' home in Tulare. (28 RT 2947.) Within a few hours of their arrival, Welcome saw McClain walking out of an apartment. McClain got into the car with Welcome and others who were all smoking marijuana. (28 RT 2949-2950.)

Welcome was fearful of McClain. Although there was never any physical conflict, the two had had words. McClain had a 9-millimeter or .380 weapon which he pulled out of his waistband and placed on his lap. (28 RT 2950-2951.) He asked Welcome and Morris whether they had heard anything on the radio about Halloween. (28 RT 2958.) Also, while listening to rap music, McClain sang lyrics to a song that Welcome understood could mean that the gun was hot, that

---

receive a "substantial portion" of the reward money. (RT 25 2602-2603.)

[50] Mr. Stevens' testimony was offered against all appellants. (25 RT 2542, 2551.)

[51] In a police interview, Stevens may have said it was the victims who wore costumes. (25 RT 2569-2570.)

someone had been killed with the gun or that he had shot someone with the gun. (28 RT 2952-2954.)

Days later, while still in Tulare, McClain told Welcome that he was on the run. (28 RT 2958.) Although McClain never stated he was involved in the incident, Welcome testified that he thought McClain was on the run because of Halloween shootings. (28 RT 3005-3006, 3009.) [52]

In November 1993, McClain had an obligation to report to state employee (parole officer) James J. Thomas which he missed. (20 RT 2060, 2061-2068 .)

James Carpenter is both McClain and Newborn's cousin. In early November 1993, McClain, Alonzo Hamilton and Laward Looney visited Carpenter at his home in Tulare, California. (23 RT 2303-2304.) McClain and the others arrived in a purple or burgundy colored car. Carpenter told police that it was a rental car. Although he denied it at trial, police testified that Carpenter had reported that McClain and the others were talking about the Halloween shootings, that they thought the kids shot were Crips, that McClain had said "Boom Boom Pow Pow Pow, I can still hear the noise." Carpenter also reportedly told police that when he learned that children had been killed, McClain got nervous and cut his hair and that McClain had a .38 that he sold to Michael Thompson. At trial

---

[52] Welcome met with police on numerous occasions, supplying information of a number of different open cases, including the Halloween shootings. Welcome was given $20-$40 for his information. Welcome also signed a written statement for McClain's investigator. (29 RT 2963, 2968-2969, 3020-3023, 3066, 3069.)

Carpenter claimed that the police put words in his mouth and that he told them what they wanted to hear. (23 RT 2307-2311, 2329, 2333-2339.)[53]

On November 7, 1993, on a flight from Ontario, California to Boston, Tonja Underwood-Richardson, a flight attendant on her way back to work, was seated next to codefendant McClain. (23 RT 2267-2269.) McClain professed to be a "fearful flyer" and asked Tonja questions about how to make his connection. Tonja asked to see his ticket and noticed the first name was "Robert" and the last name was something with an M. McClain had a lot of money and said that he was a drug dealer. (23 RT 2270, 2281.)

McClain gave Tonja a piece of paper with his pager number. He explained that he was going to be in Memphis on business for 30 days, travel by car to Kansas and was not sure whether he would return to Pasadena. Next to his pager number McClain wrote "Herb." (23 RT 2272-2274.)

When she found out he was from Pasadena, Tonja asked McClain why he hadn't flown out of Los Angeles. McClain responded that there were too many police at the Los Angeles airport and that he would be stopped because fit a gang member profile. McClain admitted to actually being a gang member. (23 RT 2274.)

Sometime in December, Tonja heard about the Halloween shootings. It

---

[53] Although police taped interviews with all other witnesses, they did not do so with Carpenter because they did not have a tape recorder available. (RT 2340.)

was on a news report that she heard McClain's name and saw his picture. (23 RT 2275.)

e. Forensic Evidence

No physical evidence connected appellant Holmes to this case.

Crime scene technicians made eight plaster casts of shoe prints found at the Halloween killing site. The parties stipulated that the casings were from children's shoes and one adult heel impression. (24 RT 2495, 2499, 3078-3079.) Edgar Evans' clothing was collected at the hospital. (24 RT 2501.) Also booked into evidence from the scene was a rubber Halloween mask, a Styrofoam cup, clear cellophane candy wrappers, a bank check, a blue bandana and a beer can. Fingerprint comparisons from these items to appellants, Bowen and Bailey yielded negative results. (31 RT 3146, 3150-3151.) Latent fingerprints lifted from items inside and a gray Tempo were identified as having been made by DeSean Holmes and Lionel Edward Evans. Additional latents from inside the vehicle did not match appellant his codefendants, Bowen or Bailey. (31 RT 3152-3155.)

Several expended and unexpended shell casings were recovered from the area depicted in People's Exhibit numbers 50, 51 and 52. 35 bullet fragments were collected in People's Exhibit 60. (RT 2081-2083, 2502, 2507-2511, 2518, 2522, 2535, 2793.) Four live rounds of either .357 or .38 caliber (People's Exhibit number 64), were collected. (26 RT 2794.) Bullet fragments were collected form the bodies of Reggie Crawford (People's exhibit number 62), and Stephan

Coates (People's exhibit number 63.)

Police removed a section of metal fence railing to process for fingerprints. No identifiable prints were recovered from the fencing. (27 RT 2516, 2860, 2876.)[54] Except for one gum wrapper, police were unable to lift usable fingerprints from any of the items seized. (24 RT 2528, 2531, 2533.)

Los Angeles Sheriff Department firearms examiner Dwight Van Horn testified that three of the bullet fragments found at the Halloween scene and one of the bullet fragments found at McFee's were .38 caliber wad cutters made by PMC. (26 RT 2792, 2803, 2845.) Van Horn could not determine the particular type of 9-millimeter weapon was used. (26 RT 2804-2806.)

Both of the bullets recovered from Reggie Crawford and Stephan Coates were fired by either a .38 or a .357 caliber weapon, but the two boys were killed by two different weapons. Either the Ruger depicted in People's exhibit number 65-A or the Smith and Wesson depicted in People's exhibit 65-B could have fired the bullets which killed Crawford and Coates. (26 RT 2807-2810.)

3. Robert Lee Price Attempted Murder

Codefendant McClain was separately charged with the October 28, 1993 attempted murder of Robert Lee Price. (31 RT 3160)

While leaving his grandmother's house at the Community Arms

---

[54] Smudges and prints with an insufficient number of characteristics would be categorized as "no prints." (RT 2876.)

Apartments, Price was called over by McClain. After Price gave McClain a cigarette, McClain pulled out a gun and shot him in the face. Price turned to run and was shot twice in the buttocks. (31 RT 3162.) [55]

B. Defendants' Case at the Guilt Phase

1. Appellant Holmes Defense

Wanda Martin is the mother of Holmes' son. At about 6:00 pm, Halloween night, Holmes picked up Wanda up from work and together they drove to the babysitter's house to pick up their son and then went home. There they had dinner. As they started to watch a movie, Holmes' received a page. Because there was no telephone in the house, Holmes went to the nearby 7-11 store to make a call. When he returned, he told Wanda that Fernando Hodges had been shot and that he was going to the hospital. Holmes returned home a little before 10:00 pm, saying he had gone to the hospital. Wanda was certain of the time because it coincided with their son's feeding. (38 RT 4092-4098, 4099, 4104.)

Holmes' aunt, Donna McCallum testified that petitioner had been given the nick-name "Boom" as a toddler. This was because he was very active and was always bumping into things. (35 RT 3853.) McCallum heard that petitioner left town shortly after the murders, but that he returned and turned himself into police when he learned his picture was in the paper. (35 RT 3855.)

---

[55] Price received $200 for testifying before the grand jury and was promised relocation of his family for testifying at trial. He admitted to five felony convictions. (RT 3171, 3175.)

Holmes offered the testimony of Kathy Pezdek, professor of psychology at Claremont Graduate School as an expert regarding eyewitness identification. Pezdek testified, generally, to the factors which influence eyewitness identification. She described memory as having three stages, input – which involves the "perception"of an event, storage – which involves how well a witness can hold on to information over time, and identification – the stage at which a witness is asked to make an identification. (34 RT 3648-3656.) Pezdek also testified to the psychological factors which can affect the accuracy of an identification, including exposure time, lighting, physical distance, and distractions. Pezdek explained that people have greater difficulty identifying someone of another race and that memory drops off over time while witnesses can be subject to suggestibility. (34 RT 3660-3694.)

Pezdek did not listen to the tapes of the Pina interviews, determine what if any physical evidence corroborated the identifications, visit the crime scene or interview any witnesses in the case. (34 RT 3655, 3669-3674, 3677, 3684, 3694, 35 RT 3827.)

Appellant Holmes called W.R. Ireland, a detective employed by the Pasadena Police Department, who testified that in the early morning hours of November 1, 1993, he interviewed Gabriel Pina. Pina had generally described the men he saw getting out of the car as including a Black male, 20 years old or younger, wearing a tannish coat, plaid shirt and ivory colored pants. When asked

whether he could recognize this person, Pina said that he was not paying attention. Ireland described Pina as "sleepy and not completely awake" because Ireland had "pulled him out of bed." (33 RT 3741-3742, 3747, 3578.)

On November 4, 1993, when Pina was interviewed by Pasadena Detective Uribe, Pina was unable to help identify the vehicle he had seen. Pina was unable to describe any individual from the second car and did not give details he later gave to the grand jury. (36 RT 3901-3906.)

Pasadena Police Officer Ruben Chavira was one of the first officers at the scene of the Halloween shootings. When he interviewed Pina, Pina told him he was unable to describe the cars; that he saw "a group" of people exit the car. He did not see anyone return. Pina never mentioned that anyone was wearing a trench coat. (36 RT 3882-3886.)

On November 31, 1993. Detective DeWane Moe of the Pasadena Police Department spoke to Kenneth Coates. Kenneth said he saw two suspects jump out of some bushes. He described the first as a Black male, aged 18 to 24, 5'10 to 6' weighing 175 pounds and being muscular. This individual has "slicked back hair, tied in a ponytail down to his shoulders," and was wearing a red bandana and dark clothing. Kenneth described the other individual also as a Black male, aged 18 to 24, 5'10 and weighing 175 to 185 pounds, "flabby" and also having a red bandana and wearing dark clothing. (35 RT 3794-3795.)

On May 11, 1995, Bob Zink, a private investigator called by Holmes, spoke

to Derrick Tate at Macon County jail in Decatur, Illinois. (36 RT 3858.) Tate told Zink that he had several interviews with police. He said that he was shown a number of photographs and told by police that the photographs were all P-9 members. Tate told Zink that he had made up the information he told law enforcement. According to Tate he told the officers what he knew they wanted to hear. (36 RT 3860-3861.)[56]

2. Appellant Newborn's Defense

In October 1993, Shawnita Blaylock dated Fernando Hodges. The night he was killed, Blaylock went to Huntington Hospital with her cousin Trina. (32 RT 3363.) Blaylock did not see Newborn or LaChandra Carr at the hospital. (32 RT 3365-3366.) Blaylock did see a number of other persons who she named, including Solomon Bowen and Karl Holmes, who she spoke to briefly before he left. Blaylock did not see McClain at the hospital. (32 RT 3368, 3371, 3411-3412.) Marie Bonner also testified that she saw neither Newborn or Carr at the hospital the night Fernando was shot. (33 RT 3624-3625.)

Blaylock paged codefendant Newborn to tell him that Hodges had been shot, but Newborn did not return her page. She also telephoned one of Newborn's girlfriends in hopes of locating him. (32 RT 3375.) Blaylock was aware that both Newborn and Hodges were P-9 gang members. While at the hospital, there was discussion that Hodges had been shot by Raymond Avenue

---

[56] Tate's account to Investigator Zink was substantially similar to the information he admitted giving appellant's Holmes' trial counsel, Thomas Nishi. (15 RT 1384.)

Crips. (32 RT 3408.)

Newborn presented the alibi testimony of Felicia Goodall who testified that Newborn was with her from approximately 7:00 p.m., Halloween night to 9:00 a.m., the next day. (32 RT 3417-3420.) James Otis partially corroborated the alibi, in that he said he dropped Newborn off at Goodall's at approximately 7:00 p.m., and picked him up from the residence at 10 o'clock the next morning. (33 RT 3455-3458.) That morning, Newborn did not appear to believe Otis when Otis informed him Hodges had been killed. (33 RT 3461.)

Newborn also presented testimony to demonstrate he had never been at Willie McFee's. (33 RT 3532, 3536.)

3. Codefendant McClain's Defense

McClain testified in his own defense. He denied committing any of the homicides and attempted homicides. He denied driving any of the cars involved and denied any knowledge of the offenses until after they had happened. McClain denied making incriminating statements about his own involvement or that of appellant Holmes to James Carpenter and Mario Stevens. McClain admitted he was present when Robert Price was shot but denied any part in the shooting. (36 RT 3962-3964, 3966-3967, 3973, 37 RT 4037-4040, 4052-4053.)

On Halloween night, McClain was at Kathy Brown's when he got the page about Fernando Hodges' shooting. McClain thought of retaliating against Crips, whose gang were suspected as Hodges' shooter. McClain would never kill

children and picked Rick Lacy as a target. Police were everywhere and there were witnesses, so McClain gave up on his plan to kill Lacy or anyone else. (36 RT 3979, 3988-3991, 37 RT 4071-4072.)

McClain admitted to a felony record, to being a gang member and admitted to some untruths to Detective Delgado. (36 RT 3971-3972, 3991, 37 RT 4011-4112.)

C. Prosecution Rebuttal

The prosecution presented Detective Korpal's testimony that James Carpenter told him that codefendant McClain admitted that he, Holmes and Cornell Daniels were involved in the shooting. (39 RT 4141.) Lakesha English offered testimony disputing a portion of Wanda Martin's alibi testimony for Holmes testifying that Holmes and Martin attended a Halloween party at 7:30 or 8:00 pm. (40 RT 4230.) Employment records indicated that Wanda Martin had clocked out at her job at 7:20 p.m. (40 RT 4245.)

D. Prosecution Penalty Phase Evidence at the Penalty Retrial

1. Circumstances of the Crime

The prosecution evidence of the crimes tracked that offered at the guilt phase.

It presented the testimony of Aleta Bergstrom who responded to the Community Arms Housing Complex and assisted in the transportation of Fernando Hodges, who suffered multiple gunshot wounds (including one to each

temple and several to his body) to Huntington Memorial Hospital, and that in this case, there was concern because fellow gang members might want to retaliate. (65 RT 6415-6421.)

Huntington Hospital security guard Horace Carlyle received the information that there was a gunshot wound in route. Carlyle testified that the log indicted that the shooting was possible gang related. According to Carlyle, two distinct groups of people arrived at the hospital; one he would call family and friends and associates that were "normal" and another group, dressed in hoods and sweatshirts. (67 RT 6433- 6438.)

Charles Baker testified regarding the circumstances of the shooting at Willie McFee's. Baker was never sure about the exact time of the gunshots, but believed it was sometime after 9:30 p.m. and before 11:00 p.m. (71 RT 7034-7036, 7044, 7046.)

In exchange for his testimony, Baker was hoping to have his drug diversion sentence deemed completed, and thus have his possession of cocaine charge dismissed. After his prior testimony in the case and approximately two to three months before this round of testimony, Baker received "about a thousand dollars" of the reward money and "about $3500" in relocation funds. (71 RT 7042, 7050.)

Antwaun Ayers, Lawrence Ayers, Kenneth Coates, Deborah Bush, Robert Nolden, Lloyd Summerville, and Stephanie Roberts testified as to boys' attendance at Stephanie's Halloween party, their trip toward home and their stop

at George's Market. (66 RT 6429, 6480 et. seq., 67 RT 6517, 6541, 6525 et. seq., 68 RT 6745 et. seq., 69 RT 6966 et. seq.)

None of the boys could identify the men in the car that nearly hit Reggie, the shooters, or the men seen running from the scene of the shooting. (RT 6763, 6540, 6550.) The men seen running from the scene were generally described as Black males, aged 18-24. One was short and stocky. Another had slicked back black hair in tied in a ponytail. (RT 6764.)

Senior Deputy Medical Examiner James Ribe testified that Reggie Crawford received five gunshot wounds, and that if Crawford was conscious for any time after the bullet entered his chest, he could not have breathed and would have been aware he was dying. (68 RT 6737, 6743.)

Pathologist Stephen Scholtz testified that Stephen Coates was shot twice and died instantaneously from a gunshot wound to the head. (69 RT 6913, 6917-6918.)

Pathologist Ogbonna Chinwah testified that Eddie Evans died from a gunshot wound to the chest, and that there was evidence was conscious and in agony from the moment the bullet entered until he died. (67 RT 6556-6558.)

The prosecution offered portions of McClain's former testimony in which he explained that when he heard that Fernando Hodges had been killed by Crips he was angry and sought revenge with fellow gang members. (70 RT 7018-7017.) McClain was armed with a .44 caliber weapon. His intention of taking the gun

was to kill a Crip. (70 RT 7023-7024.) Although he paged and looked for fellow gang members, it was not to conspire with them to kill Crips. McClain said he did that sort of thing on his own. (70 RT 7024.)

Both Jessica Ramirez and Roger Boon testified regarding their observations Ramirez repeated that she looked out the window of her home when she heard two cars pull up and people talking. The cars contained Black males. She heard on say "Hurry up." As one car left, "about three" individuals walked around the corner. Later, Ramirez heard gunshots. (67 RT 6580-6583.) Roger Boon testified that he was at a Halloween party when he saw muzzle flashes and heard shots fired from two different weapons. He heard approximately 12 shots. (67 RT 6591-6593, 6603.) Five minutes after the gunfire stopped, Boon saw two vehicles driving toward him from the direction the of the fired shots. (67 RT 6593.) As one of the vehicles passed by, a person reached out and gave a thumbs-up signal to Boon. (67 RT 6595.) Boon went to the scene of the Halloween killings. One of the victims was breathing at first, then died. Another was already dead. (67 RT 6598.)

Jessica Ramirez could not identify any of the males she saw in or out of the cars. (RT 67 6583.) Richard Boon saw seven people but could not tell the race or identify any of the people who passed by in cars. (67 RT 6596.)

On Halloween night 1993, while walking his dog with his girlfriend, Gabriel

Pina[57] saw four cars traveling up the street at a high rate of speed. (67 RT 6604, 6607.) He noticed that some of these cars were modified. (67 RT 6607.) Pina continued his walk and upon rounding a corner saw the same four cars parked along the side of the road. One of the cars was parked in the middle of the street. (67 RT 6610.) One of the cars approached Pina, then reversed and returned. (67 RT 6612.) Pina though this was odd. The car had tinted windows so he could not see inside. He continued to walk and the car pulled up again. This time, the driver look at Pina through the front windshield. At the time, the distance between Pina and the driver was estimated at 15 feet. (67 RT 6612-6614.)

Pina noticed 15-20 people standing near the four cars. (67 RT 6614.) Pina heard gunfire. He sent his girlfriend home and was hiding behind a tree when he saw two people run around the corner and get into the two parked cars. (67 RT 6620-6621.)

Pina went home, put the dog away, and returned to the crime scene with his girlfriend. Pina spoke to a number of police officers. Pina was not thinking straight when he spoke to the officers and some of the information he gave was incorrect. (67 RT 6641-6643.)

In addition to being interviewed at the scene, Pina was interviewed at the Pasadena police station on a number of occasions. He gave varying descriptions of people, vehicles, his location, location of other individuals, the degree of his

---

[57] Both the prosecution and appellant Holmes called Gabriel Pina to testify.

attention, the extent of distractions, and the surety of his recall at every turn. [58]

At the penalty phase retrial Pina identified pictures of Holmes and McClain. (71 RT 7118-7122.)

Los Angeles County Firearms Examiner Dwight Van Horn testified that evidence items 5-18, 21, 84-88, and 90-102 were all fired from the same 9-millimeter weapon. (69 RT 6865, 6878.) Two bullets recovered from Reggie Crawford's body (Exhibit 129 and item no. 59) were fired from the same .38 or .357 caliber weapon. (69 RT 6882-6883.) The bullets recovered from Stephen Coates were all fired from the same 38 or .357 caliber weapon. The Coates and Crawford bullets were not fired from the same 38 or .357 caliber weapon. (69 RT 6883-6884.)

The parties stipulated to admission of a prosecution chart (Exhibit no. 128) which depicted the item and item numbers of evidence examined by Deputy Dwight Van Horn. (Bullets, bullet fragments and casings.) (69 RT 6860-6865.)

2. Victim Impact Evidence

According to his mother, Katrina Evans, Edgar Evans was 13 years old when he was murdered. Ms. Evans saw Edgar leave for the Halloween party when she came home from work. (66 RT 6491-6492.) Near 10:00 p.m., Ms.

---

[58] The extent of Pina's inconsistent statements at every stage of the proceedings, including the interview process and in testimony and regarding nearly every observation and recollection testified to is discussed extensively below in Arguments V and VI.

Evans became concerned. Edgar had not come home and had not called to say he would be late. (66 RT 6493.) Near 11:00 p.m., Ms. Evans received a call from a neighbor informing her of the shooting and mentioning that she thought Edgar might have been there. The neighbor told Ms. Evans that she was to go to the hospital. (66 RT 6495.)

At the hospital, Ms. Evans was greeted by a friend who worked there. The friend informed Ms. Evans that she would need to identify someone and suggested the two pray before doing so. When Ms. Evans was taken in, she saw the feet of a body on a stretcher. She knew immediately it was Edgar because she knew every inch of him. Afterward, she blacked out. She could not believe that he was laying there when just earlier he had been healthy and happy. (66 RT 6499-6500.)

Later, while in the waiting room, a nurse came to her and gave her Bible verses and scriptures that had been recovered from Edgar's pockets. (66 RT 6500.)

Ms. Evans called her daughter, Edgar's sister, to tell her he was dead. (66 RT 6502) She described the physical and emotional pain which accompanies losing a child; the fear she feels for her other children and the impact on her husband, son and daughter. (66 RT 6502.)

Ms. Evans described Edgar as a good brother to his siblings. He was a very good boy who found ways to earn money and help everyone around the

neighborhood. He was a real go-getter on his way to becoming very successful. (66 RT 6496-6497.)

Ms. Evans identified three pictures of Edgar. One, of Edgar in his school uniform, was taken just after he placed third in a citywide essay contest; one, was of Edgar and his little brother; and one, of Edgar and his little sister. (66 RT 6498-6499.)

Colett Evans, Edgar's cousin, described Edgar as "a little protégé." (71 RT 7053.) She had a hard time accepting the fact that Eddie was gone. (71 RT 7056.) Colett described the funeral and how she felt then. When attempting to read an essay written by Edgar, she broke down on the stand. (71 RT 7058-7059.) The prosecuting attorney, Mr. Myers read the essay to the jury. (71 RT 7060-7062.)

Lloyd Summerville testified that he was affected by the shooting in lots of ways. He was frightened, unable to go to school, moved to a different state and received threats. (67 RT 6522.)

Stephen Coates was named after his father, Stephen. (70 RT 6988.) Mr. Coates was notified of his son's death by his daughter, who called him on the telephone in hysterics. Mr. Coates kept thinking that because it was Halloween, someone was playing a cruel joke. (70 RT 6988-6989.) Mr. Coates asked his son Stephen to come to Los Angeles with him for Halloween, but he said he had a party to go to. After Stephen's death, Mr. Coates blamed himself for not insisting.

(70 RT 6990.) Although he was separated from Stephen's mother, Mr. Coates would get together with his son every other weekend or as often as they could. (70 RT 6989.) He spoke of his fondest memories with his son and of the feelings of loss at his death. (70 RT 6990-6991.)

Stephan Coates' funeral was held eight days after he died. Making funeral arrangements was the hardest thing his mother, Deborah Bush had ever done. It just didn't seem right that she should have to pick out a coffin and a plot for her son. The whole week before the funeral was like hell. Media and people she didn't know would stop by. Ms. Bush had to go down to the funeral home to approve of the way her son was displayed. (69 RT 6979-6980.)

At Stephen's Coates' funeral, Kenny Coates finally realized his brother was dead. (68 RT 6761.) Kenny remembered Stephen could draw and play basketball. One of his murals was on Washington Middle School. (68 RT 6762.) Ms. Bush remembered Stephan as the quiet one of her children. His favorite past time was drawing. Stephan always stood up for the underdog and one of his passions was little kids. (69 RT 6981.) A video tape of Kenny showing Stephan's mural was displayed for the jury. (69 RT 6981-6982.)

At the time her son was killed, Ms. Bush was a crime scene investigator for the Pasadena Police Department. She knew that she had to leave the scene and take her other children home. She said leaving Stephan behind at the scene was the most difficult thing she had to do. (69 RT 6974-6976.)

Reggie Crawford's mother Florence, recalled that the original plan that Halloween had not been to go to Stephanie's party, but that through Stephen Coates the plans changed. Ms. Crawford would have preferred that Reggie stay with his siblings and not go trick or treating because she felt it was dangerous. (70 RT 6992-6993.)

At about 10:00 p.m., Ms. Crawford passed the boys in her car. She thought of picking them up, but because there were so many, decided to let them walk to the Coates' home to finish up the night. Within 5 minutes of returning home, Ms. Crawford heard the shooting. A neighbor knocked on her door and suggested she check on her son Reggie. Ms. Crawford felt uneasy, especially when she heard sirens, but did not think it concerned her boy. Eventually, Ms. Crawford decided to get into her car and check on what had happened. As she approached the scene of the shooting, she saw Robert Nolden running toward her. Robert told Ms. Crawford that Reggie had been shot. She thought that he had been only wounded. After police would not let her go further and advised that she go to the hospital, Ms. Crawford returned home and called her sisters to take her to the hospital. (70 RT 6993-6996.)

When she arrived at the hospital, the nurses would not let her back to see Reggie. At the time, Ms. Crawford didn't know that three of the boys had been killed, so she waited for about an hour hoping to see her son. (70 RT 6995-6996.)

Eventually, Ms. Crawford, left the hospital and returned to the scene, but

was told to go home. After waiting approximately 30 minutes, Reggie's grandfather came to the house to tell her that Reggie had been killed. (70 RT 6996-6997.) Ms. Crawford had to tell her other children that their brother was dead. She called this experience "a living hell." (70 RT 6999.)

For Robert Nolden, people he used to see every day were now gone. (66 RT 6490.) Lawrence Ayers still carried the bullet in his leg. (67 RT 6536.)

Half of the bullet is still in Antwaun Ayer's hand. (67 RT 6547.)

3. Gang Affiliation

In 1993, investigator Carlos Lopez, with the Pasadena Police Department, was assigned to the Black gang unit of that department. (66 RT 6450.) After a general description of his contact with Black gangs including P-9's, a description of hard-core versus associate members, and his opinion as to how one becomes associated with a gang and rises to hard-core status, Lopez testified that he had had contact with all three defendants.

After a minimum of 50 contacts with codefendant Newborn, Lopez was under the impression that Newborn was a leader of Parke Street Nine Lives (P-9's). (66 RT 6455-6456.) After a minimum of 20 contacts with codefendant McClain, Lopez was under the impression that McClain, having just gotten out of prison was in between leader and associate of Parke Street Nine Lives. (66 RT 6456-6457.) After a minimum of 20 contacts with appellant Holmes, Lopez was under the impression that he too was in between leader and associate of Parke

Street Nine Lives. (66 RT 6457.)

Lopez went on to identify the individuals in number of photographs of alleged P-9 gang members including one of various alleged gang members at a P-9 funeral (Exhibit no 100), a photograph with an alleged member holding a red rag with various alleged gang member names and an alleged gang member with a 9-millimeter gun and shells (Exhibit no. 6), and photograph of graffiti which, in Lopez's opinion indicated an alliance between P-9's and another street gang, S-9's (Exhibit 93). (66 RT 6457-6451.)

Lopez also identified a photograph of graffiti with the words "Boon" or "Boom" which he identified as appellant Holmes' nickname, "Sunday Shoes", which he identified as codefendant Newborn's nickname, and "Monstra Herb 1" a name he had not heard before. (Exhibit B; 66 RT 6463-6464.) Another photograph (Exhibit 116 C), contained the words "Anybody Killa" with "Sheriff" and "Police" crossed out. In Lopez's opinion this meant death and murder. (66 RT 6465.)

4. Acts of Violence or Threats thereof and Prior Felony Convictions

a. Appellant Holmes

In August of 1993, at a carnival at Jackie Robinson Park, Officer Tory Riley saw the handle of a gun protruding from appellant Holmes' pant pocket. Holmes was 15 or 16 years old at the time. Holmes did not threaten or assault anyone with the gun. He did not attempt to elude police when arrested. (68 RT 6796-

6798.)

b. Codefendant Newborn

On May 5th 1986, while teaching carpentry at the California Youth Authority, Joseph Petelle witnessed a verbal altercation between codefendant Newborn and another ward develop into a physical altercation. Because he struck first, in Mr. Petelle's opinion, Newborn was the aggressor. (69 RT 6894-6897.)

In August of 1986, Gary Driggs was a counselor with the California Youth Authority. Codefendant Newborn was a ward under his supervision. After exchanging what Driggs characterized as "gang-related disrespect," and as Newborn was being escorted to lock-down, Newborn broke free and engaged in a fight with another ward. Driggs activated his alarm and instructed both wards to stop fighting. (69 RT 6856-6858.)

For three or four months prior to October 1991, Tanchell Anderson had been involved in a romantic relationship with codefendant Newborn. (67 RT 6560-6561.) Two weeks after Ms. Anderson terminated the relationship, the two met up outside a liquor store and exchanged words and called each other names. After Ms. Anderson slapped codefendant Newborn, the two exchanged blows. The altercation did not cause Ms. Anderson to seek medical attention. (67 RT 6563-6567.)

Ms. Anderson's mother reported the incident to the police. (67 RT 6575.) Ms. Anderson told police codefendant Newborn punched her more than 30 times.

(67 RT 6586, 6588.)

In May 1992, Aneadra Keaton had an argument with codefendant Newborn because she ditched school and he wanted her to attend. The two argued. Newborn slapped her and pulled Ms. Keaton by her arm and pushed her, but she was still able to walk down the stairs. Ms. Keaton complained of a swollen lip. Ms. Keaton had a baby in her arms at the time. (69 RT 6933-6940, 6953.)

In August 1992, Newborn came to Ms. Keaton's house with Fernando Hodges. Ms. Keaton and her friend Shawnita Blaylock left with Newborn and Hodges. Keaton and Newborn argued and Newborn hit her three times. Hodges also hit Blaylock. (69 RT 6944, 6964.)

In November of 1992, Rochelle Douglas was pregnant with codefendant Newborn's baby. (68 RT 6661, 6663.) Newborn arrived at her house and the two argued about the paternity of the child. (68 RT 6665, 6675.) The argument turned physical; Ms. Douglas hit Newborn with a telephone and Newborn slapped Ms. Douglas. (68 RT 6667-6668.) Ms. Douglas' statements to police differed somewhat in that she told police that Newborn slapped her four times – resulting in swelling and redness to her cheek and ear– and that Newborn pulled the phone out of the wall. (68 RT 6669-6670, 6892.) The altercation did not cause Ms. Douglas to seek medical attention. (68 RT 6676.)

In August 1992, the window of Detrick Bright's car was kicked in. Shortly after it happened, Ms. Bright told officers that she had seen codefendant

Newborn running toward her car immediately before the window was broken. Ms. Bright was cut by the broken glass. (68 RT 6694, 6697, 6699.)

In April 1993, during an altercation with Newborn over a pager, Ms. Bright fell back into some rose bushes. At the time of the incident, Ms. Bright told police that Newborn pushed her into the bushes. (68 RT 6699, 6701, 6793-6794.)

When he was arrested for this incident, Newborn resisted and as a result of his resistance, one of the arresting officers ended up with a slight abrasion on his nose. (69 RT 6803-6905.) In order to make him comply, Newborn was sprayed with mace. (69 RT 6806.)

In December 1993, during an argument with Newborn, Newborn sprayed Windex, Lysol, and Raid in Ms. Bright's face. Some went into her mouth. Ms. Bright was pregnant at the time. Newborn called 911 for medical aid. The next morning, Ms. Bright was awakened when Newborn sat on her. Ms. Bright's statements to police differed somewhat in that she said Newborn held her against a wall and sprayed Raid in her face and eyes and that he threw her to the ground rather than sat on her. (68 RT 6701-6704, 6712, 6719-6721.)

In December of 1992, codefendant Newborn came into Louise Jernigan's beauty supply store and put, what she thought was, a gun to her side because, according to Ms. Jernigan, Newborn knew that she knew that he had killed her son. (68 RT 6767-6769.) The two left the store and argued in the parking lot. When Newborn left, Ms. Jernigan called the police. (68 RT 6772-6773, 6777,

6781, 6786.)

On May 12, 1993 police officer Monica Cuellar responded with other officers to a call of a male with a gun. A number of civilians were at the scene. Cuellar was assigned to pat-search codefendant Newborn. Newborn was noncompliant and used obscenities with both Cuellar and two other officers who stepped in to help. Cuellar formed the opinion Newborn was inciting the crowd. Eventually Newborn complied, was handcuffed and placed in a patrol car. Newborn was not physically violent to any of the officers and no weapon was found on his person when searched. (69 RT 6822-6828.)

c. Codefendant McClain

On July 27, 1989, when Raquel Flores returned home from work, McClain approached with a number of other males, and stole 4 or 5 chains from around Ms. Flores' neck. Ms. Flores did not press charges. (69 RT 6833-6840.)

On November 8, 1989, while on patrol near Charles White Park, Los Angeles County Sheriff's Deputy Blankenbaker saw four Black males run into a bathroom area, then heard a shot from inside of the bathroom. A small caliber weapon was found near a toilet. McClain said that he had shot himself. Live rounds of ammunition were found on McClain's person. (69 RT 6819-6821.)

While housed at the Los Angeles County Jail on the instant case, Sheriff's Deputy Gregory Boghosian observed codefendant McClain to slip his handcuffs from back to front, run toward another inmate in an attempt to attack the inmate.

(68 RT 6648-6649, 6655.) Codefendant McClain was taken to the ground. When deputies lifted him back up, they discovered a "jail-made stabbing device" underneath McClain's body. (68 RT 6655, 6656.) The device appeared to have been made from the sole of a shoe. (68 RT 6656.)

In September 1992, Officer Luis Banuelos, saw McClain and Solomon Bowen running out of a housing project. (68 RT 6684-6686.) Banuelos followed and found the two hiding near a gas station. (68 RT 6687.) Banuelos detained the two and during a pat down search recovered several .38 caliber bullets from McClain's pocket. Banuelos also recovered two weapons in the area. (68 RT 6688-6689.)

In August 1990, Bernard Rowe's friend, Bryant Cook told him that he had been robbed of his car by gunpoint. Mr. Rowe had not seen anything because he was in the house getting a beer. (69 RT 6722-6727.) Mr. Cook recalled that when he saw two men walk toward Rowe, he knew something was up and so took off running. Other than "a gesture thrown under a coat," Cook did not see anything at all. (69 RT 6829-6831.)

At the time of the incident, Mr. Rowe and Mr. Cook told deputies that two men approached him and his friend. They were ordered up against a garage wall and the men took the car from the driveway. The vehicle was stopped by police approximately 10 minutes later. Mr. Rowe was taken to that scene where he identified the car and codefendant McClain as one of the men involved in the

robbery. (68 RT 6729-6732, 6845-6847.)

As carpentry teacher Joseph Petelle was leaving the courtroom after testifying against codefendant Newborn, as he wished Deputy District Attorney well and thanked Detective Uribe, he overheard codefendant McClain, as he leaned back in his chair, say "I'll kill you." Petelle was "incensed." The parties stipulated that Mr. Leonard, McClain's advisory counsel heard McClain say "You're a dick head." (69 RT 6921-6925.)

On October 29, 1993, Robert Lee Price, an alleged member of the Raymond Avenue Crips was shot in the face and thigh. (70 RT 7027, 7029-7031.) The jury's verdict finding codefendant McClain guilty of attempted murder and the attached use and arming enhancements (Pen. Code §§ 12022.5 and 12022.A(1)) was read to the penalty phase jury. (70 RT 7032-7033.)

Judicial notice was taken of four felony convictions, three convictions for possession of a firearm by a felon and one for grand theft auto. (69 RT 6850.)

E. Defense Penalty Phase Evidence at the Penalty Retrial

1. Appellant Holmes

a. Lingering Doubt

While walking his dog with his girlfriend, Gabriel Pina saw four vehicles traveling at 40 to 50 mph. Pina's memory of the description of the vehicles had faded. The first vehicle might have been a green compact import driven by a Black male with short hair; whom Pina did not recognize from the neighborhood.

(71 RT 7065-7066.) Pina recalled a 1984 or 1985 black S Model Honda Civic hatchback which may have been the second vehicle. Pina did not remember the color of the vehicles in sequence. (71 RT 7063, 7065, 7067.) The black vehicle was lowered and was driven by a Black male, whom Pina believed to be 20 or 25 years old and thinner than the driver of the first car. (71 RT 7067-7068.)

Noting that he was unsure of the sequence of the cars, Pina stated he thought [59] the third car was white and may have had tinted windows. This car may have been a Nissan Sentra. Pina could not see the driver. (71 RT 7068-7069.)

Pina could not recall the color of the fourth car, and believed it too was tinted. He surmised that this was why he had no memory of seeing anyone driving. (71 RT 7070.)

After the shootings, Pina returned to the scene and was questioned by a number of police officers. He was asked if he could give descriptions of the cars or the drivers. At that time, Pina gave "a vague description of one or two cars." His description of one car was that it was a dark blue '83 Corolla or possibly a Saturn. He described the other cars only as small. (71 RT 7070-7071.) He later testified that he should have said '94. The only description he could give at the time of this interview about the drivers was that they were Black males. (71 RT

---

[59] Pina admitted to having an unspecified reading disability and that he sometimes didn't "use appropriate words." (71 RT 7069.)

7071, 7073) [60]

Pina explained his varying descriptions and inconsistent memory by saying "Well, when you see about three kids dead, laying on the floor, your mind does not jump up and recall different things all the time." (RT 7072.) Pina also explained that through the process of going through trial, he started to remember more details. Recognizing that his memory was not necessarily getting better with time, Pina indicated he just remembered more key things better. (71 RT 7075-7076.)[61]

Pina identified codefendant McClain as the individual he saw "looking over a dashboard with his head tilted..." and appellant Holmes as one of the individuals he saw run around a corner and back to the cars. (71 RT 7115, 7119-7122.)

---

[60] As a visual aid for the jury Holmes' trial counsel displayed a chart indicating the number of varying descriptions Mr. Pina gave. (71 RT 7071-7072.)

[61] Although Pina did not remember what he said about what car or what individual inside the car or to whom he said it, and much of his testimony was speculative, he stated he was certain of the "key details" ultimately used to link appellant with the shootings. For example, in just 10 short pages of testimony, Pina answered he did not recall or was unsure, or speculated in his response 20 times. (71 RT 7064:28 "It's been so long I can't remember exact details." 67 RT 6065: 24 "Do you recall the make, the model, the year? Not off the top of my head, no." 71 RT 7067:4 "I believe it is possible...71 RT 7067:12 "It probably was..." 71 RT 7067:23 "I can't really recall." 71 RT 7068:9 "I don't remember." 71 RT 7068:18 "The third car is possibly –see I can't be specific..." I didn't really lock it in my memory." "I believe it was..." "I don't remember." 71 RT 7069: 13 "That one, if I remember, might have tinted windows. I can't recall." 71 RT 7070:1 No, I don't recall. To tell you the truth. I don't remember." 71 RT 7070:3 "Do you recall the color of that car? If I think about it I probably could, but right now I can't." 71 RT 7070:23 "No I don't recall." 71 RT 7071: 3 "My mind drew a blank." 71 RT 7073:14 "That name I don't recall." 71 RT 7073 "I believe so." 71 RT 7073:24 "Yes, I possibly said that. Probably meant...") During his entire direct penalty phase testimony Pina answered he did not recall or was unsure, or speculated in his response more than 100 times.

When asked by codefendant McClain why it was he did not inform police that he had a description of one or more of the people he had seen until after he saw the suspects on the television and in the newspaper, Pina explained: "The image that I had in my mind were like pictures in some sense. I focused and I imaged your face and the other person's face. And I'm very bad to choose words. I couldn't really describe you by — what do they call it? I cannot describe you guys exactly. If I see the same – if you showed me one picture and you mix it all up and you put a bunch of them similar to it I will pick out the same picture again in that sense, if that makes sense to you." (71 RT 7127.) [62]

Pina received $4,500.00 of the reward money. (71 RT 7097.)

Holmes called law enforcement officers to discuss the several and varying Pina interviews.

According to Detective Uribe, Pina telephoned him to say that he could identify two of the five suspects from the newspaper. He did not mention seeing anyone on television. (71 RT 7136-7137.) At the scene, Pasadena Police Officer Ruben Chavira asked Pina what he had heard. Pina described a 1983-1984 dark blue Toyota and three other small vehicles. He also said that he had seen several people running. Pina was not able to describe any of those individuals. (71 RT 7158-7159.)

---

[62] Even the prosecutor seemed to imply that Mr. Pina's testimony would not be sufficient to uphold the previous jury's verdict of guilt. (71 RT 7122.)

On November 1, 1993, during a taped interview with Detective Ireland, Pina indicated that he had seen four vehicles. Two of the vehicles Pina could not describe. One he described as a brand new, dark blue or dark green possible Toyota Celica. Another was an older, 1980-1989, white car. (71 RT 7162-7163.) Because **he was not paying attention**, Pina was not able to describe any individuals. (71 RT 7164.)

Pina told Ireland that after shots were fired he saw approximately three people running. (71 RT 7164.) When asked if he could identify any of these individuals, Pina responded that he was not sure **because he was not paying attention**. (71 RT 7167.) Ireland described Pina's demeanor during the interview as "**confused**." Ireland was not sure that Pina was fully awake. **He confused answers to simple questions**, and despite living in the area, he confused street names. (71 RT 7168-7169.)

During his first interview with Uribe, Pina was asked to describe the vehicles. Pina was able to describe the first two vehicles only, although he said all four had been lowered. Pina was not able to provide makes or models and when given brochures to look through, he could not make any further identifications. (71 RT 7138-7140.) Pina's description of individuals was limited to a Black male, 22-23 years old, with shoulder length jheri curl and "possibly" two Black males in the second vehicle. (71 RT 7140-7141.)

Pina's second interview with Uribe followed Pina's telephone call saying that

he had seen individuals on television and in the newspaper. (71 RT 7142.) [63] After viewing the photographs, Pina returned to codefendant McClain's picture and said that he resembled the individual that he saw on the night of the shooting but that he needed to see him from a different angle. Korpal showed Pina a picture of McClain from the newspaper. (71 RT 7144.) It was Uribe's belief, although he could not say so with certainty, that Pina had not seen the picture in the newspaper before seeing the photographic spreads. (71 RT 7145-7146.)

Holmes did not recall his eyewitness expert.

b. Life History Mitigation

Appellant Holmes' father, Willie Wimberly has four children, Dereck – who played professional football, Delandria, Trellis and Karl. According to Wimberly, Karl's young childhood was fine until his mother died. Karl was only 4 or 15 years old at that time. Karl's mother's death impacted all of the children and changed Karl's life. (71 RT 7174-7176.)

When asked how the death penalty would impact him, Mr. Wimberlay said "it would probably have an impact on all of us, basically, because all of us was always close. If you saw one, you saw the rest of them." (71 RT 7177.)

Over defense counsel's objection the prosecutor presented evidence that appellant Holmes had been arrested but not convicted, as a juvenile, for robbery,

---

[63] Pina was shown sets of six photographs containing two photographs of appellant Holmes. (71 RT 7143.)

vehicle theft, and gambling (71 RT 7180-7182.)

Appellant Holmes' aunt, Donna Mc Callum, explained that appellant got the nickname "Boom" when he was little. This was because he was always bumping into things and bumping his head. (71 RT 7183.) Karl was given the nickname by his mother. (71 RT 7184.)

Karl's mother passed a way in 1990. Her death was very sudden. (71 RT 7184.) If Karl would receive the death penalty, Ms. Mc Callum said that that would definitely impact her life. She loved Karl. It would also impact his grandparents and great-grandmother's lives. (71 RT 7185.)

2. Codefendant Newborn

Codefendant Newborn presented evidence that no reports of shots having been fired in the area of Willie McFee's home were placed until 2:00 am, November 1, 1993. (72 RT 7264.)

Newborn offered evidence refuting Ms. Jernigan's version of the December 11, 1992 beauty shop incident. (72 RT 7193-7194, 7240-7250.) [64]

---

[64] Pasadena Police Officer Tracey Ibarra responded to the beauty supply store that was the subject of evidence in aggravation offered against Newborn. Insofar as Jernigan never said Newborn had a gun, Ibarra's recollection of Jernigan's statement at the time of the incident differed from Jernigan's testimony at the time. (72 RT 7193-7194.)

Helen Edwards was employed at the beauty shop the day the above incident took place. Although Newborn and Edwards are not related by blood, Edwards considered Newborn like a nephew. Newborn frequently came by the beauty shop to say "hi" and buy hair products. Newborn walked into the store, hugged Ms. Edwards. Jernigan and Newborn exchanged words but never approached Jernigan and continually denied killing her son. (72 RT 7240-7250.)

Newborn also presented life history mitigation evidence.

Newborn was born to Gracie Newborn when Ms. Newborn was 16 or 17 years old. Ms. Newborn already had another son, Alonzo Hamilton, to whom she gave birth at the age of 15. With Newborn's father, Buford, there were occasions of physical and sexual abuse. The police were called. Ms. Newborn obtained a restraining order. Buford would beat and rape Ms. Newborn in front of her children Finally, after five years they divorced. (72 RT 7198-7202, 7238.) Newborn's relationship with his father was hostile. (72 RT 7203.) Several years later, Buford was killed.

Ms. Newborn described codefendant Newborn's relationship with Fernando Hodges as a close relationship. (72 RT 7204-7205.) Newborn is godfather to Fernando Hodges child. (72 RT 7215.)

Ms. Newborn raised her son the best that she could. She tried to teach him right from wrong and tried to take him to church. (72 RT 7206.) Nevertheless, by the time he was 15 years old, codefendant Newborn had been to juvenile camp and the California Youth Authority. (72 RT 7206-7207.)

Codefendant Newborn had a physical disability which resulted in a noticeable limp. Newborn was teased by the other children Newborn also stuttered and had trouble reading in writing and was considered hyper. For those difficulties, by 2nd or 3rd grade he was placed in a special school. Newborn was medicated for his hyperactivity. Even into his teen years, Newborn wet the bed.

(72 RT 7207- 7210.) Newborn was punished for wetting the bed. (72 RT 7211.)

Newborn also sustained head injuries. His sister hit him with a rock. Another time he was hit in the head with a bat and another time with a hammer. Once Newborn fell off his bike and knocked out a tooth. (72 RT 7212-7213.) When small, Newborn would eat laundry detergent. (72 RT 7216.) Ms. Newborn had been informed by personal at the youth authority that that Mr. Newborn was in the low average range of intelligence and that he had a thought disorder, delusions or hallucinations. (72 RT 7230.)

Newborn received two awards. One for being a ball monitor and a basketball trophy. (72 RT 7214.) He was once employed at the Rose Bowl picking up trash. (72 RT 7216.)

Ms. Newborn loved her son. (72 RT 7207.)

3. Codefendant McClain

Codefendant McClain presented evidence to refute his involvement in his alleged possession of a weapon during the assault on an inmate while housed at the Los Angeles County Jail on the instant case. (73 RT 7272-7274.) [65]

The mother of McClain's daughter Earlean Shamburger testified that if McClain were put to death it would hurt both her and her daughter. (73 RT 7285-

---

[65] Although not present at this particular incident Clarence Jones testified that it was common for inmates to throw out weapons to help another inmate involved in a racial confrontation. (73 RT 7272-7279.) Mr. Jones was in custody at the time of his testimony and was impeached with numerous felony convictions. (73 RT 7274-7279.)

7286.)

McClain's mother, Doris Russell testified that it would affect her whole family's life were McClain executed. She added that sitting in the courtroom, knowing he had reached this point for something he hadn't done was hard. (73 RT 7293-7294.)

F. Prosecution Rebuttal

On October 16, 1996, while assigned to this court for this case, Los Angeles County Sheriff's Deputy Robert Browning testified that he was threatened by codefendant McClain. (73 RT 7330-7332.)

Browning explained that while he and others had McClain exit the holding cell to put an electronic security device around his waist before entering the courtroom, codefendant McClain asked why his belt was warm. Browning explained that it had just been tested. McClain went back into the holding cell to retrieve his shirt and Newborn was ordered out for his belt. Newborn said to the deputies, "If you push one button, then you better push all three, because you know what I'm going to do." The deputies looked at each other as if recognizing something could happen. Deputy Admire said "Whatever" indicating they wanted to drop the matter. In response, McClain said, "Don't get within two feet of me or I'll kill you, and I'll have weapons this time." (73 RT 7332-7337.) Holmes was seated in the court room at the time. (73 RT 7331.)

G. Surrebuttal

Both Los Angeles County Sheriff's Deputies David Admire and Les Tranberg testified that they did not hear the words "I'll kill you," during the October 16, 1996 incident, although did hear McClain say "If you get within two feet" and something like "next time I'll have weapons." (73 RT 7342-7343, 7345-7346.)

ARGUMENT

I.

ARGUMENTS JOINED FROM APPELLANT NEWBORN'S OPENING BRIEF

Pursuant to Rules of Court, rules 36(a) and 13(5), appellant Holmes joins and incorporates the following arguments raised in Newborn's opening brief:

A. Guilt Phase Arguments

1. Appellant was Deprived of Due Process, Equal Protection, and a Representative Jury in Violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by the Trial Court's Error in Refusing to Remedy the Prosecutor's Improper Exercise of Peremptory Challenges Based on Race and Sex.

(Newborn's opening brief at pages 96 through 119 and Appendix A.)

2. Appellant was Deprived of Due Process and a Representative Jury by the Erroneous Excusal of Juror Number 126 for Cause.

(Newborn's opening brief at pages 119-134.)

3. Appellant was Deprived of Due Process, a Fair Trial, and his Right to Confrontation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by the Trial Court's Restrictions on Cross-Examination of DeSean Holmes.

(Newborn's opening brief at pages 135-155.)

4. Appellant was Deprived of Due Process and a Fair Trial in Violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by Prosecutorial Misconduct in the Form of Flagrant Appeals to the Jury's Passion and Prejudice During Closing Argument.

(Newborn's opening brief at pages 195-206.)

B. Penalty Phase Arguments

1. Appellant was Deprived of Due Process and a Fair Trial in Violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution by the Trial Court's Error in Admitting Evidence of Holding Cell Graffiti in the Absence of any Proof of Appellant's Authorship or Endorsement of the Writing

(Newborn's opening brief at pages 280-290.)

ARGUMENTS JOINED FROM APPELLANT MCCLAIN'S OPENING BRIEF

Pursuant to Rules of Court, rules 36(a) and 13(5), appellant Holmes joins and incorporates the following arguments raised in McClain's opening brief:

A. Penalty Phase Arguments

1. California's Death Penalty Statute, as Interpreted by this Court and Applied at Appellant's Trial, violates the united States Constitution and International Law

(McClain's opening brief at pages 458-523.)

2. The Instructions Defining the Scope of the jury's Sentencing Discretion and the Nature of its Deliberative Process Violated Appellant's Constitutional Rights

(McClain's opening brief at pages 440-452.)

3. The Trial court Erroneously Failed to Define the Penalty of Life Without the Possibility of Parole

(McClain's opening brief at pages 452-458.)

GUILT PHASE ARGUMENTS

I. THE TRIAL COURT'S FAILURE TO SEVER APPELLANT FROM CODEFENDANTS NEWBORN AND MCCLAIN DEPRIVED HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL[66]

A. Proceedings Below

1. Pretrial Motions

On July 1, **1994**, defendant Newborn filed a motion to sever himself from all defendants. [67] Newborn's motion was based on *Bruton v. United States* (1968) 391 U.S. 123, and *People v. Aranda* (1965) 63 Cal.2d 518. (4 CT 821-834.) McClain filed a motion to sever the Price shooting from the Halloween shootings. Prior to the hearing the prosecution responded, in writing, only to McClain's request to sever counts. (4 CT 851-862.) On July 8, 1994, at the hearing on the matter, without benefit of argument by any party, the trial court expressed its opinion that severance was unnecessary. The court said, "when I read these moving papers, I can't see a severance... and I really have been sustained on all my severance motions." (3 RT 60-61.) The court continued, "I don't want any more delays. Now we have the severance. I read every motion you have here. I do not hesitate from severing a case if I think it is appropriate." (3 RT 61.)

The court inquired whether defense counsel wish to add anything oral to the

---

[66] Appellant Holmes incorporates by reference the facts and arguments of Argument IV re impact of gang evidence and association with codefendants.

[67] At the stage of the proceedings, Bailey and Bowen were still joined with McClain, Newborn, and Holmes. (3 RT 50.)

moving papers, then ruled "at this time I see no reason to sever. But if something comes up – again, because of the grand jury I don't have everything, nor do you. At this time I will not sever the case based on the moving papers and what we have." (3 RT 62.) [68] At this juncture, Newborn informed the trial court that it was his understanding that codefendants would in fact incriminate his client and asked for some assurance that implicit in a denial for separate trials would be some indication that the prosecution would not use those statements in their case in-chief or would sanitize statements which violated *Bruton*. (3 RT 64.)

The prosecution assured the trial court and counsel "there is absolutely no *Bruton* issue in this case" and went on to indicate that sanitized and redacted statements would be available. The court was not particularly reassured by the prosecution's belief that there would be no problem and indicated it would take out "anything that looks like or smells like *Aranda/Bruton* issues." Expressing his personal dislike of severance, the court reiterated once again, "I am not going to have five juries on five defendants when it is not necessary." (3 RT 65.)[69]

At a pretrial hearing on July 29, 1994, the court again stated "there is no severance of the case." (5 RT 1994.)

On July 5, **1995**, McClain filed a written motion to sever his trial from that of

---

[68] The motion was denied without prejudice and was not joined by Bailey. (3 RT 62.)

[69] At this hearing Bailey's counsel stood in for appellant's absent trial counsel. (3 RT 51-52.)

his codefendants . (4 CT 1003-1013.) On July 17, 1995, the trial court granted the prosecution's motion to sever defendants Bailey and Bowen. (8 RT 247.) McClain and appellant Holmes moved to be tried separately from their codefendants; or alternatively, they requested they not be tried with Newborn. (8 RT 247, 248.)

The trial court denied the severance motion stating:

> Court: I don't find any grounds for it. Every case we have had has had multiple defendants. That issue has come up; we have researched it. I don't see anything different about this case. We have severed off two clients. The building is bankrupt; the County is bankrupt. Separate trials for every defendant would be unacceptable to everyone. (8 RT 248-249.)

2. Midtrial Motions

a. Derrick Tate

Just prior to Derrick Tate's testimony, Newborn represented to the court that Tate would testify appellant Holmes told him that the murders were committed by appellant Holmes, codefendant Newborn, and E – Dog (a.k.a. Ernest Holly), but not codefendant McClain. (15 RT 1337.) Newborn argue that the only thing that was admissible was to have Tate say that appellant Holmes said he did it, but that he expected the prosecution would want to go further so that testimony indicated Holmes did not commit the murders alone. Newborn was also concerned that counsel for McClain would attempt to elicit from Tate that McClain was not there, and he would not be able to do the same, leaving the jury with the impression that the "others" who committed the crime with Holmes included Newborn. (15 RT 1338.)

The prosecution represented that Tate was instructed "never to the utter the words Lorenzo or Herb" and proposed that Tate testify: "he was bragging about being a gangster, being a killer. He says, 'I'm going to get me a hat that says trick-or-treat'" and "you know, I'm a gangster. Anyways, I get down in the bushes," and he said as soon as they went past he said,' I jumped out and I said trick-or-treat,' because he was behind some other killing." (*Ibid.*) Tate would also testify that appellant Holmes told him that the victims were supposed to be Fernando's killers. (15 RT 1340.)

McClain argued he should be able to elicit from Tate that appellant Holmes stated that McClain was not there – and the court agreed. Newborn countered that the fact that he could not do so would permit the jury with the impression that Newborn was present. (15 RT 1341.) Ultimately, the court agreed to instruct the jury not to hold Tate's testimony against Newborn, and would permit Newborn to cross-examine Tate about whether Holmes said Ernest Holly was involved. (15 RT 1342-1343.)

Counsel for Holmes requested Tate be precluded from testifying because at the time of two interviews he was a police agent.

When Tate was called as a witness, the trial court instructed the jury that his testimony was limited to appellant Holmes and codefendant McClain. (15 RT 1347.) Tate described a conversation in December of 1993 with appellant Holmes. According to Tate, during this conversation, appellant indicated he was a

gangster and a rider; that he talked about getting a hat that said "trick or treat" and he described how the shooting occurred. According to Tate, Holmes said "they was in some bushes, and they jumped out and they said trick or treat." (15 RT 1350-1351.) At the courts prompting, he added Holmes said "they was riding around; it was just looking for somebody, and it was in some bushes and they jumped out and they said trick-or-treat." At the prosecution's prompting, Tate testified appellant told him he was with two other people, that appellant Holmes said he was a killer and the shooting was in response to Fernando Hodges' death. (15 RT 1352, 1353, 1354.)

On redirect examination the prosecutor sought to play a statement made by Tate to the police. Counsel for Newborn and McClain objected, requested a mistrial and renewed severance motions. The motions were denied. (16 RT 1404-1405.)

b. DeSean Holmes

The prosecution called DeSean Holmes to testify about incriminating statements allegedly made by Newborn. Newborn's counsel objected to the proposed testimony of DeSean on a number of grounds, including his opinion that DeSean's plea agreement, which included a provision that he not testify against appellant Holmes, would necessarily restrict cross-examination of counsel by Newborn. (17 RT 1514, 1522.) Counsel for Newborn insisted that he had a right to question DeSean about any statements he may have made about appellant

Holmes and codefendant McClain. (17 RT 1522.)

McClain's counsel renewed the motion for severance on the grounds that cross-examination by Newborn's counsel would necessarily bring out incriminating testimony that would spill over to her client and of which she had no way to confront or cross examine. (17 RT 1517.) Newborn and McClain both complained that the tapes of DeSean's statements were provided very late, were difficult to understand, full of gaps and required transcription. (17 RT 1515, 1519-1520.)

In addition to joining the arguments of codefendants Newborn and McClain, appellant Holmes argued that severance was required because any cross-examination by the codefendants' counsel would necessarily violate the plea agreement that DeSean Holmes not testify against appellant Holmes and further, as it was anticipated DeSean would testify that he had a conversation with appellant's counsel, Thomas Nishi, which would leave an impression with the jury that Nishi attempted to dissuade DeSean from testifying and this testimony would require Nishi to be a witness at these proceedings. (17 RT 1521-1522.)

> Mr. Nishi: In reading this, there is a suggestion that somehow I went up to this guy and told him not to testify.... it did not go the way this individual is saying. I am placed in a bind now because I have to be a witness. I have to testify as to the conversation we had.... the other thing I would like to raise as part of this agreement is that he not testify against his cousin. That was a deal worked out between the witness and the prosecutor. Unfortunately Mr. Jones has indicated that he intends to ask questions dealing with my client. Because of that, Your Honor, in order to effectuate this particular plea agreement I would ask that the court sever this case, grant a mistrial and I would have my own separate trial so that...DeSean Holmes could testify in the manner in which this contract or this understanding is set forth. (17 RT 1521-1522.)

The court denied the severance and his trial motions and cautioned DeSean to be careful to answer only the questions he was asked. (17 RT 1534.)

c. James Carpenter

Counsel for codefendant Newborn sought permission to ask Carpenter whether Carpenter had told police McClain told him that the shootings had been committed by McClain, Holmes, and another person, and that he did not mention Newborn. (23 RT 2343-2344.) [70]

Counsel for appellant Holmes objected to any questioning by counsel for Newborn about the fact that Newborn's name was not conveyed to Carpenter by McClain. (23 RT 2346.)

> The Court: Mr. Jones is saying he has to represent his client, Ms. Harris has to represent her client, and it leaves you with "others." He does not mention your client by name. Maybe being mute is the way to do it. I can advise you. I can only tell you, I have been more multiple defendant death penalty cases than anyone I know, and this is a common thread that runs through them. Each person has the obligation to defend her client. Under a *Aranda/Bruton* I said in every case I ever had I have to go through that motion and what was said and how it was said.
>
> Mr. Nishi: I understand that. But we have always – – everybody here has asked for severance. Now we are in a position where we are trying to accommodate everybody but at the same time – --
>
> The Court: You can't. This is a murder trial. Like I told you, three people are in eternity, three people facing eternity. It is not only an issue of a trial for the defendants; it is a trial for the victims. It is a trial, things come out. [71]

---

[70] In other words, according to Carpenter, McClain implicated himself and Holmes but did not mention Newborn.

[71] The trial court's statement indicates that it based its decision not on the reasons advanced for separate trials in the severance motions, but rather on a

> Mr. Jones: I think the problem is not mine and it is not Mr. Nishi's, it is the people's insistence in opposition to sever trials for these defendants. And once they insist on joint trials, but I think these kinds of problems arise. (23 RT 2347-2349.)

Ultimately, the trial court denied any renewed motion for severance and ruled that counsel for Newborn had the right to ask whether McClain neglected to mention Newborn was involved. (23 RT 2348.)

d. Prior to Defense Case

After the prosecution rested, counsel for appellant Holmes renewed his motion for severance based on the indication by the prosecution that it was going to introduce numerous acts of violence on the part of Newborn which would be prejudicial to appellant. (32 RT 3355-3356.)

i. Herbert McClain's Testimony

Prior to the defendant McClain's testimony, counsel for appellant Holmes expressed his concern that Holmes would be implicated by McClain, specifically with regards to the comments McClain allegedly made to James Carpenter and renewed the severance motion. He stated to the court: "When we were here, I asked my client be severed, because I knew these problems are going to arise should we have someone that was going to testify. I am asking the court not permit that particular statement in light of the fact that the people oppose the

---

fixed belief that the codefendants were stuck with each other. This was an abuse of discretion. (*People v. Massey* (1967) 66 Cal.2d 899, 916-917.)

severance in this case, and I am now stuck with the statement." (36 RT 3925-3926, 3929, 3931.)

The prosecution once again expressed its opposition to severance and further expressed its intention to implicate appellant Holmes through the alleged statement made to Carpenter by McClain by an evidentiary ruse of calling it an inconsistent statement.

> Mr. Myers: First off, you know, when there is evidence against any defendant, a defendant is stuck with what is testify, whether they like it or not. The severance is not a convenient method to get rid of evidence. A severance has to have some legal grounds. As a matter of fact, the fact of the matter is, we went over with Mr. Carpenter to sanitize the statements to make sure that the word "somebody" was used in place of Karl Holmes. But it is clear, Mr. Carpenter's statement that we should consider, the additional statement, that he did use the word "Karl Holmes"... in speaking with Carpenter. Carpenter told the police, according to Korpal and Uribe's testimony that Herb said that he, Karl Holmes, and another individual were involved in a massacre in Pasadena. It is at this point that the statement of Carpenter is an inconsistent statement. I can bring out a prior inconsistent statement through an individual who allegedly heard it, because McClain was the one who made the statement. McClain made the statement. I can question him," did you tell Carpenter that you and Holmes were involved in this massacre?" I have a good-faith reason to ask that question. He can deny it but nonetheless, he is a witness, he is on the stand, and he has made the statement in the past. I am entitled to ask him if he made the statement. (36 RT 3926-3927.)

Counsel for appellant framed the issue as follows:

> Mr. Nishi: The problem that I have it is, we have an inconsistent statement stated by... a defendant to an informant, who then... denies it. I don't think it's fair to Mr. Holmes, because I think Mr. McClain is on the stand, he is going to deny. Now we have two denials. I have no one to cross-examine

at all. (36 RT 3931.)[72]

Running roughshod over Holmes constitutional rights the prosecution asserted "I don't think that Mr. Holmes should benefit from us bending over backwards to comply with *Bruton*...." According to the prosecution the only issue was if McClain denied making the statement how it could be proved to the jury. (36 RT 3927, 3933.) The court agreed that if McClain took the stand the prosecution had the right to impeach him with the prior statement which contained a direct reference from codefendant McClain that Holmes committed the crimes. (36 RT 3929, 3944.) The court denied appellant Holmes's request that Carpenter be brought back and confronted with his statement prior to permitting McClain to be impeached. (36 Rt 3944-3945.) The court rejected Holmes' argument that the statement should be precluded as double hearsay. (37 RT 4001-4002.)

3. Resulting Testimony

DeSean Holmes' testimony concerned alleged incriminating statements by codefendant Newborn about a burglary, the shooting he committed with severed codefendant Bowen and "some other people that he socialized with" at the home of William McFee, and Newborn's participation in Halloween crimes. DeSean Holmes also testified extensively that he was afraid to testify because of threats

---

[72] Counsel for appellant explained that *Aranda/Bruton* still applied, because in this case the testifying codefendant would deny making the statement thereby leaving him no witness to examine about a statement corroborated by the impeachment testimony of two law enforcement agents thus, resulting in a violation of due process and confrontation clause. (36 RT 3934-3935.)

made against him and his family. (17 RT 1540-1573.)

DeSean Holmes held a party on October 15, 1993, which was attended by Newborn, Holmes, McClain, and Hodges. (17 RT 1539.) DeSean Holmes testified that he knew Reggie Crawford, one of the victims. (17 RT 1550.)

During cross examination by counsel for Newborn, the issue of whether or not counsel for appellant attempted to dissuade DeSean Holmes from testifying was raised.

> Mr. Jones: Did you tell the police, sir, that you spoke to me on the phone and that I told you you should do like Furman and take the Fifth?
>
> DeSean: That was a mistake. I got that from Nishi. (17 RT 1588.)

Prompted by Newborn's counsel, DeSean went on to testify at some length about what it was that Nishi allegedly told him to do.

> Jones: And you told them yesterday that on a phone conversation with Lorenzo's lawyer – – they told you, you have the right not to say anything you have the right to do what Furman did in the OJ trial.
>
> DeSean: Yes but I said Nishi told me that... It wasn't a big mistake. I just got the name wrong. (17 RT 1589.)

Prompted by counsel for Newborn, DeSean repeated again that appellant's counsel Thomas Nishi advised DeSean not to testify. (17 RT 1590, 1591, 1621 1622.) Counsel for Newborn also elicited that because DeSean demanded it, he would not be asked any questions about anybody other than Newborn. (17 RT 1616.)

During his cross-examination of DeSean, appellant's counsel, Nishi,

attempted to discredit DeSean's testimony that it was he – rather than Newborn's counsel – who advised DeSean not to testify. (17 RT 1660-1661, 1665-1667.)

On redirect examination, the issue was revisited by the prosecution and DeSean clarified that appellant's counsel went to visit him and advised him that he had a right "just like Furman not to testify, to take the Fifth" and added that Nishi said he would get in contact with his lawyer and try to get him out of custody. The next day, Nishi repeated his advice about DeSean's right not to testify during a telephone conversation. (17 RT 1668-1669.)

DeSean Holmes also described himself as a crime victim. When asked to explain, DeSean invoked his Fifth Amendment rights and the court sustained the prosecutor's objection to any continued cross-examination about the incident. (17 RT 1575, 1587, 1592.)

Newborn's counsel made an offer of proof:

> Jones: He was the driver of a car from which shots were fired at another gentleman. After the shots were fired out of the car driven by this witness, they fled the scene and there was a high-speed pursuit at which time the driver, Mr. DeSean Holmes, bailed out of the car and fled. That was approximately noon time. At 8 p.m., later that night, after discussing the matter with numerous parties, the report indicates Mr. DeSean Holmes came back to the police station indicated – – matters that totally exonerate him. (18 RT 1692.)

At the prosecutor's suggestion, the trial court prevented cross-examination on this issue, but permitted a stipulation that DeSean was not a victim in the case. Over defense objections, the prosecutor elicited from DeSean that his coach told him if he testified in this case, Danny Cooks was going to hunt and kill him just as

they killed Mahjdi Parrish, a witness in another case. (17 RT 1680-1681.) The defense was unsuccessful in its attempts to cross-examine DeSean about whether he himself was involved in the carjacking and killing of Parrish. (18 RT 1700-1701.)

Counsel for McClain argued:

> Harris: It is just mind-boggling to me. The jurors have the impression that this young man is afraid because Majhdi Parrish was on some list of Lorenzo Newborn's to be killed. And now...we find out that perhaps he had something to do with it. And that is just totally unfair, and all of this was brought out on this side of the table seeking truth. (18 RT 1702.)

Noting that this issue comes up in multiple defendant and gang cases, the trial court opined that it was still proper for the prosecutor to question DeSean generally about his fears. (*Ibid.*) When Newborn's counsel asked DeSean about his testimony that he heard about other witness killings and mentioned Parrish, DeSean again invoke the Fifth Amendment. The trial court found no privilege and DeSean acknowledged he had heard about Parrish. Nevertheless, the trial court sustained the prosecution's objection when Newborn asked DeSean whether Parrish had been complaining witness in a case filed against him. Once again DeSean invoke the Fifth Amendment. (18 RT 1733-1735.)

Codefendant Herbert McClain testified on his own behalf. McClain's testimony was admitted as to all defendants over defense objection, subject to a possible limiting instruction that never materialized. (37 RT 4082.)

On direct examination, McClain denied involvement in the Halloween

shootings and the Price shooting. Although he did see Carpenter in Tulare, he denied any admissions made to Carpenter or Mario Stevens. McClain admitted a number of felony convictions (36 RT 3962-3973.)

On cross-examination, McClain admitted his own association with P-9 and then named a number of gang associates including, Newborn, Bowen, and Hodges. (36 RT 3983-3986.)

McClain explained that he was at Kathy Brown's house when he found out Fernando Hodges had been killed. McClain paged his "homies." McClain was armed with a .44 and once he learned Fernando had been killed by some Crips he set out to retaliate by killing a Crip. (36 RT 3987-3991.) McClain knew some Crips because he had been in and out of jail with them. (37 RT 4011.)

McClain hit all the neighborhoods looking both for his homeboys and any Crip he might find. McClain went to Community Arms but did not go to Huntington Hospital. McClain met up with Rickie Lacy, who he knew was a Crip, but did not Lacy him because there was a woman nearby with some kids and he didn't want any witnesses to the killing and there was a police car outside. (36 RT 3993-3994, 4006, 4014, 4018.)

McClain admitted that he lied to law enforcement but denied he would do so to the jury. (37 RT 4007, 4030.)

The prosecution impeached McClain with his admission to James Carpenter, and in doing so implicated appellant Holmes in Halloween killings.

Myers: Now then, was there an opportunity for you to converse with James Carpenter, speak with James Carpenter?

McClain: Yes.

Q: And during that conversation with James Carpenter did you say, "Boom boom pow pow pow, I can still hear the noise?"

A: Nah.

Q: During that conversation with James Carpenter did you implicate Karl Holmes in the Halloween killings?

A: No.

Q: Did you say that you and Karl Holmes and someone else was involved –

A: I haven't said shit. I haven't – – that was and even – – why were we even discussing shit like that? What would – – what would be the topic? What would bring that up? (37 RT 4037.)

During cross-examination, codefendant McClain used offensive language. He linked his codefendants to his alibis, bravado, obvious disdain for law enforcement and lack of respect for the legal process.[73]

McClain: Hell no, because you all know I didn't do this. I didn't kill your kids.

---

[73] The citations above are just a representative example of the offensive nature of codefendant McClain's testimony. (See 36 RT 3976, 3998, 37 RT 4016, 4043, 4050, 4051, 4052, 4053, 4055, 4061, 4064, 4065, 4066, 4067, 4070, 4071, 4074, 4076, 4077.) Additionally, McClain repeatedly connected himself to appellant, supporting an inference that appellant Holmes was similarly situated and that McClain spoke for all the defendants. (See 37 RT 4043 [if a P-9 got shot all P-9's would know it], 4044 [all P-9's would have known the circumstances of Fernando's killing], 4062 [Hodges killing was a violation of a peace treaty between Crips and P-9] 4063 [Price was killed for personal reasons but that led to Hodges death] 4064 [" you are saying that because my homeboy got killed, you are trying to say that we went and killed some kids], 4065 ["It makes us look guilty"], 4067 [Pina is lying].)

I didn't kill kids. And you all with the smoke and mirrors the bullshit, you're trying to make these people believe that me and my homeboys is going to do some shit like that, and because you don't got no case from the jump, you're just going to gaffel (sic) us because my homeboy got killed and try to make the best fucking case you can, and that what all this bull shit is about, bringing in all these Jimmy the weasels supposed to be motherfucker is that know us, who don't know me, put this bullshit ass case together like all you got some kind case. You're really going to try to kill me on some bullshit I didn't even do. You're motherfucking right I don't like the shit. (37 RT 4040.)

McClain: – so I'm going to tell the jury what time it is from my mouth and I ain't – --I ain't going off no legal system. I'm going to let you all know I ain't killed no kids, man. And I'm going to let her know, I ain't killed her kids. There it is there. Now, that is what I'm doing up here. All the rest of the show that you are doing, they should don't mean nothing to me. I am ready to get off the stand now.... I don't remember shit. Play the tape. I'm through fucking with you. (37 RT 4052.)

McClain: You let all the rest of them Jimmy the weasels come up here talking about play the tape and this and that because they know they are lying. You let them get away with that shit because they can't stand to be scrutinized because they're scared to get caught in a lie. Well, I'm not lying. I ain't got nothing to hide. I don't kill no kids. I have not done that shit, period, period. I wouldn't do that to no little Black boys, man. (37 RT 4052-4053.)

Directly following this outburst, the prosecutor used McClain to highlight the fact that Newborn and Holmes were not testifying on their own behalf, and their failure to testify supported an inference of guilt:

Myers: Oh, by the way, Mr. McClain, if you didn't kill the kids, you would get up there and admit it, wouldn't you?

McClain: I wouldn't get up here.

Q: If you did kill the kids, if you were on the stand right now – --

Harris: Objection: asked and answered.

McClain: I am saying my homeboys got to do what their lawyers tell them for their best interest. I'm saying that I – my personal feeling is that I feel you all are going to try to railroad me anyway, so fuck with that your lawyer is talking about. I'm going to get up here and let everybody know what time it is. (37 RT 4054.)

Counsel for Newborn and Holmes objected that the prosecutor's cross examination of McClain had improperly highlighted their election not to testify and put the election in a negative light. (37 RT 4083.)

McClain: My homeboy right there (pointing at Newborn), I know damn well I done better than that and he wouldn't even put up with no shit like that, period and how then kids – – man, I can't even begin to think who would do some shit like that, man, to be totally honest with you. But we are not the ones, man, and you don't want to see that. You don't want to see that. But I can see it in her face and I know that they know we didn't do that shit that you all ain't going to say that. You all going to come with this other shit. (37 RT 4064-4065, 44 RT 4694.) [74]

Myers: Well, as soon as Robert Lee Price was shot you knew they would be your enemy again because of P–9 was accused of that shooting?

McClain: We had had – – we had talked and we had come to an understanding that it was not going to be – --

Q: Who is "we?"

A: – no gang violence. (37 RT 4071.)

Additionally under the guise of admission, the prosecutor was permitted to play similarly offensive portions of McClain's taped statement to police.

---

[74] The prosecutor later argued McClain's admission that he was intent on retaliation and inclusion of Newborn as a pupil of sorts was proof that appellant Holmes was involved in the crimes. "What does that mean? These guys were all in it." (44 RT 4694.)

"McClain: all right. All right. I'm going to - – I'm going to tell you why, as that's the way that Pasadena is. One person say something, thinking, thinking, uh, uh, say (inaudible), this is the easy way I can explain it, that is that shit rolls in a – – in a – – in a roller coaster fashion, you know, downhill. And it does – and once somebody think they got – – they heard something, they got some kind of information, then they go tell this bitch, and then you know how bitches talk. They going to go through all these bitches, than all the niggers, shooting dice, 'oh I heard that Herb did that shit' and woo woo woo and really got everything so then that's not knowing who." (37 RT 4048.)

"McClain: I didn't want to get blasted, man. I didn't want to be standing out buying no mother fucking hot dog or doing something at night and have the police blow my face off thinking I'm armed and dangerous and all this shit, you know." (37 RT 4060.)

Following McClain's testimony, defense counsel complained about being burdened with codefendant McClain's testimony and asked for an instruction that McClain's testimony should be held only against McClain and not used against the other defendants. (37 RT 4084.) During the discussion of jury instructions, the prosecutor argued that since McClain testified, all his extrajudicial statements should be admissible against all defendants. Defense counsel again objected to McClain's testimony should be limited to McClain alone. The trial court noted: "I know he said lots of crazy stuff and it shouldn't be attached to your client..." The court agreed to give CALJIC no. 2.07. (41 RT 4300-4302.)

During a discussion regarding the absence of evidence that anyone at the hospital discussed retaliation, the trial court stated "I think Mr. McClain sealed your fate on that because he said he went out looking for Crips based on his homeboy being shot after he talked to people that had been at the hospital." (41 RT 4311.)

The prosecutor sought to argue that codefendant McClain's statement in testimony about the other P – 9 gang members being involved in the shooting referred to an included codefendant Newborn and appellant Holmes. The trial court permitted the prosecutor to argue that McClain committed the crimes with other P-9's. (41 RT 4296, 4299.)

The trial court noted: "Mr. McClain decided to take the stand. He did put in jeopardy other members of a group that he hangs out with." (41 RT 4302.) Although the court ultimately instructed with CALJIC 2.07, which states that evidence that was *previously* admitted with a limiting instruction could not be considered against other defendants, no such limiting instruction had been given with McClain's testimony at the time it was presented, and the jury therefore had no basis for applying CALJIC 2.07 to McClain's testimony.

4. Applicable Law

California Penal Code, §1098 governs joinder and severance in California state prosecutions. That statute provides in pertinent part:

> When two or more defendants are jointly charged with any public offense, ... they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants.

People v. Massie, *supra*, 66 Cal.2d 899, 916-917, held that a trial court must not refuse consideration of reasons advanced in support of a motion for separate trial, but instead must exercise its discretion. This Court stated that a trial court should "separate the trials of codefendants in the face of an

incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*Massie*, at 917; extensive footnotes with citations omitted.)

A criminal defendant has the right to confront witnesses against him. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas* (1965) 151 U.S. 400; *Sacho v. Wright* (1990) 497 U.S. 805.) The primary purpose of the confrontation clause is the right to cross-examination. *(Davis v. Alaska* (1974) 415 U.S. 308.) Thus, jointly charged defendants are entitled to severance if improperly rejected statement of a codefendant is admitted, even if the trial court provides clear limiting instructions. (*Bruton v. United States, supra*, 391 U.S. at p. 137.) A redacted confession by a codefendant is not effective if the accused directly states that an accomplice was involved (*Richardson v. Marsh* (1987) 481 U.S. 200), obviously refers to the existence of an accomplice (*Gray v. Maryland* (1998) 523 U.S. 185), or "contextually" implicates an accused through other evidence at trial. (*People v. Fletcher* (1996) 13 Cal.4th 451, 469.)

In *People v. Aranda, supra,* 63 Cal.2d at pp. 530-531, this Court established the steps the trial court must take to remedy the prejudice to other defendants other codefendants extrajudicial statement. The trial court must first attempt to redact all references to the codefendant from the statements. If the trial court cannot eliminate the prejudice by editing the statements, it must grant separate

trials. If the trial court will not sever the trials and cannot properly redact the statement, it must exclude the statement.

When as here, the trial court opts to redact the statement, a reviewing court must determine the "efficiency of this form of editing... on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial." (*People v. Fletcher, supra* 13 Cal.3d at p. 468.) A prominent risk of redacting statements is that the jury may receive misleading testimony. (See e.g. *Gray v. Maryland, supra* 523 U.S. at p. 204, fn. 1.) A conviction based on uncorrected false evidence violates the 14th amendment. (*Napue v. Illinois* (1959) 360 U.S. 264, 269.)

State and federal case law regarding severance of defendants requires reversal of the conviction of jointly tried defendants, where the trial court either abused its discretion in denying severance prior to trial (*People v. Ervin* (2000) 22 Cal.4th 48, 68), or during or after trial, upon the demonstration of gross unfairness. "The reviewing court may nevertheless reverse the conviction where, because of consolidation, a gross unfairness as occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Turner* (1984) 37 Cal.3d 302, 313, see too *People v. Massey, supra*, 66 Cal.2d 899.) And federal law requires severance where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506

U.S. 534, 539.) In *Zafiro,* the court explained that a risk of unfairness requiring severance "might occur when evidence that the jury should not consider against the defendant and that would not be admissible if the defendant were tried alone is admitted against a codefendant," adding that "evidence of a codefendant's wrongdoing in some circumstances erroneously deleted jury to conclude that a defendant was guilty." (*Id.*, at p. 539.)

Case law also requires severance when there is an excessive risk of prejudice from conflicting defenses. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 78; *People v. Massie* (1967) 66 Cal.2d 899, 917.)

As the Ninth Circuit has explained,

> the defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." (*United States v. Eastwood* (5th Cir. 1973) 489 F.2d 818, 822 n.5 (quoting *United States v. Robinson*, 139 U.S. App. D.C. 286, 432 F.2d 1348, 1351 (D.C.Cir. 1970)). If the essence of one defendant's defense is contradicted by a co-defendant's defense, then the latter defense can be said to "preempt' the former. *See United States v. Swanson*, 572 F.2d 523, 529 (5th Cir.), *cert. denied*, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978) (no severance required because defense of noninvolvement did not "preempt' defense of lack of intent). (*United States v. Berkowitz* (9th Cir. 1981) 662 F.2d 1127, 1134.)

Elaborating on the concept of mutually antagonistic defenses, the Ninth

Circuit held:

> Prejudice cannot be understood in a vacuum. The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict. Prejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual and independent basis. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1978, 1082.)

Since this is a capital case in which appellant claims his due process and confrontation rights were violated because of the court's failure to grant his motion to sever, it is not enough for a reviewing court to simply defer to the trial court's exercise of discretion. In a capital case, Penal Code, §1098 must be applied in a manner consistent with Eighth and Fourteenth Amendment requirements. This is so because there are three considerations unique to capital cases, and error in any involves constitutional dimensions.

First, when evidence admitted against a co-defendant is voluminous and extremely inflammatory, there exists a significant danger that the constitutional burden on the government to prove its case beyond a reasonable doubt will be lightened. (*People v. Garceau* (1993) 6 Cal.4th 140; *Zafrio v. United States,* (1993) 506 U.S. 534, 544 (Stevens, J., concurring) ["joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt].) If a jury wants strongly enough to convict the defendant because of its hatred of the defendant's gang and the repugnant lifestyle it represents, jurors will overlook any

weakness in the prosecution's case because of their intense desire to punish the defendant because of his gang affiliation.

Second, there is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case," (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638.)

Third, there is the requirement of truly individualized consideration prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) It is only where these conditions are met that the United States Supreme Court has been willing to find that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and ... made a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).)

> Together, these three constitutional concerns demand a much stricter scrutiny of motions for severance in a capital case than is required in

> a non-capital case. (*People v. Keenan* (1988) 46 Cal. 3d 478, 500 ["Severance motions in capital cases should receive heightened scrutiny for potential prejudice"].)

Therefore, whether the operative legal provision is Penal Code section 1098 or the rights included within the Eighth Amendment as applied to the states through the Fourteenth Amendment, the danger to be avoided is the same: that the jury will treat the co- defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

Appellant submits it is within this context that the trial court's exercise of discretion in refusing to sever these trials should be evaluated. The essential consideration for the reviewing court in determining whether defendants should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States, supra*, 506 U.S. 534, 539; *United States v. Tootick, supra*, 952 F.2d 1078: *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511.)

In the instant case, the trial court should have granted appellant Holmes' pretrial motion to sever. Having failed to do so, at the time codefendant McClain voiced his intention to testify in his own behalf, the court should have granted

Holmes' renewed motion to sever.

5. Application of the Law to the Facts and the Requirement of Reversal

a. Trial with Newborn

The introduction of DeSean Holmes' testimony requires reversal on three bases: (a) codefendant Newborn's admission to DeSean Holmes that he and Bowen participated in a shooting at McFee's was redacted in such a fashion that it gave the impression that appellant Holmes was present at that shooting; (b) DeSean's testimony that appellant's counsel attempted to dissuade him from testifying implied appellant's guilt and Nishi's belief therein, as well as suggesting that appellant's counsel committed misconduct of an egregious nature; and (c) DeSean Holmes' testimony and admission written agreement that DeSean agreed to implicate only codefendant Newborn revealed his desire not to implicate his cousin, appellant, creating the impression that he sought to protect appellant or, to the contrary, coupled with the threats he testified to, that he was fearful appellant would retaliate against him.

i. Newborn's admission to DeSean that he and Bowen participated in a shooting at McFee's was redacted in such a fashion that it gave the impression that Holmes was present at that shooting

The redaction of DeSean's statement– that Newborn and "others" were involved in a shooting that took place at the home of Willie McFee -- an hour before and a short distance from the Halloween killings – was, in light of the other

evidence presented at trial, insufficient to protect appellant from the admissions of his codefendant. DeSean Holmes testified that he had seen appellant Holmes and his codefendants with Hodges. The only charged overt act the jury found to be true was that "at Pasadena Avenue and Blake Street on October 31, 1993, at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen and unnamed co-conspirators fired numerous rounds from a 9 mm gun at or near the residence of an individual believed to be a Crip."

Moreover, as argued in argument I.A.3, (incorporated fully herein) the arbitrary restriction on appellant's counsel's right to cross-examine DeSean, left the jurors with the impression that DeSean was someone who knew the victims, cared about the fate of these children, was a crime victim himself, and whose life was in such danger his own family attempted to dissuade him from testifying.

ii. DeSean's testimony that Nishi counsel attempted to dissuade him from testifying implied appellant's guilt and Nishi's belief therein, interfered with appellant's right to counsel by painting counsel as a willing to commit misconduct in order to win the case, and created a conflict of interest. The prosecution committed misconduct in seizing this opportunity to impugn the integrity of appellant Holmes and his counsel.

At the prompting of his codefendant's counsel and that of the prosecution DeSean Holmes testified repeatedly that he had been advised by appellant's counsel, Thomas Nishi, not to testify. That codefendant's counsel sought to clarify any confusion the jury might have that it was he, rather than Nishi, who attempted to dissuade DeSean from testifying is indicative of how damaging it can be to a

defendant's case to have a jury believe in defendant's own attorney would attempt to impede justice. According to DeSean, Nishi repeated his advice on two separate occasions and went so far as to promise to speak to DeSean's attorney to have him released from custody once Nishi was assured DeSean would not be testifying.

Counsel for appellant was completely ineffective in his efforts to impeach DeSean Holmes' repeated testimony that he was advised he did not need to testify. On cross-examination by Nishi, DeSean did not change his testimony. Nishi did not present any independent evidence that such conversation did not occur.

The obvious and extremely prejudicial implication to be drawn from DeSean's testimony was that appellant's counsel was attempting to manipulate the legal justice system. Moreover, the jury likely attributed Nishi's attempts to dissuade a witness from testifying to a belief of or knowledge of the guilt of his client. This eventuality was recognized by counsel for appellant when the parties discussed the admission People's exhibit C, the agreement between DeSean and the prosecution. (41 RT 4256.)

Counsel argued the document had no probative value but had the obvious and prejudicial effect of suggesting to the jury that appellant had said something that incriminated himself. Counsel also reminded the court that insofar as the prosecution created a contract with DeSean Holmes that he would not testify

against his cousin, he was placed in the position of not asking any questions about the contractual agreement for fear that it would open the door and permit testimony against appellant. (41 RT 4257.) The court admitted exhibit C into evidence without redaction, finding that the agreement between DeSean and the prosecution was a vital part of the People's case and that all counsel had an opportunity to cross-examine the witness.

The improper testimony and argument created an irreconcilable conflict of interest, depriving appellant Holmes of his right to counsel.

Gideon v. Wainwriqht (1963) 372 U.S. 335 established that indigent criminal defendants have the right to appointed counsel at their trials. Under the Sixth and Fourteenth Amendments to the United States Constitution (*Powell v. Alabama* (1932) 287 U.S. 45, 68-71 and *Holloway v. Arkansas* (1978) 435 U.S. 475, 481-487) as well as article I, section 15 of the California Constitution (*People v. Bonin* (1989) 47 Cal.3d 808, 833-834), a defendant in a criminal case has a right to the assistance of counsel. Included in this right is "a correlative right to representation that is free from conflicts of interest." (*Wood v. Georgia* (1981) 450 U.S. 261, 271.) A criminal defendant "is entitled to counsel whose undivided loyalties lie with the client." (*Stoia v. United States* (7th Cir. 1997) 109 F.3d 392, 395, citations omitted.)

In this case, the trial court's refusal to sever permitted the prosecution's misconduct in eliciting and stressing evidence that could not be confronted

without trial counsel himself testifying, and placed appellant Holmes' counsel in a conflict of interest. Rule 5-210 of the California Rules of Professional Responsibility requires that attorneys not testify in adversarial proceedings in which they serve as counsel. The improper testimony suggested that appellant Holmes' trial counsel had advised a violation of the law, dissuading or threatening a witness, which not only contravenes criminal law, but would also be a violation of the California Rules of Professional Conduct, Rule 3-210.

Apart from the criminal and professional conduct implications of DeSean Holmes' testimony that trial counsel had endeavored to dissuade him from testifying, a reasonable juror could conclude that trial counsel was dishonest, potentially threatening, and would use any means to secure a victory at this trial. In an ordinary criminal trial, the predictable effect would be for jurors to question counsel's credibility as to all matters. This was not an ordinary trial, however; there were allegations of a violent criminal conspiracy, extensive evidence about gangs and gang involvement, and testimony about numerous threats to witnesses. Counsel could not perform as a credible advocate when he himself stood accused of tampering with a witness. Neither could he ethically take the stand in an effort to refute the accusation.

The Sixth Amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence (*McMann v. Richardson* (1970) 397 U.S. 759, 770-771), and the right to

counsel's undivided loyalty. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272. *See also Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 579-580; *United States v. Allen* (9th Cir. 1987) 831 F.2d 1487, 1494-1495.) The duty of loyalty ("perhaps the most basic of counsel's duties" [*Strickland v. Washington* (1984) 466 U.S. 668, 692]), places a responsibility on the attorney to put his client's interest ahead of his own. (*See, e.g.,* ABA Annotated Model Rules of Professional Conduct, Rule 1.7 cmt. (1992).) When there is an actual conflict, counsel breaches that duty of loyalty. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692.)

The guarantee of unconflicted counsel is so important that, unlike with other Sixth Amendment claims, when a defendant alleges an unconstitutional actual conflict of interest, "prejudice must be presumed" (*Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, citing *Delgado v. Lewis* (9th Cir. 2000) 231 F.3d 976, 981; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 350), and harmless error analysis does not apply. (*United States v. Allen*, *supra*, 831 F.2d at pp. 1494-1495, citing *Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 349. *See Mickens v. Taylor* (2002) 535 U.S. 162, 173 [*Sullivan* standard "requires proof of effect upon representation but (once such effect is shown) presumes prejudice"].) Prejudice is presumed since the harm may not consist solely of what counsel does, but of "what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to pretrial plea negotiations and in the sentencing process." (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 490, emphasis in original.) "The mere physical presence of

an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." (*Ibid.*)

This Court has observed that:

> Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or third person. . . [.] *Conflicts may also arise in situations in which an attorney represents a defendant in a criminal matter and currently or formerly had an attorney-client relationship with a person who is a witness in that matter.* (*People v. Bonin*, *supra*, 2 Cal.4th at p. 835, emphasis added.)

In order to establish ineffective assistance of counsel in a conflict of interest situation, a defendant who did not raise an objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 348.) Adverse effect cannot be presumed from the mere existence of a conflict of interest. (*See Mickens v. Taylor*, *supra*, 535 U.S. at pp. 170-175.) The Supreme Court has explained that *Sullivan* does not require "inquiry into actual conflict as something separate and apart from adverse effect." (*Id.* at p. 1244, fn. 5.) Rather, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." (*Ibid.*) However, once a defendant shows that a conflict of interest existed and that it adversely affected counsel's performance, prejudice will be presumed and the defendant need ***not*** demonstrate a reasonable probability that, but for the attorney's conflict of

interest, the trial's outcome would have been different. (*Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 349-350; *see also Mickens v. Taylor*, *supra*, 535 U.S. at pp. 172-173; *Glasser v. United States* (1942) 315 U.S. 60, 76.)

In this case, defense counsel labored under an actual conflict of interest, of which the trial court was fully aware, and which unquestionably adversely affected counsel's performance. Trial counsel complained that the failure to grant a mistrial and/or severance meant that he would be required to become a witness, a function fundamentally inconsistent with his role as defense counsel. (See, RT 1521-1522.) In fact, trial counsel did not testify, although the evidence offered unquestionably made him a potential witness on the issue of whether he attempted to dissuade witness DeSean Holmes from testifying.

Moreover, the jury was instructed with CALJIC 2.06, permitting it to draw an inference of guilt from a defendant's efforts to conceal evidence. No limiting instruction was provided to ensure that the jury would not apply that instruction to the allegations of counsel's misconduct. Reasonable jurors could have concluded that the unrebutted evidence suggesting counsel's misconduct could be attributed to appellant Holmes. Appellant was deprived not only of his right to unconflicted counsel, but also of his rights to due process of law, to be convicted only upon proof beyond a reasonable doubt of his guilt, and reliable determinations of guilt, capital eligibility, and penalty.

During its argument to the jury the prosecutor specifically called into

question the integrity of appellant's counsel:

> Myers: Nishi is saying both Korpal and Luna lied about the photo identification procedure.... But consider the source. The person who is calling these guys liars is the same person who according DeSean Holmes told him, DeSean, to take the Fifth and the like Furman. (44 RT 4675.)

The prosecution use of DeSean Holmes' testimony to gain an unfair advantage and unconstitutionally lighten his burden of proof constituted misconduct.

It is often stated that the prosecutor's function is to seek justice, not convictions. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means" to seek justice. (*Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 55 S.Ct. 629]; See also *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266.) This Court has held that it is a prosecutor's duty to fairly present evidence material to the charges, and the trial judge's duty to see that facts material to the charge are fairly presented. (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

It has also been held that a "... fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law...." (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 266), i.e., the prosecutor's violation of her duties implicates the defendant's constitutional rights to due process, under the Fifth and Fourteenth Amendments.

The general test for prosecutorial misconduct is found in *People v. Strickland* (1974) 11 Cal.3d 946: "Prosecutorial misconduct implies the use of

deceptive or reprehensible methods to attempt to persuade either the court or the jury." (Id. at p. 955; see also *People v. Price, supra,* 1 Cal.4th at p. 447; *People v. Luparello* (1986) 187 Cal.App.3d 410, 420.) In deciding whether to reverse a decision based upon an allegation of misconduct, a reviewing tribunal need not find a prosecutor's conduct to have been intentional. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214, citing Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case* (1954) 54 Colum.L.Rev. 946, 975.)

Additionally, "[i]n a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and the conduct of the trial." (*People v. Evans* (1952) 39 Cal.2d 242, 251.)

> iii. DeSean Holmes' testimony that he entered into an agreement to implicate only Newborn revealed his desire not to implicate his cousin, appellant, creating the impression that he sought to protect appellant or, to the contrary, coupled with the threats he testified to, that he was fearful appellant would retaliate against him.

As indicated above, People's Exhibit C, the contractual agreement between the prosecution and DeSean Holmes was offered into evidence in unredacted form. Thus, in addition to lengthy testimony regarding Nishi's advice to DeSean that he did not have to testify, and DeSean's testimony that he agreed to testify against Newborn only (thus raising the specter that he had information regarding other perpetrators), the jury had physical evidence before it which indicated

DeSean had information which implicated appellant.

During the parties discussion as to the admissibility of evidence, counsel for appellant's noted that the second page of the plea agreement contained the phrase "I will not testify against my cousin, Karl Holmes." (41 RT 4256.) Counsel argued that the jurors would view that phrase as an implicit suggestion that appellant had said something that incriminated him. (*Ibid.*) The prosecution responded the document also contained the phrase "I am aware the prosecution can limit questions by the defense only to the extent the law permits. Therefore, I am aware of the possibility the defense may ask about Karl Holmes and I will honestly answer those questions." In parentheses the document also contained the phrase "by my initial here I make no representation whether or not I have information concerning Karl Holmes." (41 RT 4258.)

The prosecutor went on to argue that counsel for appellant had the opportunity to question DeSean about the written agreement. Regarding any inference that appellant was implicated by the agreement the prosecutor noted:

> Mr. Myers: ... that inference on the document is no different than if Mr. Holmes testified to it. This document was presented to Mr. Holmes. There was an opportunity to cross-examine about this document. What is there is there. That cannot be undone.

Overlooked by the prosecutor and the trial court is the very fact that had appellant been severed from Newborn neither this document nor DeSean's testimony would have been relevant in appellant's case.

Moreover, severance should have been granted and reversal is now

required because appellant Holmes and codefendant Newborn had conflicting interests with regard to DeSean Holmes. During the conference regarding admission of the plea agreement, counsel for Newborn stated that he agreed with the prosecutor and wanted the document admitted in unredacted form. (41 RT 4259-4260.)

Coupled with testimony regarding threats made to DeSean and his family there are only two reasonable interpretations the jury could have drawn: that DeSean was loyal to appellant and therefore refused to reveal information he had which implicated Holmes or that he was fearful for the safety of himself and his family and for that reason refused to reveal information he had which implicated Holmes. The second alternative was argued by the prosecutor:

> Myers: The reason that this document is probative and the probative value outweighs its prejudicial effect is because this document describes in great deal the pressures that were placed upon DeShawn Holmes concerning his decision to come forward and testify in this case. Clearly DeShawn Holmes is a critical and fundamental witness in this case, the credibility of whom is key to the jury's decision making process. And anything that factors to this degree in the credibility assessment has substantial probative value which clearly outweighs any potential prejudicial effect. (41 RT 4259.)

During closing arguments, the jury was reminded to look at the agreement by Newborn's counsel. (43 RT 4609.)

The prosecutor argued DeSean's testimony was credible and corroborated. (42 RT 4430-4431, 4435.) Although DeSean's testimony was to Newborn's guilt only, the prosecution bootstrapped Newborn's alleged admission to DeSean to appellant Holmes alleged admission to Derrick Tate in order to argue the guilt of

both defendants:

> Callahan: [DeSean] said that Lorenzo Newborn was mad at Ernest Holly for pointing out the wrong people. He mentions that Ernest Holly is involved. Where else have we heard the name Ernest Holly? We heard about it in court. We heard about it from Johnny Brown and we heard about it from Derrick Tate. Derrick Tate is the individual who spoke with [appellant] Holmes... and Holmes told him that Ernest Holly was involved. So we have corroboration of that. (42 RT 4432.)

And later

> Callahan: The name Ernest Holly came up again in the testimony of DeSean Holmes, and he came up in connection with Ernest Holly taking a gun to somebody's house by the name of Shawnee Floyd. So once again we have Mr. Holly being involved somehow in this crime, which is corroborated once again by Derrick Tate statement. And Derrick Tate said that the man at the end of the table, [appellant] Holmes told him that Ernest Holly was involved. (42 RT 4434.)

> Callahan: We also heard Mr. Tate tell us that Ernest Holly was involved. Who said that to him? Karl Holmes. Karl Holmes told him Ernest Holly was involved. Where else have we heard about Ernest Holly, ladies and gentlemen? We heard about it from defendant Newborn. He told DeSean Holmes that Ernest Holly was involved. (43 RT 4455.)

The prosecution used other aspects of Newborn's alleged statements to DeSean to directly implicate appellant Holmes, including his comment that they were "riding around." (43 RT 4454.)

During its rebuttal argument, the prosecution filled in whatever gaps may have existed regarding the identity of the "others" Newborn allegedly named to DeSean.

> Myers: Okay. DeSean, who has everything to gain by implicating Ernest Holly is a shooter, never does so. All DeSean says is that Lorenzo Newborn says – – he says that Ernest Holly and *another guy* pointed out the kids as Crips. He doesn't say Ernest shot the kids. Now then, he also said

in the car with Lorenzo was Ernest and *another person, another person.* (44 RT 4659-4660 .)

Given the jury's finding that appellant and appellant only used the weapon, the jury must have understood from these comments that the other person was appellant Karl Holmes.

b. Trial with McClain

Preceding to trial with defendant McClain resulted in such gross unfairness as to deprive appellant of a fair trial and due process of law.

According to the prosecution it was McClain who initiated the series of events which ultimately allowed the Halloween shootings. (44 RT 4625, 4627.) According to the prosecution, the jury could determine the intention and motive of appellant by McClain's testimony. (44 RT 4626, 4628.) The prosecutor quoted McClain's testimony about his intent to retaliate against Crips for Hodges' death, including his efforts to roundup fellow gang members to do the job. (44 RT 4686-4690.)

Additionally, the prosecution committed misconduct by eliciting testimony highlighting and then commenting upon, the failure of appellant Holmes to testify. No admonition or limiting instruction was given to the jury, despite objections of counsel.

The Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, forbids comment by the prosecution on the defendant's silence at any phase of the trial. (*Griffin v. California* (1965)

380 U.S. 609, 615 [14 L.Ed.2d 106, 85 S.Ct. 1229].) Such impermissible comment is also a violation of the defendant's right to the presumption of innocence and fair trial secured by due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and I5) and, in a capital case, a violation of his right to fair and reliable guilt and penalty determination (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17).

Although *Griffin* involved explicit references to the failure of the defendant to take the stand (*Griffin v. California, supra,* 380 U.S. at p. 615), this Court has recognized that:

> "The rulings of the courts should not be so esoteric that a judgment must turn on the superficial difference between this prosecutor's phraseology and that found improper in Griffin.'" (*People v. Modesto* (1967) 66 Cal.2d 695, 711, overruled on other grounds in *Maine v. Superior Court* (1968) 68 Cal.2d 375,383, fn. 8.)

The Modesto court noted that the impermissible comment in Griffin was not "a magical incantation, the slightest deviation from which will break the spell.'" (*Ibid.*) Instead, the comments must be evaluated in terms of their net effect upon the jury. (*Ibid.*) "'*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand.' [Citation.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 112.)

Thus, although the prosecutor can comment on the state of the evidence and the failure of the defense to call logical witnesses (*ibid.*), it is *Griffin* error for the prosecutor to make remarks that are "manifestly intended to call attention to the defendant's failure to testify" or are "of such a character that the jury would

naturally and necessarily take [them] to be a comment on the failure to testify" (*Lincoln v. Sun* (9th Cir. 1987) 807 F.2d 805,809; *United States v. Cotnam* (7th Cir. 1996) 88 F.3d 487, 497). Improper comments can take many forms. For example, it is *Griffin* error for a prosecutor to state that certain evidence is uncontradicted when that evidence could not be contradicted by anyone other than the defendant testifying on his own behalf (*People v. Bradford* (1997)15 Cal.4th 1229, 1339; *United States v. Cotnam, supra*, 88 F.3d at p. 497) or to refer to the absence of evidence that only the defendant's testimony could provide (*People v. Murtishaw* (1981)29 Cal.3d 733,757 and fn. 19; *Williams v. Lane* (7th Cir. 1987) 826 F.2d 654, 665). It is likewise Griffin error to argue that the defendant won't tell his side of the story (*Griffin v. California, supra,* 380 U.S. at p. 615) or to refer to the defendant "sitting --just sitting" in the courtroom. (*People v. Modesto, supra,* 66 Cal.2d at p. 711.)

In the instant case, as discussed above, while examining codefendant McClain, the prosecutor highlighted the fact that appellant Holmes did not testify on his own behalf, and that his failure to testify supported an inference of guilt. [75]

---

[75] Myers: Oh, by the way, Mr. McClain, if you didn't kill the kids, you would get up there and admit it, wouldn't you?

McClain: I wouldn't get up here.

Q: If you did kill the kids, if you were on the stand right now – --

Harris: Objection: asked and answered.

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

The prosecution committed misconduct by eliciting testimony highlighting, and then commenting upon, the failure of appellant Holmes and co-defendant Newborn to testify. They had an absolute right to silence, which was grievously compromised. No admonition or limiting instruction was given to the jury, despite objections of counsel.

6. Conclusion

Had appellant not been required to proceed to trial with Newborn, DeSean Holmes' testimony would not have been relevant. Because appellant was not severed from Newborn, DeSean's testimony that Newborn and other coconspirators were involved in the shooting at McFees', that Ernest Holly and another person pointed out the victims as Crips, that DeSean had entered into an agreement whereby he would not offer testimony against appellant and the written agreement, and that appellant's counsel had advised him he need not testify would never have been presented to appellant's jury. Cumulatively these errors resulted in a denial of appellant homes his rights to confrontation a fair trial, and due process.

Similarly, trying appellant with McClain resulted in a denial of appellant homes his rights to confrontation a fair trial, and due process and requires reversal.

---

it is. (37 RT 4054.)

II. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION IN VIOLATION OF FIFTH, SIXTH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF INCRIMINATING HEARSAY FROM LACHANDRA CARR

A. Summary of Facts

LaChandra Carr testified that she had known appellant Holmes for about three years; that she knew codefendant Newborn, but that she did not know codefendant McClain. (18 RT 1802-1803.) On Halloween,1993, Carr spent the afternoon at her grandmother's in the company of Latoya Carr and Anedra Keaton. Carr's friends left before dark. (18 RT 1804, 1806.) Carr paged her boyfriend Solomon Bowen, some time between 6:00 p.m. and 7:00 p.m. About 20 or 30 minutes later Bowen came by to pick her up. (18 RT 1808.) Bowen told Carr that Fernando Hodges had been killed and that he was going to the hospital. He asked whether Carr wanted to go; she said no, so he dropped her off at his mother's home and said that he would be back. (18 RT 1812-1813.) Carr spoke to Bowen a number of times that night by telephone, but she did not see him again until the next morning when he came by her house after she had been picked up and taken home by her parents. (18 RT 1815-1816.)

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

During her trial testimony regarding her testimony at the grand jury, the trial court suddenly accused Carr of being"cute." Carr did not seem to understand and asked "How is it cute when I'm telling the truth?" The trial court then threatened to put her in jail. The court removed the defendants and placed Carr in custody for the night. The trial court's justification, without any factual support, was that he did not think Carr would return. (18 RT 1825-1827.)

The following day, over multiple defense hearsay objections, Carr repeated that Bowen had told her he was there; that he was not the driver; and he was not a shooter. (19 RT 1833-1834, 1835.) Thereafter the prosecution began questioning Carr about her testimony to the grand jury about whether or not she was not the hospital. The prosecution elicited that Carr told the grand jury that she was at the hospital that night. (19 RT 1836-1837.) Carr was shown People's exhibit 20 which contained a number of photographs, and asked whether or not she told the grand jury that she had seen Bowen (depicted in photograph D), McClain (depicted in photograph E), Newborn (depicted in photographs C), Bailey (depicted in photograph A) and Holmes (depicted in photograph B) at the hospital. To all but McClain, Carr testified that she did tell the grand jury that she had seen each individual at the hospital. (19 RT 1838-1839.) When asked about her discrepancy in testimony from the day before, Carr maintain that the truth was she was not at the hospital, that she didn't know why she said she was there she just knew that the individuals named were there because Bowen called her and told her so.

Counsel for appellant Holmes objected and moved to strike as hearsay. (19 RT 1839.) The prosecution's response was only that it went to explain her conduct. (19 RT 1839.) The trial court commented that it was not sure whether or the comment was being offered for the truth of the matter that they were there, but since the witness had testified twice under oath and said two different things the prosecution had a right "to go into it." (19 RT 1839-1840.)

The prosecution concluded its examination by asking "Is it fair to say that the reason that you're not scared now and you were scared then is because you are not implicating Mr. Newborn and Mr. Holmes and you implicated them at grand jury?" Carr responded" "Correct." (19 RT 1856.) Nevertheless, on cross-examination Carr maintained that she was not at the hospital and agreed that because she was never there she could not say that she saw Holmes at the hospital. (19 RT 1857.) [76]

Defense counsel moved for mistrial based on the admissibility of Carr's grand jury testimony of what Bowen had told her about who was present at the hospital. The court denied the motion and justified its earlier ruling to permit the testimony on the basis that "when a person testifies under oath at two different proceedings and says different things, you have got to let it in for some reason." Defense counsel reiterated that "Something she says Bowen says is not

---

[76] Shawntia Blayclock testified that at no time did she see Carr – who she had grown up with --when she was at Huntington Hospital. (32 RT 3366.)

admissible to impeach her...." The trial court responded" I think I told the jurors that they're going to have to make a determination whether what she said is true, whether she was at the hospital or not at the hospital," although "it may be hearsay on hearsay." (20 RT 2027-2028, 2038.)

B. The Trial Court's Errors

1. The error in permitting Carr's trial testimony that Bowen was there but did not drive and was not a shooter.

On hearsay grounds, defense counsel repeatedly objected to prosecution questions regarding what Bowen had told Carr about his part in Halloween killings. (19 RT 1833, 1834, 1835.) The prosecution's response was that the information was not offered against the defendants, but was "a statement regarding another defendant's participation and doesn't implicate any of these defendants here at all." (18 RT 1834.) The trial court overruled the objection stating: "I don't know if this is for *Greening* for impeachment. I have no idea until she answers."

2. The error in permitting Carr's grand jury testimony that appellant was at the hospital

While it was permissible cross-examination as a prior inconsistent statement that the prosecution question Carr about her testimony to the grand jury and whether or not she was not the hospital, what followed– questioning about WHO she told the grand jury Bowen told her was present, was not. During a defense motion for a mistrial based on the erroneous introduction of this hearsay evidence, the prosecutor argued "the statement that she heard it from Solomon

and what Solomon said is not being offered for the truth of the matter asserted, therefore it is not hearsay." This was a facially untenable position for the prosecution to have taken. Foremost, under Evidence Code section 1235, a prior inconsistent statement is admissible for the truth. Moreover, under the theory advanced by the prosecution, it was necessary to prove the presence of one or more defendants at the hospital. Were it not offered for the truth, whatever Bowen told Carr about who is present the hospital would be completely irrelevant.

The constitutional error presented here is similar to that analyzed in *People v. Miranda* (2000) 23 Cal.4th 340. There, the defendant complained of a police officer's testimony at a preliminary hearing that related to confession of a non-testifying codefendant, implicating defendant and another in the crimes. This Court noted the testimony would have been "inadmissible at the defendant's trial as a violation of state hearsay rule or state and federal confrontation principles...." (*Id.*,at p. 342 citing *Lily v. Virginia* (1999) 527 U.S. 116, 132- 133; *Bruton v. United States, supra*, 391 U.S. 123, 136, and *People v. Fletcher* (1996) 13 Cal.4th 451, 460-465.) This Court concluded that the hearsay recitation of the codefendant incriminating extrajudicial statements was admissible at the preliminary hearing "for the limited purpose of establishing probable cause to hold defendant for trial." (*Ibid.*)

Here, the trial court did not state any hearsay exception that it was relying on, and none exists. (See e.g., *People v. Roberts* (1992) 2 Cal.4th 271, 304 [error

"in finding the (codefendant's) statements to come within the co-conspirator exception," such that "defendants state and federal rights were violated"].)

C. The Requirement of Reversal

The portion of the hearsay evidence in which Carr was permitted to report, Bowen's incriminating statements that he was present, but not a driver or shooter, and that appellant was present at the hospital is prejudicial unless demonstrated to be harmless beyond a reasonable doubt. (*Bruton v. United States, supra,.*)

The prosecutor repeatedly argued the truth of Bowen's comments to Carr, including that Holmes was present at the hospital. The prosecution informed the jury that not all of the perpetrators were brought before them. It laid out a case that Bailey and Bowen were involved and presented evidence of the connection between Bailey, Bowen and the defendants. Bowen's inadmissible admission that he had participated but that he was not a driver or a shooter was an indictment against the defendants before this jury. (42 RT 4412, 44 RT 4630.)

Although the trial court eventually instructed the jury that Bowen's statement to Carr could not be used against any defendant, this occurred after the evidence had been admitted and after it had been argued by the prosecution. (44 RT 4672.) The harm was already done and resulted in the denial appellant's right to due process and to a fair and reliable sentencing determination by an impartial jury, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and

17 of the California Constitution. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 [plurality opinion]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 108 S.Ct.1981, 100 L.Ed.2d 575.)

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

A. Summary of Facts

LaChandra Carr was called as a witness by the prosecution. She acknowledged that she had been Solomon Bowen's girlfriend in 1993, and described her numerous police interviews in the aftermath of the shootings. She acknowledged that she felt pressured to give a statement to police and testified she made up "what they wanted to hear so they would leave me alone." She testified that on the night of the shooting, she was at her grandmother's house. Bowen picked her up, told her that Hodges had been killed and said he was going to the hospital. He asked if she wanted to join him but she did not. Bowen took her to stay at his house. They spoke on the telephone several times, but she did not see him again until the next day when he came to pick her up from her own home. (18 RT 1801-1819.)

Carr told the jury that she told police that Bowen told her that he did not shoot the victims, he was not the driver, and he did not know that this shooting was going to take place. (18 RT 1822.)

In an effort to impeach Carr, the prosecution turned to her grand jury testimony where Carr testified that she had gone to the hospital. (18 RT 1825.) At this point, the trial court lashed out at the witness. There is no indication in the record of what, if anything, Carr did to provoke the court.

Court: You do think you're kind of cute. Let me tell you something. We have three young men into eternity, three men are facing the death penalty. Do you understand that?

Carr: Yes.

Court: These jurors are here, these lawyers are doing their job and you think this is cute, so I will tell you what – --

Carr: How is it cute when I'm telling the truth?

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

Myers: Your Honor, may we approach?

Court: No.

Myers: May I?

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

Myers: Yes, sir.

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

At this point the defendants were taken from the courtroom. (18 RT 1826.)

The court then continued out of the presence of defendants.

Court: All right. Defendants are not present. This is a hearing on this witness. I am going to put you in custody because I don't think you're going to return. Because you testified before the grand jury and you haven't been cross examined, that means you would be unavailable. This is a very serious case. You don't think it is. I do, and so what I'm going to do is keep you in custody and make sure you return tomorrow. If you think you're helping either side here, you're not. What you are doing is acting like this is for you. These lawyers put a lot of time and on both sides. The defendants lives are at stake and we have two people, three people who are already dead. The jurors are trying to do their job and you're sitting there acting like you don't care and you don't want to answer any questions, and I'm not

going to tolerate it. Do you understand?

Carr: Yes.

Court: I am not into that stuff. You're going to be here tomorrow and I'm going to ensure that by putting you in custody and make sure that you come back tomorrow. You can answer however you want tomorrow, but I'll tell you something, you're not helping either side here. This is a court of justice that is what we are going to have. Thank you. (18 RT 1826-1827.)

At the prosecution's prompting, the court set bail. The prosecution informed the court that Carr wanted to say something. To that the court responded: "No, I don't want to hear from her. This is not a hearing. Counsel want to talk to me in chambers, if you want to convince me otherwise, but I am not going to listen to her." (18 RT 1828.)

The following morning, Carr resumed her testimony and over repeated defense objection gave incriminating testimony that her boyfriend Solomon Bowen had told what had happened but that he was not a driver and he was not a shooter, and that appellant Holmes was at the hospital where retaliation for Hodges death was discussed. (19 RT 1833-1835, 1839, 1844-1846.)

B. The Trial Court's Errors

1. The Trial Court's Error in Incarcerating Carr

As noted above, Carr was called by the prosecution and gave testimony that conflicted with her grand jury testimony. The prosecution eventually asked the jury to believe her grand jury testimony that she was at the hospital and that she saw Holmes and Newborn there. Thus, the former statement was urged as

substantive evidence of appellant Holmes' guilt. Appellant Holmes had no opportunity to confront the alleged source of the information, Bowen.

It is unknown what if any actions or manner offended the trial court and led to Carr's incarceration. Neither is there any evidence in the record whatsoever upon which the court could base its belief that Carr would not appear the following day to finish her testimony.

California has a well-established procedure for determining when it is appropriate to incarcerate a material witness to ensure that witness's presence at trial. Penal Code section 1332 provides that [n]otwithstanding the provisions of sections 878-883, inclusive, when the court is satisfied, *by proof on oath*, that there is good cause to believe that any material witness for the prosecution or defense, where the witnesses, an adult or a minor, will not appear and testify unless security is required, at any proceeding in connection with any criminal prosecution... the court may order the witness to enter into a written undertaking to the effect that he or she will appear and testify at the time and place ordered by the court or that he or she will forfeit an amount to the court which the court deems proper." Section (b) provides that "[i]f the witness required to enter into an undertaking to appear and testify, either with or without sureties, *refuses compliance with the order for that purpose*, the court may commit the witness if an adult, to the custody of the Sheriff... until a witness complies or is legally discharged."

Here, the court entirely abrogated the requirements of "proof on oath" and "good cause to believe" Carr would not appear to testify. Moreover, even if such proof had been made, the trial court was required to establish an undertaking in surety in an amount appropriate to ensure that Carr would attend. Only if Carr had refused to enter such an undertaking would her incarceration have been permitted.

The incarceration of a material witness is an important factor in determining voluntariness of that witnesses subsequent statement. (*Smith v. Duckworth* (7th Cir. 1988) 856 F.2d 909, 913.) This Court has recognized in the context of prosecutorial misconduct, that state officials may not preemptively punish prospective witnesses because that could skew the witness's testimony toward the prosecution. (*In re Martin* (1987) 44 Cal.3d 1, 31.) *Martin* involved intimidation of defense witnesses, with the result that they would not testify. Here, the trial court intimidated a witness called by the prosecution and the likely result was that her subsequent testimony was prosecution oriented.

2. The Trial Court Erred in Conducting the Unauthorized Proceedings in Appellant's Absence

The record clearly indicates that prior to the hearing on the incarceration of LaChandra Carr, the defendants were removed. This was clearly a critical phase of the proceedings, at which appellant had a state and federal constitutional right to be present.

In *Campbell v. Rice* (9th Cir. 2004) 408 F.3d 1166, 1171, the court stated the

constitutional principle that "[a] defendant has a right to be present at any critical stage of his criminal proceedings if his presence would contribute to the fairness of the procedure." Even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.)

In the instant case, appellant Holmes, according to Carr, had known Carr, for three years. Because of this he would have been in the best position to point out to counsel that the summary procedure announced by the court was all too likely to intimidate her and turn her from a neutral witness into a prosecution prone witness. When the trial court invited defense counsel, again in appellant's absence, to make a further presentation in chambers if they wanted, none did. Whatever assistance and information Holmes could have given his counsel in this regard Nishi would not have had access to and Holmes was denied any opportunity to alert his counsel to the prejudicial effect incarcerating this witness would have.

C. The Requirement of Reversal

The standard of review is whether the prejudice resulting from a defendant absence may be found harmless beyond a reasonable doubt. (*Rushen v. Spain* (1983) 464 U.S. 114, 121.) No such harmless error finding is permissible in this

case because (1) trial count of the nothing to object to the rogue proceeding or to ameliorate its prejudicial impact and (2) Lachandra Carr testified in a manner favorable to the prosecution when she was brought to court the following day. This resulted in the denial of appellant's right to due process and to a fair and reliable sentencing determination by an impartial jury, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and 17 of the California Constitution. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 [plurality opinion]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 108 S.Ct.1981, 100 L.Ed.2d 575.)

IV. AS A RESULT OF THE TRIAL COURTS ERRORS AND THE PROSECUTOR'S MISCONDUCT, APPELLANT WAS CONVICTED EITHER BECAUSE THE JURY BELIEVED HE WAS A GANG MEMBER OR BECAUSE OF THE PREJUDICIAL ASSOCIATION WITH HIS CO DEFENDANTS -- AGAINST WHOM ABUNDANT AND PREJUDICIAL GANG EVIDENCE WAS OFFERED – BUT NOT BECAUSE OF EVIDENCE THAT HE COMMITTED THE CRIMES[77]

The trial court erroneously admitted abundant unreliable, misleading, and inflammatory evidence that McClain, Newborn, Bowen, Bailey, and others – but not appellant Holmes, were members of the street gang P– 9. Evidence of Holmes' alleged gang affiliation was weak and lacking credibility and admission of the highly prejudicial evidence of the codefendants and others gang association ultimately cast Holmes among them as a callous, violent gang member. The prosecution impermissibly relied on gang affiliation to convict appellant through guilt by association and betray him as a bad person with a propensity to retaliate against his rivals as well as the witnesses and the jurors in this case.

The rights of free speech and association are protected under the 1st Amendment to the United States Constitution. (*Dawson v. Delaware* (1992) 503 U.S. 159.) It is well-settled that while gang membership or activity may be relevant in certain contexts, it is in itself insufficient to convicted defendant of criminal charges. (*United States v. Abel* (1984) 469 U.S. 45, 53.) Evidence that a defendant has an explicit agreement to support fellow gang members and fight is likewise insufficient proof for conviction of conspiracy to commit specific conduct.

---

[77] Appellant incorporates Argument I re: severence.

(*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1246.) In addition, convicting a defendant based on evidence of association with gang members violates fundamental principles of our justice system. (*Ibid.*, see too *Kennedy v. Lockyer* (9th Cir. 2004) 370 F.3d 1041, 1056.) The admission of such evidence in this case violated appellant's right to due process under the 14th Amendment which "protects the accused against conviction accept upon proof [by the State] 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.)

Here, the trial court's erroneous admission of the evidence lessened the state's burden of proof, instead allowing the prosecution to obtain a conviction based on the jurors' fears of gangs and personal threats in combination with guilt by association. (See e.g. *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; *Mitchell v. Prunty* (9th cir. 1997) 107 F.3d 1337, 1342.) This interference with the jury's judgment also deprived appellant of his Sixth and Fourteenth Amendment rights to a trial by an impartial jury. (See *Sullivan v. Louisiana*, supra, 508 U.S. 275, 278.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees, supra*, 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have its guilt determined by inflammatory propensity

evidence. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346-347.) By ignoring well-established law which prevents the state from using evidence admitted for limited purpose of the general propensity evidence in which excludes the use of unduly prejudicial evidence, the state arbitrarily deprived appellant of a state created liberty interest.

The Eighth Amendment absolutely requires that "any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

Arguably, some evidence of gang association was relevant to this case. Evidence of appellant Holmes alleged membership in P-9 and P-9's rivalry with the Crips gang was arguably relevant to motive. However, the fact that some gang-related evidence may have been appropriately introduced did not immunize the jury from the emotional impact of gang evidence detailing alleged criminal and violent propensities of appellant's codefendants, Bailey, Bowen, and others. Because the evidence of appellant's affiliation was weak, the abundant and inflammatory evidence offered against others was used to imply appellant guilty by association.

Additionally, the evidence of threats, killings, and violence which had nothing to do with this case overshadowed the evidence that was actually relevant to the jury's determination of appellant's guilt. Even more prejudicial was a suggestion that appellant and his codefendants, by virtue of their gang

association, were a direct threat to the witnesses who testified and jurors who decided his capital case.

The emotionally-charged bad character evidence described herein was unreliable, inflammatory, cumulative, remote, and far more prejudicial than probative. Its admission violated state law as well as appellant's state and federal constitutional rights. In view of the closeness of the case and the inflammatory nature of the evidence, alone and when combined with other evidence, reversal of all of appellant's convictions is required.

A. Evidence of Appellant Karl Holmes Alleged Association as P–9 Gang Member was Particularly Weak

Over defense objections, rival gang member and convicted felon, Mario Stevens – who stood to benefit by relocation, job assistance, payment of living expenses and reward money – identified appellant as a P-9 member, (25 RT 2543, 2550, 2551.) Convicted felon Derrick Tate testified he had seen Holmes wearing a hat that said "P-9" and that Holmes described himself to Tate as a gangster. (15 RT 1353.)[78]

Other witnesses had the opportunity to testify to appellant's gang membership and did not do so. The prosecution's gang expert, Derrick Carter, identified from several photographs alleged P-9 members. On cross-examination,

---

[78] After being convicted, appellant emotionally declared "P-9 rules." (45 RT 4752.) This outburst, having not been heard by the jury until after the guilt verdicts was not relevant to support other evidence of appellant's association with P-9.

Carter testified that appellant Holmes was not among any of those individuals he identified as P-9 members. (14 RT 1176-1178.) On redirect examination, the prosecutor had every opportunity to ask Carter whether or not Holmes was a P-9 member. Carter never identified appellant Holmes as a gang member. (14 RT 1180.)

Shawntia Blaylock, who was Fernando Hodges girlfriend and knew appellant Holmes, identified others but did not identify Holmes as being a member of P-9. (32 RT 3367, 3388, 3405.)

DeSean Holmes did not testify that appellant was a member of P-9. (17 RT 1538-1539.) Herbert McLean testified appellant was **not** a member of P9. (37 RT 4079.)

Neither was Holmes identified as being particularly close to Fernando Hodges – unlike codefendant Newborn, who has Hodges' best friend and godfather to his child, and unlike codefendant McClain who testified to his close association with Hodges. (32 RT 3363-3364, 36 RT 3973.)

Based on this evidence, it is clear appellant, if associated with P9, was more loosely associated than his codefendants and the other P-9 members such as Bailey and Bowen, for whom the prosecution offered gang related testimony.

B. Erroneously Admitted Gang Evidence

1. Testimony

DeSean Holmes told the jury that he was uncomfortable testifying because

his life had been threatened and that he approached Deputy Brown for protection because he was afraid that Ernest Holley and Danny Cooks were trying to kill him. (17 RT 1679-1682.)[79] DeSean Holmes testified that he discussed his fears about testifying with District Attorney Myers who agreed that if DeSean testified against anyone he could be killed. (17 RT 1679-1682.) Over objection, DeSean Holmes described to the jury threats Cooks allegedly relayed through DeSean's coach, his mother, and others. DeSean also testified that Cooks told DeSean's coach that he was going to get DeSean the way Majhdi Parrish, a witness in another case, was killed. (17 RT 1680-1681.)[80] DeSean made clear to the jury that he had heard that other witnesses had been killed or harmed. (18 RT 1733.)

Sheriff's Deputy Johnny Brown testified that he had offered DeSean protection because Danny Cooks, whom Brown was investigating and Ernest Holley were threatening his life, because "he had been asked to kill two witnesses that had been responsible for sending two of his friends to jail." (16 RT 1509-1510, 30 RT 3095, 3097-3098.) Deputy Brown reported that DeSean claimed he was providing information to law enforcement because his friends had turned against him and were threatening his life. (30 RT 3103.)

Derrick Tate described to the jury threats on his life and told the jury that he

---

[79] Both Holly and Cooks were identified as gang members but neither were charged with any of the allegations in the indictment against appellant.

[80] The court prevented efforts by the defense to present evidence as to DeSean's possible involvement in criminal activities involving Parrish. (18 RT 1699-1702, 30 RT 3111.)

believed something could happen to him for going to the police with information noting, "look what happened to the kids." (16 RT 1392.) Prompted by the prosecutor and over defense hearsay objection, Tate testified to threats he had heard about including that two to three weeks before he testified in October of 1995, his mother and girlfriend told him they received a threatening phone call saying that he "had better not show up in court." (16 RT 1393-1394, 1396.) Tate's mother and girlfriend did not tell him who made the threats. Tate then noted that the girlfriend of Terranius Pitts, a P-9 gang member who went to and/or called Tate's house to give him a warning, was in the courtroom. (16 RT 1395-1397.) Tate testified that he had been told by his family in Illinois that people were coming by, looking for him, and saying he should not show up in court. (16 RT 1396.) Over objection, Tate told the jury that one of his relatives told him never to return to Pasadena because he was in danger. He also told the jury that he heard that a witness was killed in relation to this case, and felt his life could be in jeopardy and feared for his safety. (16 RT 1398-1400.)

The trial court permitted McFee to tell the jury that he had been on the run for a year and a half and been forced to move because his life had been threatened for no apparent reason. (24 RT 2473-2476, 2490.) He further stated that he was testifying for his life in the face of threats he assumed came from gang members. (24 RT 2490, 2492-2493.) Over objection, the prosecutor was permitted to play for the jury the tape in which McFee told Detective Uribe he was

receiving threats in the form of anonymous phone calls. (24 RT 2475-2479.)

Over defense objection, LaToya Carr was asked by the prosecution whether she had some friends who were killed between Halloween and the date of her testimony. When she responded that she had, over additional defense objections she was required to name her friend who had been killed. (33 RT 3604-3605.)

Appellant Holmes could not confront and cross-examine the alleged sources of these extrajudicial threats depriving him of his rights to due process, confrontation and reliable determination of guilt , death eligibility and punishment.

2. Gang Photographs, Identification, and History

Pasadena Police Detective Derrick Carter identified from several photographs alleged P-9 members, most of whom had nothing to do with this case. (14 RT 1161-1166.) Carter described to the jury People's exhibit 6, a photograph of a red bandanna with names of alleged P-9 members written on it. (14 RT 1167.) In response to the prosecution's question whether Carter knew Ishmael Offut, Carter responded "Ishmael was a P-9 gang member who is now dead." (*Ibid.*) Defense counsel's objection to Carter's testimony and motion that it be stricken from the record because it was irrelevant, cumulative, and highly prejudicial was overruled. (14 RT 1168-1169.) Continued objections throughout Carter's testimony were also overruled. (14 RT 1159, 1168-1169, 1171, 1173.)

Over objection, Carter was permitted to provide a history of P-9. (14 RT 1169-1173.) Carter also informed the jury that after Fernando Hodges had been

shot, Carter looked at him in the hospital – even though this testimony did nothing to connect appellant or his codefendants to the Halloween crimes. (14 RT 1169-1173.) Carter then identified for the jury a photograph of Hodges with holes in his head, as he appeared in the hospital. (14 RT 1173; Peo. Exh. 2-B.) Finally, the trial court permitted Carter to state that if a P-9 is gunned down, and P-9's happen to suspect the Raymond Avenue Crips, that if P-9 was going to "ride" on someone, they were going to ride on Raymond Avenue Crips. (14 RT 1174.)

Deputy Chris Keeling, who was called to testify about a jail incident involving defendant Newborn, was permitted over defense objection to testify that it was his job to interact with gang members in custody. (19 RT 1934-1935.)

C. Legal Standards

Under Evidence Code section 352, the trial court may exclude evidence if its probative value is substantially outweighed by the probability that it's admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evidence should be excluded under section 352 if it "uniquely tends to evoke an emotional bias against [the] defendant as an individual, and which has very little effect on the issues." (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alverez* (1996) 14 Cal.4th 155, 204, fn. 14.)

Evidence Code section 1101 (a) prohibits the admission of evidence of a

persons character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101(b) provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 383.) Under section 1101(b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent...) other than his or her disposition to commit such an act" (*People v. Catlin* (2001) 26 Cal.4th 81, 145.)

The admissibility of bad character evidence depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin, supra,* 26 Cal.4th at pp. 145-146.) There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered outweigh the potential, inherent prejudice of such evidence. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Because such evidence can be highly inflammatory and prejudicial, its admissibility must be "scrutinized with great care." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) When evidence of other acts offered to prove a material fact, the court must employ a case-by-case balancing test the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. (*People v. Stanley* (1967) 67 Cal.2d 812, 818.)

Gang evidence is bad character evidence. Gang evidence is admissible only when it is relevant to material issue aside from character, is more probative

than prejudicial, and is it not cumulative. Gang evidence is not admissible to "show a defendant's criminal disposition or bad character as a means of creating an inference that the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) This is so because criminal defendants have the right to a trial on the evidence linking them to the charge crime, not based on a general criminal profile. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072.) In addition, this Court has cautioned that even if gang evidence is relevant, it may have a highly inflammatory impact on the jury and, therefore, "trial court should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193; see too *People v. Champion* (1995) 9 Cal.4th 879, 922.) Although "[m]embership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion," the highly inflammatory nature of gang evidence creates the risk that the jury will convicted defendant based on criminal disposition rather than on evidence of the crime charged. (*In re Wing Y* (1997) 67 Cal.App.3d 69, 79.) Furthermore, gang evidence invites juries to improperly convict defendants based on guilt by association. (*Mitchell v. Prunty* (9th cir. 1997) 107 F.3d 1337, 1342.) A finding of guilt by association "undermines the defendant's right to a fair trial." (*People v. Castaneda, supra*, 55 Cal.App.4th at p. 1072.)

The dangers of such evidence are amplified in places such as Los Angeles where "public and political perception is that Southern California is in the midst of

an unprecedented gang holocaust." (Burrell, *Gang Evidence: Issues for Criminal Defense* (1990) 30 Santa Clara L. Rev. 739, 741.) In light of these profound risks, trial courts must carefully scrutinize gang-related evidence before admitting it and resolve any doubts in favor of the defendant whose life and liberty are at stake. *(Ibid., People v. Lavergne (*1971) 4 Cal.3d 735, 744.)

D. Application of the Law to the Facts

The factual issues in dispute were whether appellant conspired to gun down either the victims in this case or some Crips and whether appellant Holmes was one of the shooters. Holmes conceded that he knew Fernando Hodges and that he was at the hospital. Holmes was never identified as an individual who discussed retaliation for Hodges' death or was seen at the hospital acting suspiciously. Appellant's relationships to Hodges, Newborn, McLean, Bailey, and Bowen were not shown to be particularly substantial. Evidence of is alleged membership in the P-9 street gang was weak. There was no testimony as to appellant Holmes' gang related activities in any context other than the charged offenses. There was no connection between appellant and any of the threats or harm to any other person connected to this case and the prosecution did not demonstrate otherwise.

Outside of a single unreliable eyewitness and the testimony of a convicted felon who stood to gain from manufacturing an admission by appellant, the prosecutor had no evidence linking appellant to these crimes. So, in order to

secure a guilty verdict, the prosecutor, who successfully resisted severance of appellant from his codefendants -- whose criminal histories and gang association as well as their connection to Hodges was far more substantial than appellant's -- bootstrapped appellant's minimal ties to the other defendants reams of prejudicial and inflammatory gang-related evidence and that of severed defendants Bailey and Bowen to prove appellant's guilt by association.

Despite the lack of evidence to support his theory, the prosecutor attributed the group think of the P-9's to appellant. (44 RT 4626.) On rebuttal Myers argued "that night the retribution, the revenge, the payback, the smoking is going to be directed at the Crips because of this (pointing at photograph of Fernando Hodges). And this (pointing at photographs of victims) Is a result of that, Herbert McClain. For had McClain not taken it upon himself to be some sort of Community Arms enforcer, to keep the Crips out because he is a big old man at Community Arms and hanging out with his P-9's, had he not shot Robert Lee Price, this would not have happened." (44 RT 4626-4627.)

Without factual support as to appellant's relationship to Hodges, Myers argued that it was a fact that Fernando Hodges was a close associate of Newborn, McLean, Holmes and their associates. (44 RT 4628.) The prosecutor went on to argue that Hodges was a P-9 and that McLean admitted to the jury that "these guys were out to kill Crips because Fernando Hodges was killed in their mind by Crip. That's a fact. And retaliation is motive." (44 RT 4628.)

Conceded by the prosecutor was that there were perhaps as many as 30 people at the hospital, appellant being one of them. However, also conceded by the prosecutor was that not everybody who was at the hospital was involved in the killings. (44 RT 4629.) Although the record is completely lacking of any alleged activities of appellant Holmes at the hospital, other than arriving in a car and speaking to Blaylock, the prosecutor argued appellant's association with P-9 and individuals such as Newborn and Bowen, who were also at the hospital, necessarily meant he was one of the individuals who discussed retaliation for Hodges death and set into action the events of the night.

Although there was no testimony that appellant Holmes was suspected of any involvement in any threats or any harm to any witnesses in the case, the prosecutor intentionally inflamed the jury and instilled in them fear of all of the defendants, including appellant Holmes. There was no evidence showing that appellant Holmes had anything to do with any alleged threats and he was denied any opportunity to confront the sources of that information.

The prosecutor argued that witnesses were afraid and had been threatened and intimidated. (43 RT 4463-4464.) District Attorney Myers argued that everyone was afraid of gang members, and "this fear is pervasive, it is invasive, it is wrong, it must stop and it must stop here in this courtroom." (44 RT 4627.)

Myers improperly vouched for the truth of witnesses' grand jury testimony because the grand jury was a "sanctuary" which provided "safety" "free from the

intimidating scowls of convicted gang members." (44 RT 4630-4631.)

Referring to Pina's testimony and asking the jurors to put themselves in Pina's place, he argued:

> Myers: And then the next thing you know there is this shooting and now you're witness to a triple murder, and you saw people. That could be you. And if it is you or if it were you, would any of you sit up here on the witness stand, would any of you take an oath to tell the truth, would any of you come to court knowing that there are gang members over there, would any of you knowing all these things come in here and say "I know these guys." (44 RT 4663.)

Over defense objection that the argument improperly suggested to the jurors that their lives were in danger, the court permitted the prosecutor to continue this argument:

> Myers: Would any of you, given the opportunity – you know that these men, that the men that you are going to be identifying, are facing the death penalty, you would know that– would any of you come in here and say....(44 RT 4663.)

The prosecutor persuaded the jury that Derek Tate was warned not to testify and argued:

> Myers: See how long, how far these arms can stretch? These are real gangsters. These are people with pull. He was told not to return to Pasadena or "you're dead." His girlfriend and mother were called and threatened. He heard a witness in this case had already been killed. He is on Lorenzo's smash list. And Mr. Nishi was kind enough to call Mr. Tate at his girlfriend's house, which must have made Mr. Tate feel very secure that the defense knew where his girlfriend could be reached. (44 RT 4674.)

The prosecutor also told the jury it was difficult to get witnesses to come forward when there is "gang intimidation and... family ties." He noted that people who snitch get killed, and told the jury: "These people have the juice to get you."

(44 RT 4698.) The prosecutor told the jury "you are the only thing between them and their next victims." (44 RT 4701-4702.)

When prosecutors engage in an egregious pattern of misconduct that infects the trial, it violates the due process of the federal Constitution. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) To show such a violation, a prosecutorial misconduct claim must demonstrate both impropriety and prejudice. (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1145-1146.) Prosecutors may not invoke societal woes as a basis for conviction. (*Viereck v. United States* (1943) 318 U.S. 236, 247-248.) The prosecutor's arguments cannot be intended to induce a level of fear in the jurors so as to guarantee a guilty verdict. (*Commonwealth of Northern Mariana Islands v. Mendiola* (9th Cir. 1997) 976 F.2d 475, 487.)

A prosecutor also may not misstate evidence or otherwise mislead a jury. (*Berger v. United States* (1935) 295 U.S. 78, 84-89.) Misstating the substance of the witnesses testimony in a prosecutor's closing argument is plain error when it affects a defendant's substantial rights. (*People v. Hill, supra*, 17 Cal.4th 800, 824-827.)

As described above, the prosecutors in this case, alone and together, committed misconduct which substantially prejudiced appellant and requires reversal of Holmes' conviction.

E. Reversal is Required

The state cannot prove that the constitutional errors outlined above were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) Moreover, there is a reasonable probability that absent the error, the jury would have reached a more favorable result. (*People v. Watson, supra*, 46 Cal.2d 818, 836.) While each error described herein requires reversal, the cumulative prejudice of the errors together leaves no doubt that appellant's convictions must be reversed.

Even a very limited admission of gang evidence can create prejudice that requires reversal. In a case such as this where evidence of appellant Holmes' guilt was limited to unreliable eyewitness testimony bolstered only by appellant's alleged admission to a witness whose motives to testify were questionable, the prosecutor's reliance on irrelevant character assassination, implied threats to the jury, misstated evidence, and evidence of gang association was particularly inflammatory.

Finally, the trial court never explained to the jury that it could not consider evidence of street gang activities and criminal acts by gang members as proof that appellant was a bad person with a propensity to commit crimes. (See e.g., CALJIC no. 17.24.3.)

Appellant's convictions must be set aside.

V. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS GABRIEL PINA'S UNRELIABLE EYEWITNESS TESTIMONY WHICH RESULTED FROM HIGHLY SUGGESTIVE PRETRIAL PROCEDURES

A. Proceedings Below

1. Pretrial Motions

On November 15, 1994, MClain moved pursuant to Penal Code section 995 to set aside the indictment against him. (4 CT 891-925.) In that motion, McClain explained that the procedures that produced Pina's identification of him were so impermissibly suggestive, that Pina's identification could not support the low probable cause threshold required to sustain an indictment. (4 CT 914-918.) McClain noted that Pina saw a public service announcement which exhibited a photograph of McClain. On April 5, 1995, appellant Holmes moved to join McClain's motion to set aside the indictment. (4 CT 976-978.)[81]

On November 16, 1994, McClain move to suppress the eyewitness identification by Gabriel Pina because it was so suggestive as to violate due process of law. (4 CT 926-934.) In his motion, McClain noted that Pina lacked sufficient opportunity to observe the driver of the car which he ultimately identified as McClain and furthermore, he was unable to identify McClain from a photographic lineup until he saw a single photograph of McClain. (4 CT 933-934.)

On April 5, 1995 appellant Holmes moved to join McClain's motion to

---

[81] Appellant Holmes also joined Bowen's motion to set aside the indictment. (4 CT 976-978.)

suppress identification evidence. In his declaration in support of the motion, counsel for appellant Holmes declared various facts surrounding Pina's pretrial identification, including that prior to being shown a six pack photographic lineup containing a picture of Holmes, he saw a "Help Catch Them" public service announcement on cable television. During the announcement, a photograph of appellant Holmes was shown. It was only after observing the photograph in the public service announcement, that Pina positively identified Holmes from the six pack photographic lineup which contained **the identical photograph** that had been in the public service announcement. (4 CT 979-984.)

On October 23, 1995, counsel argued the suppression motion. (22 RT 2159-2163.) Appellant Holmes orally join the motion. (22 RT 2158.) Counsel argued that shortly after the crimes occurred, Pina was interviewed by police and could not provide any physical descriptions of any of the participants. Months later while watching television, Pina indicated that he saw a picture that he thought was the driver of one of the vehicles. Thereafter, Pina went down to the police station and pointed to one picture in a "six pack" and stated "I think that might be him." Pina was then shown a newspaper photograph by Detective Uribe and subsequently picked out codefendant McClain and then appellant Holmes. Counsel for appellant pointed out too, that appellant's picture appeared in two separate photographic lineups: 17–A and 17– B. (22 RT 260-261.)

The prosecutor pointed out that Pina picked out only one of the two photos

of appellant and on that basis there was no substantial likelihood of misidentification or suggestive identification because "if it were, at the time they went through the six packs Mr. Pina would have picked out both of them." (22 RT 2162-2163.) Without explanation, the trial court denied McClain's and Holmes' motions. (22 RT 2169.)

2. Pina's Grand Jury Testimony

Appellant's suppression motion relied primarily on Pina's grand jury testimony which referenced his November 1, 1993, taped statement to police and the photographic lineup which occurred **nearly two months** after the crimes.

Before the grand jury, Pina testified that he and his girlfriend Lilian Gonzales, took a walk with their dog at approximately 9:00 p.m. or 10:00 p.m. (2 CT 429-430.) As they walked north on Mentor, a car racing up the street caught Pina's attention. (2 CT 430.) Pina noticed four cars speeding up the street. (2 CT 431.) The first two cars were close together with the other two following a little behind. When the first car reached Orange Grove, it paused at the top and all of the cars turn right. (*Ibid.*)

The first car was described as a dark green or blue '94 or 93 MR-2 or Corrolla which had tinted windows and something hanging from the mirror. (2 CT 432-533.) Pina saw one male driver, but could not see if anyone else was in the car because of the tinted windows. (2 CT 533-434.) Pina got a good view, but "not too much as it was passing me." The Black male, was probably in his 20's or 25

years old. (2 CT 434.) Pina did not remember anything else about the first car or its occupants. The car stood out to him because it was modified. (2 CT 434.) Pina described the second car as possibly being a white Nissan Sentra. He believed this car was a two door. He based this belief on a later observation that someone getting into the car had to move the seat forward. The second car was occupied by a Black male with short curly or nappy hair who appeared clean cut and was probably in his 20s. Although it was possible there were other people in the car, Pina's testimony was that this driver was alone. Pina remembered nothing else about the second car because he "didn't really pay too much attention to that particular vehicle at that time." (2 CT 434-436.)

Pina described the third car as a brown or maroon Honda Civic hatchback. This car did not appear to be modified and was occupied by a driver only. This driver too was described as young, clean-cut with nappy hair close to his head. (2 CT 436-437.)

As for the fourth car, "it caught [his] attention, but not as much." (2 CT 437.) Pina explained: "I didn't really pay too much attention to it. I saw it, I knew what it was, that I just don't recall it." Pina recalled there were two or three occupants in the fourth car. He could remember nothing about them except that they were Black males. (2 CT 437-438.) Although someone in one of the cars was wearing a white shirt, Pina did not remember who or in which car. (2 CT 437.)

Pina with his girlfriend and dog, was turning south onto Catalina when he

noticed that the cars from Mentor were parked across the street from him near Emerson, but facing Orange Grove. (2 CT 438-439.) The only car moving was the first car which had its parking lights on. (2 CT 440.) The first car stopped near the other three cars, "talking to a bunch of the guys that gathered in front of this house, in front of this driveway." There was a group of about 15 Black males and they all had costumes on. (2 CT 439, 441.) At this point, Pina became "paranoid of the situation." (2 CT 440.) Pina testified he was focused on the first car. (2 CT 442.)

Then, according to Pina:

> Pina: As he pulled up, I could see inside this car with the lights from the street lights. As he pulls up, he almost stopped completely underneath one, and I saw the guy, eye to eye contact. As he looked at me, he was like leaning forward to get a good look at me, because the way the car is designed, you almost have to look forward to see up ahead a little bit. And that's when I saw him, the driver of that car. (2 CT 442.)

Pina explained he saw this driver twice, the first time had been when he backed up and he and Gonzales were still walking southbound. The second time he saw him "better." (2 CT 442.)

When the driver of the first car pulled up towards the group of young Black males, two guys from the group walked toward the car and talked to him for a second. Pina overheard one or two guys start yelling "Hey, come on. Hurry up." Next, Pina heard a gate close. The two guys who approached the first car left, the car backed up turned towards Emerson, crossed Emerson and parked on Emerson near Wilson. The second car, the one he described as a white Nissan

parked behind it with only a driver. (2 CT 443-446.) Pina did not see anybody exit either of the cars. (2 CT 447.) The other two cars stayed on Catalina. There were a number of people outside of those cars who jumped into the two that remained parked on Catalina after the other two cars had left and someone shouted "Come on. Hurry up. Let's go." (2 CT 448-449 .) Pina remained focused on the first and second cars parked on Emerson. Pina testified the driver of the first car "was just acting too weird." (2 CT 450.)

The first two cars had been parked on Emerson for less than a minute before he heard gunfire. Pina told Lillian to take the dog and go home. (2 CT 451.) Pina saw two people running around the corner northbound on Wilson. Pina testified "I saw two people running around the corner northbound on Wilson. One guy in the MR-2 and the other guy got into the Sentra." (2 CT 452-453.) Pina focused on the one who ran to the Nissan Sentra. (2 CT 453.) He testified that this male had a trench coat and "a couple of things as he was running." Pina testified this individual looked back at him as he was getting into the car. (2 CT 454.)

A month or two after the incident, Pina glanced at a "'help wanted type thing" on television. One guy caught his eye, Pina testified it was the driver of the first car. (2 CT 461.) Thereafter he went to talk to detectives. He was shown six pack photographic lineups. Pina "had a hard time with the folders at first." Pina was then shown another picture of one individual from the newspaper. "Right then

[he] recognized him [as the driver of the first car]." (2 CT 462-463.) When Pina was shown a photograph from the newspaper there were other pictures shown to him as well. Pina testified he did not pay much attention to these other photographs. (2 CT 464.)

As Pina was shown six pack photographic lineups he recognized another individual, the one who went into the back seat of the Nissan. (2 CT 464.) Pina testified: "I remember his face and his features and he had also little blemishes on his skin that would stand out that made me remember him." (2 CT 465.)

3. Pina's Trial Testimony and Statements to Law Enforcement

By the time of trial, Pina testified that he didn't remember as far back as Halloween, 1993. (26 RT 2737) Nevertheless, on direct examination Pina testified at trial that on October 31, 1993, at about 10:30 p.m., he and his girlfriend, Lilian Gonzales, were walking their dog near the crime scene. (25 RT 2636-2640.) Pina was walking north on Mentor when he noticed four cars going north at a high rate of speed.

When Pina spoke with Officer Chavira[82] 30 minutes after the homicides, he stated that the first of the four cars he saw on Emerson was a 1983 or 1984 Toyota Corolla. (36 RT 3885, 3894.) He could not describe the other three cars except to say that they were small. (36 RT 3885.)

---

[82] Pina did not remember speaking to Chavira or the names of any officers he spoke to. (26 RT 2735-2736.)

A few hours later, in a taped interview, Pina described the first of the four cars as a dark green or blue possibly. (35 RT 3743.) Pina described the second car is an older white sedan, perhaps a 1980 or 1989 model. (35 RT 3742-3743.) Pina could provide no details about the third or fourth cars. (35 RT 3744.)

At a November 4, 1993, interview when asked to describe the cars in order, Pina told Detective Uribe at the first car was a small import car. (36 RT 3903.) According to Uribe's notes, Pina indicated "tinted window, modified exhaust all around." (36 RT 3920.) He described the second car as possibly a four-door white Sentra, lowered with tinted windows all the way around. (36 RT 3903-3904.)

As indicated above, Pina's description of the cars to the grand jury evolved in detail so that the lead car was a 1993 to 1994 MR-2 or Toyota Corolla, the second car was a white Nissan, and the third car was a maroon or brown Honda Civic. (26 RT 2745, 2747-2749.)

At trial, on direct examination Pina described the first car as a 1994 import, the third car as a black Honda CRX, and the fourth car as a two-door white Nissan Sentra. (26 RT 2750.) On cross-examination, he said it could have been a Geo. (26 RT 2733.) Although he previously described the second car – the car he allegedly saw appellant Holmes enter – as a white Nissan, he denied this at trial. (26 RT 2750.) Pina maintained it was a four-door vehicle. (26 RT 2734.) Rather, at trial he testified that the car depicted in People's exhibit 21, a grey or silver Ford Tempo without tinted windows (which by fingerprint evidence had at some point

been in DeSean Holmes' possession) resembled the second car. (17 RT 1538, 1571, 26 RT 2751-2753.) He described the fourth car as a white two-door Nissan. (26 RT 2734, 2750.)

At trial, Pina testified that the cars he saw each had only one person in them – the driver. (25 RT 2642.) [83]

The cars turned right to go east on Orange Grove. (25 RT 3643.) [84] While Pina was walking on the west side of Catalina, he noticed some cars were parked down the street and that there were people outside of those cars. Pina did not pay particular attention to these cars as he was distracted by one that was parked in the middle of the street. (25 RT 2645.) Pina saw 10 to 15 people, one of whom was wearing a joker's costume, standing outside these cars. (25 RT 2654, 2676.)

Pina's statements to law enforcement which preceded his grand jury testimony, differed significantly. Thirty minutes after the homicides, when he spoke to Chavira, Pina reported that he had seen about four people standing near the house. (26 RT 2705.) Moreover, during his taped statement of November 1,

---

[83] This fact casts further doubt on Pina's description of the individual who entered this car and ultimately his identification of appellant Holmes. This is so because Pina claimed the individual had to push the front seat forward to get into the two door vehicle and turned toward Pina as he did so. If this car had only one individual in it, there would have been no need for anyone to waste time to push the seat forward, particularly if this person was escaping a crime, to get into the backseat.

[84] Pina conceded that he had difficulty focusing on the vehicles and what they were doing and that he made certain assumptions as to what all four were doing based on what the first car did. (25 RT 2643.)

1993, he told police he believe that the people who had committed the crimes were coming from the house. There was no mention of a joker's costume in the police tape. (26 RT 2705, 2709, Def. Exh. H-1.) [85]

Pina testified at trial that he continued walking south on Catalina on the west side of the street. He noticed that one of the lead cars from Mentor, with darkly tinted windows, was coming north towards them on Catalina. The car pulled up parallel to Pina, then moved to reverse back toward Emerson. The car then came north again, and as the car came closer, the driver looked out the window. Pina testified he was just north of the streetlight at approximately 16 feet from the lead car when the driver looked at him. (25 RT 2646-2648, 2675.)

Pina described that when the car was parked near the group of people, one person approached to talk to the driver. Then, people started to get into the cars. At the same time someone rattled the gate, and someone called someone else's name. One or two people called out "Hey, come on," (25 RT 2655.)

Just as he and his girlfriend turned the corner to go westbound on Emerson, Pina heard gunshots. (25 RT 2658-2659.) In his trial testimony (unlike previous accounts) he added that when he told Gonzales to go home he said "I'm going to make sure these guys don't double back on us." (25 RT 2659.) Pina described his actions heroically saying he "ran towards the middle of the street to get a visual,

---

[85] As it turns out, the home belonged to prosecution witness Joe Colletti. (19 RT 1902-1903.)

and at the same time I started running towards them a little bit to you know, distract them if they were going to go that way." (*Ibid.*)

At this time, Pina "noticed" "some" people running around the corner house get into those cars. (*Ibid.*) The individual he ultimately identified as appellant Holmes was one of the first ones that went round the corner. (25 RT 2660.) His intent was to focus on the person closest to him. He noticed this person's facial features and what he was wearing. Pina described appellant as wearing a tannish trench coat with a "Pendleton" shirt. (25 RT 2661.) Pina described the car that appellant allegedly entered as a white four-door. (*Ibid.*)

Prompted by the prosecution while being shown appellant's Holmes' photograph, Pina identified appellant Holmes as the person he saw running toward him west bound on Emerson. (25 RT 2665.)

When confronted with the vast number of discrepancies between his various descriptions, Pina opined that his memory at the time of trial was superior to his memory during his interview with Uribe and during his grand jury testimony because he had more time to think. (26 RT 2770, 2739.) Inexplicably, although he disavowed his grand jury testimony and interview statements, Pina maintained that he would never say things that he is not sure of. (26 RT 2738.)

Between the night of the homicides in appellant's trial, Pina had 13 to 14 contacts with people from law enforcement or the prosecutor's office. Pina refused all requests to speak to defense counsel prior to his testimony. (26 RT

2694-2695.) Approximately 30 minutes after the homicides, when he spoke to Pasadena police officer Chavira, Pina mentioned that he had seen people run **from** the cars, and that he saw person exit a residence in the neighborhood. (36 RT 3883-3886, 3894-3897.) Pina did not describe any of the people that he had seen. According to Officer Chavira, if Pina and stated that he could identify any person or had given any physical description it would have been in his notes. (36 RT 3886, 3897.)

Several hours later, Pasadena police Detective Ireland took a taped statement from Pina. When asked whether he would recognize any of the people he saw near the crime scene, Pina told the officer he had not paid attention because of his disability, but he wished he had. (26 RT 2712-2713; 36 RT 3747.)

On November 4, 1993, Pina went to the Pasadena police station where detectives showed him brochures containing photographs of cars. Pina did not identify any of the cars in the brochures as similar to cars he had seen the night of the homicides. (36 RT 3901.)

Other than a general description of the driver of the first car, Uribe's notes indicate that Pina was unable to describe the people he saw. (36 RT 3905.)

On December 24, 1993, a $40,000 reward for assistance in this case was published in the news media along with photographs of suspects in the case. (71 RT 7097.) Pina saw these photographs when he glanced at the television during a public service advertisement about the case. (2 CT 461; 26 RT 2718-2720.)

Upon hearing the announcement, Pina contacted law enforcement to say he could identify one or two suspects. (26 RT 2719-2720.)

On December 29, 1993 Pina went to the police station where he was shown a series of six pack photographic lineups. Piña told the officers "I heard that you caught some of the people, and they had a little brief commercial program about looking for some people, and I wanted to see if I was going to pick the right one...." (25 RT 2664.) [86]

Initially, Pina saw photographs among the six pack photographic lineups that looked familiar. When he asked to see another view of this individual he was shown a newspaper which contained a picture of appellant Holmes. Although he had seen appellant Holmes' picture in the photographic six pack lineups he did not choose him at the time but only made an identification after he had been shown the newspaper photographs. (26 RT 2758.) [87]

The individual Pina had seen getting into the second car had blemishes on his face. Pina "locked into that." (26 RT 2764- 2765.) [88]

Regarding Pina's position when he saw the second individual running, Pina's trial testimony and grand jury testimony differed significantly.

---

[86] Pina went to the police station to identify one of the individuals he had seen on the TV. (26 RT 2755.)

[87] Pina maintained that he was mistaken when he testified before the grand jury that he had seen more than one photograph in the newspaper, but then agreed that his testimony before the grand jury was the truth. (26 RT 2759-2760.)

[88] From the witness stand, Pina was unable to make out blemishes on appellant's face. (26 RT 2771.)

The question posed to Pina at the grand jury was:

> "What I would like you to do is step down and, with this blue thumbtack, stick this approximately where you were when you saw the guys running, getting into the cars after the shots." (26 RT 2768.)

The defense introduced Exhibit K, which the prosecutor stipulated was the exhibit used by Pina during his testimony at the grand jury. (26 RT 2766.) Pina recalled putting the thumbtack in its present position on Exhibit K. Then commented: "I am not Superman. I can't see from there." (26 RT 2769.)[89] Pina acknowledged that no one could make an identification from the position marked on Exhibit K. (26 RT 2770.)[90] Although he continued to maintain that he crossed Catalina, passed the corner and ran toward the suspects, Pina acknowledged that he never got within 100 feet of them and could not remember where exactly he was. (26 RT 2771.)

4. Defense Expert Testimony

Kathy Pezdek, Ph.D., an experimental psychologist – meaning a research psychologist engaged in scientifically based research studies regarding factors that relate to the accuracy of memory – was called as an expert witness on behalf of Holmes. (34 RT 3648, 3651.) Dr. Pezdek's testimony related to factors to

---

[89]Pina agreed that from this position there would have been five houses, with cars in front plus another street –a distance of approximately 100 yards. (26 RT 2772.)

[90] Although, at trial, Pina maintained that he crossed Catalina he acknowledged that he never told that to Detective Uribe and did not testify that he had done so at the grand jury. (26 RT 2769-2770.)

consider when evaluating the accuracy of an eyewitness identification. Dr. Pezdek explained that memory works at specific stages. And unlike most people's perception that memory works much like a video camera, decades of research has demonstrated that memory is not a precise process. (34 RT 3655-3656.) Specifically, memory is broken down into a three stage process. The stages are the input stage, which has to do with the perception of an individual initially; the storage stage, which has to do with how well a witness can hold onto information in memory over some period of time; and the third stage is the identification stage -- the stage at which the witnesses is asked to make an identification. Dr, Pezdek explained that there are different factors that relate to the accuracy of each of these three stages. (34 RT 3656-3657.) Dr. Pezdek identified a number of factors that affect eyewitness identification including exposure time, lighting and physical distance, distraction, and whether an identification was cross-racial. (34 RT 3657-3661.) Dr. Pezdek also explained that there is a very low correlation between the confidence of the witnesses accuracy of his identification and the actual accuracy of identification. (34 RT 3661.)

B. Applicable Law

1. Due Process

An unnecessarily suggestive pretrial identification which results in an unreliable trial identification violates due process of law. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 113-115; *Neil v. Biggers* (1972) 409 U.S. 188, 196-198;

Simmons v. United States (1968) 390 U.S. 377, 383-384; *People v. Kennedy* (2005) 36 Cal.4th 595, 608.) Such a violation occurs when an identification procedure is "so impermissibly suggestive as the rise to a very substantial likelihood of misidentification." (*Simmons, supra*, 390 U.S. at p. 384.) To determine whether or the circumstances of an identification are impermissibly suggestive, a court must look at the" totality of the circumstances" surrounding the identification. (*Stovall v. Denno* (1967) 388 U.S. 293, 302.)

2. Eighth Amendment Reliability

Suggestive identification procedures render the trial process unreliable and have, "too often brought about the conviction of the innocent." (*People v. Caruso* (1968) 68 Cal.2d 183, 188.) Indeed, "'the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.'" (*United States v. Wade* (1967) 388 U.S. 218, 229, citing, Wall, *Eyewitness-identification in Criminal Cases*, 3 Wigmore, Evidence §786a (3d ed. 1940); see also Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication* (2005) 93 Calif. L.Rev. 1585, 1591, fn. 2, 1601-1602.)

In light of the risk of unreliable conviction in eyewitness identifications, a death sentence, such as appellant's which is substantially based upon a suggested identification procedure, violates the eighth and 14th amendments to the United States Constitution. (*Woodson v. North Carolina* (1976) 428 U.S. 280,

305.)

3. Pina's Identification of Holmes was the Product of an Unnecessarily Suggestive Pretrial Procedure

"[A]n identification procedure is unnecessarily suggestive when its use is not imperative" (*United States v. Montgomery* (9th Cir. 1998) 150 F.3d 983, 992.) There was no necessity for the suggestive procedures law enforcement employed in appellant Holmes' case. Here, Holmes was a suspect whose picture had been displayed on television and in the newspaper. It was not until after Pina was shown the newspaper which contained the photograph (which have been displayed on the television) that Pina picked appellant from a six pack photographic lineup. Obviously, by that time of appellant's appearance was known to Pina, as well as the fact the police considered him a perpetrator.

When law enforcement employs unnecessarily suggestive identification procedures, the next question is whether in light of the totality of the circumstances, there was a "substantial likelihood of misidentification." (*Simmons*, *supra,* 390 U.S. at p. 384.) Under *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200,

> the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Examination of the totality of the circumstances prior to and during the photographic lineup in light of *Neil v. Biggers, supra,* and other markers of

reliability, reveal that law enforcement procedures in this case were so suggestive that they created the irreparable risk that Pina misidentified Holmes.

a. Pina had Limited Opportunity to View the Suspect

It is evident that the greater the opportunity the witness has to observe a person, the more reliable that person's identification is to the trier of fact. (*Robinson v. United States* (D.C. Cir. 1972) 459 F.2d 847, 858.) Thus, the first factor to look at in evaluating the reliability of an identification is "the opportunity of the witness to view the criminal at the time of the crime." (*Neil v. Biggers, supra*, 409 U.S. at p. 199.) Pina's opportunity to observe the suspect as he fled and entered the vehicle was too limited to produce a reliable identification. He was a considerable distance away; it was dark; and he could give no description immediately after the event more later that night.

i. Identification of the Car

Pina's evolving recollection of the cars is important to his ultimate identification of appellant Holmes. This is so because Pina's opportunity to observe the individual he identified as appellant coincided with that individual getting into the second car. His changing recollections suggest he had no true, accurate memory, but was instead endeavoring to reconstruct what happened.

When he was first interviewed, 30 minutes after the crime, Pina could not describe any car, other than the first car, except to say that they were small. (36 RT 3885.) A few hours later, Pina described the second car is an older white

sedan, perhaps a 1980 or 1989 model but could provide no details about the third or fourth car. (35 RT 3742-3744.) Days later, he described the second car as possibly a **four-door** white Sentra, lowered with tinted windows all the way around. (36 RT 3903-3904.) At the grand jury proceedings, Pina described the second car as possibly being a white Nissan Sentra. He believed this car was a two door because he later observed someone getting into the car who had to move the seat forward. (2 CT 434-436.) At trial, Pina maintain the second car was a four-door. At the grand jury proceedings, Pina gave no description about the fourth car, but at trial it became the four-door white Nissan. (2 CT 437-438; (26 RT 2734, 2750.)

ii. The Suspects

As noted, Pina could not describe the suspects the night of the offense.

At the grand jury proceedings, Pina testified that he saw two people running around the corner northbound on Wilson. One guy got into the MR-2 and the other guy got into the Sentra. (2 CT 452-453.) Pina focused on the one who ran to the Nissan Sentra. (2 CT 453.) He testified that this male had a trench coat and "a couple of things as he was running." Pina testified this individual looked back at him as he was getting into the car. (2 CT 454.) When describing his identification of appellant from a six pack photographic lineup, Pina testified as he was shown the lineups he recognized the man who went into the back seat of the Nissan. (2 CT 464.)

At trial, Pina abandoned his description of his opportunity to observe the suspect when he looked at him as he pushed the seat forward and entered the backseat of the second car. By the time of trial, Pina testified instead that he heroically ran toward the suspects and as the suspect ran toward him he got a good look at his face. This was in spite of the fact that Pina had been unable to physically describe any of the "some" individuals he had seen running towards the cars. (26 RT 2712-2713; 36 RT 3747, 3905.) In earlier interviews Pina said he saw people running from the cars, but not toward it and that he saw person exit a residence in the neighborhood. (36 RT 3883-3886, 3894-3897.)

Thus, qualitatively and quantitatively, Pina's opportunity to observe the suspect he ultimately described as appellant was too limited to produce a reliable identification.

b. Pina Stated he did not Pay Attention to the Second Vehicle or the Suspects

The second factor listed in *Biggers* is the witness's degree of attention. (*Biggers, supra*, at p. 199.) In the instant case, Pina stated repeatedly that he did not pay attention in the second vehicle or the suspects.

At the grand jury proceedings, Pina explained he remembered little about the second car because he "didn't really pay too much attention to that particular vehicle at that time." (2 CT 434-436.) By the time of trial, Pina testified that he didn't remember as far back as Halloween, 1993. (26 RT 2737.) He stated however, that he did not pay particular attention to three of the cars because he

was distracted by one that was parked in the middle of the street. (25 RT 2645.)

With regard to his descriptions about suspects, when asked whether he would recognize any of the people he saw near the crime scene, Pina told the officer he had not paid attention, because of his disability, but he wished he had. (26 RT 2712-2713; 36 RT 3747.) Approximately 30 minutes after the homicides, when he spoke to Pasadena police officer Chavira, Pina mentioned that he had seen people run **from** the cars, and that he saw person exit a residence in the neighborhood. (36 RT 3883-3886, 3894-3897.)

At trial, Pina admitted that because of the commotion details were mixed up. (26 RT 2739.) He admitted" "everything in my body was going supersonic, as they say, when I was there; and, of course, I was tired, fell asleep and woke up, went down to the police station. I wasn't all hundred percent there at that time." (26 RT 2744.) Pina admitted to having made various mistakes and assumptions. (26 RT 2742, 2748, 2749, 2759, 2761, 2763.)

Pina's lack of attention undermines the reliability of this identification.

c. Pina's Inability to Describe the Suspect Undermines his Ability to Make a Reliable Photographic or in court Identification

The third matter for consideration under *Biggers* is the accuracy of the witnesses prior description of the criminal. (*Biggers, supra*, at p. 199.)

As noted above, other than describing the suspect Pina ultimately identified as appellant Holmes, as a Black male with facial blemishes, Pina was never able

to physically describe the individual he saw a running toward or getting into the second vehicle. In fact, until his identification at the police station, Pina could offer no further identification than black male.

A witness's "minimally detailed description when he [talks] with the police plainly devalues his description as a factor demonstrating the reliability of his identification." (*Dickerson v. Fogg, supra*, 692 F.2d at pp. 245-246.) In *Dickerson,* the eyewitness described the perpetrator in court after seeing the defendant, but did not provide a detailed description in his initial contacts with police. (*Id.*, at p. 246.) Here, Pina could not even render a description in court. He recalled his statement to police that he couldn't describe anyone because he had not paid attention. He had knowledge than he had a hard time describing things in words. He testified "that is how I remember things, by looking." (26 RT 2713.)[91] Pina also stated he could gave only "possible" descriptions because he was not certain. (26 RT 2738.)

Also, like Holmes' case, the sole purpose of the witnesses meeting with police at the scene of the crime in *Dickerson* was to conduct an investigation, and there was no plausible explanation, aside from his inability to do so, why the witness did not describe the suspect. (*Ibid.*, see also *Abdur Raheem v. Kelly* (2nd cir. 2001) 257 F.3d 122.)

---

[91] However, Pina had no difficulty describing for the jury thermal units of air – something you cannot see. (26 RT 2716.)

Pina's failure to describe the suspect when the information was freshest in his mind and his subsequent inconsistent descriptions thus point to the unreliability of his identification.

d. Pina was Uncertain of his Identification until Prompted by Detectives with a Newspaper Photograph

The *Biggers* court instructs that the fourth factor to examine evaluating the reliability of an identification is that "level of certainty demonstrated by the witness at the confrontation." (*Biggers, supra,* at p. 199.) Here, Pina identified Holmes only after he had seen a newspaper containing a photograph of appellant identical to one which had been displayed during a television advertisement that he had seen. He was obviously aware that the police believed appellant Holmes was a perpetrator.

The United States Supreme Court has recognized that even when law enforcement uses ideal procedures to obtain identification, there is a risk of misidentification. (*Simmons, supra*, 390 U.S. at p. 383.) This is especially true when the witness only saw the suspect briefly. (*Ibid.*)

e. Pina did not Attempt to Identify the Suspect Ultimately Identified as Appellant until 59 days after the Homicide

The fifth *Biggers* factor is the length of time between the crime and the confrontation. (*Biggers, supra*, at p. 200.) Pina did not attempt to identify a suspect until 59 days after the homicides. (26 RT 2696.) Detectives offered no explanation for the delay, which contributed greatly to the risk of misidentification.

(See e.g., *U.S. v. Fields, supra*, 625 F.2d at p. 870 [witness is identification of questionable reliability were the first "sure" identification occurred approximately 2 months after the robbery]; *Dickerson v. Fogg, supra*, 692 F.2d at p. 247 [while 40 hours was not long enough to entirely obscure the witnesses memory, the time of sharpest memory had passed].)

Pina's self-assessment that his memory was better at trial than during his numerous contacts with police, interviews, and prior testimony is contrary to logic, expert testimony, and the state of the law and indicative of the unreliability of his identification of appellant Holmes.

4. The cross-racial nature of the identification is indicative of its unreliability

The trial court instructed the jury evaluating the identification to weigh "cross racial or ethnic nature of the identification." (42 RT 4352.) Dr. Pezdek also mentioned this factor. (34 RT 3660.) "Social science research... has established beyond peradventure that witness identifications, especially when cross racial and based on brief moments of observation, are quite unreliable." (*United States v. Hannigan* (3rd Cir. 1994) 27 F.3d 890, 900.) In light of abundant and clear research, this Court has recognized that the ability of whites, including those who are not racially prejudiced, to recognize individual black faces is substantially impaired. (*People v. McDonald* (1984) 37 Cal.3d 351, 368, overruled on other grounds.)

While the trial court instruction was a step in the right direction, even jurors

who are aware of problems with across race identifications may be unable to overcome them:

> Some jurors may deny the existence of the own race effect in the misguided belief that it is merely a racist myth exemplified by the derogatory remark 'they all look alike to me,' while others may believe in the reality of this affected by the reluctant to discuss it in deliberations for fear of being seen as bigots. (*People v. McDonald, supra,* at p. 368.)

For these reasons, both Pina's ability to identify an African-American perpetrator and the jury's ability to consider the impact of cross-racial identification were impaired. Examined in light of the totality of the circumstances there is a substantial likelihood the Pina misidentified Holmes.

C. Reversal is Required

When a tainted identification comes from the only eyewitness in the case, it's admission cannot be harmless. (*People v. Martin* (1970) 2 Cal.3d 822, 831.) This is particularly true in this case in which, as demonstrated in the next claim, prosecutors were relying on the identification and the testimony a convicted felon to make its case against appellant Holmes. Gabriel Pina was critical to the prosecution's case. As Holmes did not dispute being at the hospital, the prosecution's case against appellant consisted entirely of Pina's identification and appellant's alleged extra judicial admission to Tate. Pina was the only witness who could place appellant near the scene, and coupled with his the testimony of Lilian Gonzales, Pina's girlfriend's, put a gun in appellant's hand thus leading to a true finding of the weapon use allegation.

During the jury's lengthy deliberations about appellant's guilt, the jury requested a read back of Pina's testimony from the time he first saw the four cars until the time he saw the suspects returned to the waiting cars. (44 RT 4662-4664.) This illustrates the great importance of jurors placed on this unreliable testimony in reaching what was obviously a very close decision. In a close case, a substantial error may require reversal and any doubts as to prejudice must be resolved in the favor of the appellant. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Because this prejudicial error violated Holmes' right to a fair trial, reliable guilt and penalty determinations, and due process, this Court must apply *Chapman v. California, supra*, 386 U.S. at p. 24, and reverse the convictions.

VI. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT HOLMES' CONVICTIONS FOR CONSPIRACY, FIRST DEGREE MURDER, ATTEMPTED MURDER, AND THE GUN USE ALLEGATION

A. Summary of the Facts

The prosecution's theory was that Fernando Hodges was shot in retaliation for McClain's shooting of Robert Price and that after Hodges was shot and taken to Huntington Hospital appellant, Newborn, McClain, Bailey, Bowen, and others entered into an agreement to kill some Crips in retaliation. The prosecutor alleged seven overt acts in support of the conspiracy. Appellant Holmes was named in the following overt acts: that he, Newborn, and McClain met at Huntington Memorial Hospital and discussed retaliation; that at Huntington Hospital an unnamed coconspirator said in the presence of appellant, Newborn, and McClain "let's go get the guns"; that at Huntington Hospital a decision was made between Newborn, McClain, and appellant to target Crip gang members; that Newborn, McClain, and appellant caravaned to the intersection of Emerson Street and Wilson Street and parked their cars in order to ambush numerous individuals believed to be Crips; that codefendant Newborn and appellant positioned themselves in bushes in order to ambush the intended victims; and that Newborn, appellant, and Bailey shot the victims while codefendant McClain waited in a getaway car. (3 CT 641-642.)

Under Penal Code section 1118.1 defense counsel moved for judgment of acquittal on the first six overt acts. Counsel argued that there was no evidence

whatsoever that the defendants met at the hospital and discussed retaliation or that someone said "Let's go get the guns" and that the allegation that the decision was made to target Crips was unsupported by substantial evidence. (32 RT 3329-3330.) As for overt acts four and five, counsel argued that "what evidence there was was not sufficient or adequate to support any conspiracy." Counsel explained that with respect to overt acts 5, 6, and 7, while criminal acts, there was no evidence proving the existence of any prerequisite conspiracy as alleged in overt acts one through four. In other words, any overt act constituting the foundational requirement for admitting evidence of a conspiracy was lacking. (32 RT 3330-3331.)

In response, the prosecutor conceded he had no testimony to support overt act number two. He argued that the testimony of LaChandra Carr placed the defendants at the hospital at or near the time Fernando Hodges had been taken there, that she used the word "triggeration," and that the security guards testimony lent credence to overt act three. (32 RT 3331-2) The prosecutor argued that as to codefendant Newborn, DeSean Holmes' and Willie McFee's testimony provided enough evidence to get by a motion to dismiss. (32 RT 3333.)

As to appellant, the prosecutor relied entirely on Carr's testimony for any foundational participation in a conspiracy. As a companion argument, the prosecutor engaged in circular reasoning stating "if there was a conspiracy that was established at the hospital, once McClain and Holmes are involved in the

murders they are part and parcel of that conspiracy." (32 RT 3335.)

Ultimately, the prosecution's case rested on Carr's testimony that Holmes was at the hospital; Pina's unreliable testimony that he saw Holmes at the scene [92], and Tate's testimony of Holmes' alleged admissions.[93] As argued above, the prosecution relied on the inherently prejudicial value of trying appellant Holmes with codefendants Newborn and McClain, allegations of gang evidence, and scare tactics in order to secure a conviction of appellant

B. Applicable Law

A conviction not supported by sufficient evidence violates the due process clause of the 14th amendment of the United States Constitution and of article I, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) "The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) "Evidence, to be 'substantial' must be 'of ponderable legal significance ... reasonable in nature, credible, and of solid value.'" (*People*

---

[92] Appellant refers to and incorporates herein Argument V regarding the unconstitutional unreliability of witness Pina's purported identification of appellant Holmes.

[93] As set forth in Argument I, incorporated herein, at the time of his interviews with police, Tate was a police agent.

v. Johnson (1980) 26 Cal.3d 557, 576.) "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] The court does not, however, limit its review to the evidence favorable to the respondent. '[A reviewing court's] task ... is twofold. First, [it] must resolve the issue in the light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit [its] appraisal to isolated bits of evidence selected by the respondent. Second, [it] must judge whether the evidence of each of the essential elements ... is substantial; it is not enough for the respondent simply to point to "some" evidence supporting while the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts."'" (*Id.,* at p. 576-577.)

While a reviewing court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence" (*id.*, at p. 578), *speculative* inferences are not sufficient to support a conviction.

> "A reasonable inference 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work....[¶¶] A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence.' " *People v. Tran* (1996) 47 Cal.App.4th 759, 771-772, quoting *People v. Brown* (1989) 216 Cal.App.3d 596, 600 citations and internal quotation marks omitted.)

Under federal constitutional law too, the critical inquiry on review of the

sufficiency of the evidence to support a criminal conviction must be to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 430 U.S. 188, 196.) The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. (*In re Winship* (1980) 442 U.S. 510.) Moreover, in a capital case, the Eighth and 14th Amendments require a heightened degree of reliability in determining guilt, capital eligibility, and punishment.

This same standard applies to defendant's motion for judgment of acquittal under California Penal Code section 1118.1. Section 1118.1 provides in pertinent that the trial court "on motion of the defendant... at the close of the evidence on either side or before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence than before the court is insufficient to sustain a conviction of such offense or offenses on appeal." In considering a section 1118.1 motion, the trial court, like a reviewing court, must determine whether there is sufficient evidence to support a judgment of conviction.

1. The Crime of Conspiracy

"At common law, and still today where unchanged by statute, conspiracy consisted of the unlawful agreement, and no overt act was required to establish

the crime. (See generally Perkins & Boyce, Criminal Law (3d ed. 1982) § 5.B.3., pp. 685-687; 2 LaFave & Scott, Substantive Criminal Law (1986) Conspiracy—Limits of Liability, § 6.5(c), pp. 93-94.) Today, many jurisdictions, including California, require proof of an overt act. (*Ibid.*) Under California law, 'No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement ....' (Pen. Code, § 184; see also *id.* § 182, subd. (b).) Thus, 'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy.'" (*People v. Russo* (2001) 25 Cal.4th 1124, 1131, citing *People v. Morante* (1999) 20 Cal.4th 403, 416.)

"Although a conspiracy may be proved by circumstantial evidence, there must be some evidence from which the unlawful agreement can be inferred before criminal liability may be imposed on the basis of conspiracy. There must be substantial evidence to establish all the essential elements of the conspiracy. Mere association alone cannot furnish the basis for conspiracy." (*People v. Donahue* (1975) 46 Cal.App.3d 832, 840-841, internal citations omitted.)

a. Evidence of an Agreement

The prosecutor conceded that the evidence against appellant as to the

crime of conspiracy was that appellant had been at Huntington Hospital. Appellant did not contest that fact. (32 RT 3333.) If there was a discussion regarding retaliation, there was no evidence appellant participated in such discussion. The prosecution advanced a second argument stating: "if there was a conspiracy that was established at the hospital, once McClain and Holmes are involved in the murders they are part and parcel of that conspiracy." (32 RT 3335.) In other words, the prosecution advanced the theory that if appellant Holmes was involved in the homicides he was guilty of the crime of conspiracy without fulfillment of the element of agreement. The prosecutor urged the jury to find conspiracy on one fact alone: that appellant homes was at the hospital. Obviously, that fact falls far short of demonstrating been necessary agreement.

Moreover, even if there was a general agreement to attack Crips, the prosecution failed to demonstrate that appellant entered into an agreement to assault the victims in this case.

It is well-settled that a general agreement of gang members to fight members of a rival gang – "an ordinary characteristic of gangs, does not cause it to the type of the illegal objective that conform the predicate for a conspiracy charge. (*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1247.) In *Garcia*, the prosecutor charged the defendant, a member of a Blood gang, with conspiracy to kill three individuals. The Ninth Circuit held that:

> Even if the testimony presented by the state had sufficed to establish a general conspiracy to assault Crips, and certainly did not even hint at a

> conspiracy to assault the three individuals listed in the indictment. Of course a more general indictment would not have solved the state's problems in this case. In some cases when evidence establishes that a particular gang has a specific illegal objective such as selling drugs, evidence of gang membership may help to link gang members to that objective. (*Id.*, at p. 1246-1247, footnote omitted.)

Here, the prosecutor alleged a general agreement to attack Crips, but did not show that appellant entered into an agreement to assault the victims in this case as alleged.

b. Evidence of an Overt Act

Moreover, the evidence is legally insufficient to support the jury's findings of overt act no. 3, which alleged that Newborn, Bowen, and others were involved in a shooting at Pasadena and Blake streets about 9 p.m. on the night of the homicide. (6 CT 1695.) 911 logs for Halloween, 1993 , show no calls about a shooting incident at Pasadena and Blake that evening. (35 RT 3764-3765.) Instead, the logs indicate that while there were complaints of the shooting at that location, they were made at about 1:00 a.m. on November 1, 1993. (35 RT 3764-3769.) As the alleged incident occurred after the Halloween killings, it could not have furthered the conspiracy to commit them. For all the reasons set out above, the conspiracy charge must be reversed.

2. The Crimes of Murder and Attempted Murder

The prosecution bolstered LaChandra Carr's testimony that appellant Holmes was at Huntington Hospital – a fact appellant did not dispute – Derrick Tate's testimony about a conversation with appellant and Gabriel Pina's

identification testimony with abundant and prejudicial gang association evidence, guilt by association evidence, and scare tactics.

As argued in various arguments in this brief, being joined to the codefendants, the admission of prejudicial gang association evidence and guilt by association evidence, and the scare tactics and misconduct employed by the prosecution unlawfully contributed to the verdict against appellant. In all respects the evidence of appellant's participation in the Halloween shootings is legally insufficient to support the verdicts.

a. LaChandra Carr

Appellant did not dispute that he went to Huntington Hospital upon learning of Hodges' shooting. However, the grand jury testimony of Carr, if admissible did not tend to establish appellant had been involved either in a conspiracy to retaliate against Crips or to place him at the scene of the crimes. There was no testimony that appellant was seen talking at any time, to McClain, Newborn, Bailey, Bowen or anyone else suspected of the crimes.[94] There was no testimony appellant left his car. There was no testimony that at the hospital appellant was wearing a trench coat, a hooded sweatshirt or a Halloween costume. The prosecution had every opportunity to ask witnesses how appellant was dressed but did not do so. [95]

---

[94] As argued earlier in Argument IV, the evidence of appellant's association with P-9 was weak and their was no testimony which established he had a close relationship with Newborn, McClain, Bailey, Bowen, or Hodges.

[95] No witness, including Wanda Martin, the mother of appellant's son, who he was with that evening, was asked what appellant was wearing and whether or

Moreover, none of the witnesses who testified to the circumstances at Huntington Hospital indicated that appellant acted suspiciously and none gave testimony which could even circumstantially support the theory that after he left the hospital he went on to commit the charged crimes.

The prosecution relied on the testimony of Officer Taylor who observed numerous people gathering outside the area directly in front of the emergency room doors and who testified that this was unusual because a number people just went up to one person and then left without entering the emergency room area. Appellant was never identified as being one of the individuals who went up to the one person or as the one person who was described as a leader and 40 years old. (42 RT 4010-4011.)

The prosecution connected Newborn and Bowen to talk of retaliation through the grand jury testimony of Carr (42 RT 4419), however there was no evidence that appellant talked to either man.

Appellant was not implicated in the shooting at Pasadena and Blake streets.

b. Derrick Tate

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting

---

not he owned a trench coat, a hooded sweatshirt, or Halloween costume. These clothing descriptions were given of the possible suspects in the case.

flesh or sharks to blood. They are smooth and convincing liars. (Province of Manitoba, *The Inquiry Regarding Thomas Sophonow: Jailhouse Informants: Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them,* <www.gov.mb.ca/justice/ sophonow/jailhouse/index.html> [as of October 13, 2003].)

Informants have long had an uneasy but accepted place in the criminal justice system. Unlike "street" informants or accomplices, jailhouse informants are witnesses who testify as to statements allegedly made by a fellow inmate while both are in custody, usually relating to offenses that occurred outside the custodial institution. (*Ibid.*)

As late as the early 1970s, testimony from jailhouse informants was rarely acceptable as substantive evidence, and such usage could support reversal of a conviction. (See e.g., *Alesi v. Craven* (1971) 441 F.2d 742, 743.) In the late 1970s and throughout the 1980s, however, the use of such evidence exponentially increased — and the more often it was used, the more seasoned veterans of the criminal justice system came to realize that they could profit from providing such testimony, even without being directly promised benefits. By the mid-1980s, testimony of jailhouse informants in serious California cases became virtually inevitable, particularly when the case was close.

This Court has traditionally allowed such evidence, provided that full disclosure is made of impeaching materials. (*People v. Alcala* (1984) 36 Cal.3d

604, 626.) However, the *systematic* nature of evidence production that generates this testimony has been revealed by independent commissions in the United States and Canada. Recent investigations by governmental commissions and the growing use of DNA to identify or exclude suspects have shown that jailhouse informant testimony is not only unreliable, but also likely to be false.

Dozens of wrongly convicted men and women were found guilty in significant part on the basis of "confessions" or "admissions" conveyed to the factfinder by an informant. The routine appearance of such witnesses has made perjury part of the structure of our most important criminal trials. To deny this infection of the process would be, in the words of Justice Frankfurter, to ignore as judges what we know as human beings. (*Watson v. Indiana* (1949) 338 U.S. 49, 52.)

Our state Legislature has recognized the potential unreliability of jailhouse informants' statements, requiring that a jury be instructed about them in cautionary terms on request. (Section 1127a; see also section 4001.1.) It enacted the law because "[n]umerous county jail informants have testified to confessions or admissions allegedly made to them by defendants while in custody. . . . Snitches are not persons with any prior personal knowledge of the crime. . . . They testify only that a defendant made an inculpatory statement to them while in proximity in the jail or place of custody. [¶¶] [Such persons] gather restricted and confidential information by duplicitous means and thereby lend the credibility of corroboration

to wholly fabricated testimony." (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 278 (1989-1990 Reg. Sess.) as amended May 4, 1989, cited by Justice Mosk in *People v. Jones* (1998) 17 Cal.4th 298, 321-324.)

The systematic development of vicarious alleged "confessions" via jailhouse informants is corrosive. Their self-interest is not so immediately apparent as that of accomplices, and is masked by an implied understanding that such testimony will be rewarded, even where there is no formal promise that is discoverable, or explicit elicitation of such testimony by a particular agent of the state.

Information received from sources who are themselves the focus of pending criminal charges or investigations is "inherently suspect." (*People v. Duarte* (2000) 24 Cal.4th 603, 617-618.) All jailhouse informants are this kind of source, and their statements are indeed "inherently suspect," see *In re Wilson* (1992) 3 Cal.4th 945, 957). Its practitioners are very often those criminals most familiar with the criminal justice system, who are facing the most serious charges, and who know how to slip around procedures designed to make meaningful cross-examination possible.

Murder convictions and death sentences based on the testimony of such demonstrably deceptive and unreliable witnesses falls well below the heightened reliability standards required by the Eighth and Fourteenth Amendments to the federal Constitution. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305.) These heightened reliability standards applied to both the guilt and penalty determinations in capital cases. (*Beck v. Alabama, supra*, 447 U.S. 625, 638.)

Although the alleged comments made to Tate by appellant Holmes were made when neither was in custody, Tate should properly be treated as a jailhouse informant. Tate first gave his information to police in January of 1994 when, under arrest at the Pasadena jail, he hoped would help him with pending felony charges. (15 RT 1355-1356; 16 RT 1378-1379.) Tate's primary motivation for talking to the police was because he wanted to get out from underneath felony battery charges. (16 RT 1378-1379.) Tate was a street savvy criminal with multiple felony convictions and he had heard about the substantial reward money before he spoke to law enforcement about the case. Tate spoke with police because he hoped to get rid of pending felony charges. (15 RT 1359-1360, 1365-1366; 16 1380-1381, 1389.) Although he reportedly received no benefit as to his felony charges, Tate received money, room and board and travel expenses in exchange for his testimony. Tate was motivated at least in part by his hope to get a portion of the reward money. (15 RT 1365-1366; 36 RT 3864.)

Tate testified that in December of 1993, when he was visiting Pasadena, appellant Holmes bragged that he [Holmes], Ernest Holley and another person hid behind some bushes from which they emerged "blasting" and yelling "trick or treat." Tate also testified that appellant was wearing a hat with P-9 on it and that appellant wanted to get a hat that said trick-or-treat (15 RT 1348-1354.)

At one point, Tate told counsel for appellant that everything he had told police was a lie. (16 RT 1384.) He did not recall telling counsel for appellant that

the information he had given to the police was information he got from television and from the streets. Tate did not state that portions of his conversation with Nishi did not actually occur; rather, he testified that he didn't recall those portions of the conversation at the time of his testimony. (16 RT 1385-1386.) There also seemed to be some question as to whether or not Tate was able to pick out a photograph of appellant without the assistance of law enforcement. (16 RT 1377.)

On May 11, 1995, Bob Zink, a private investigator called by Holmes, spoke to Tate at Macon County jail in Decatur, Illinois. (36 RT 3858.) Tate told Zink that he had several interviews with police. He said that he was shown a number of photographs and told by police that the photographs were all P-9 members. Tate told Zink that he had made up the information he told law enforcement. According to Tate he told the officers what he knew they wanted to hear. (36 RT 3860-3861.)

c. Gabriel Pina

The testimony of Gabriel Pina was so inherently unreliable that it is legally insufficient to support the convictions against appellant. As argued above, the in-court identification of appellant was based on an impermissibly suggestive procedure which created a substantial likelihood of misidentification. (See Claim V, which is incorporated by reference herein.) Additionally, circumstances beyond the reliability of the identification procedure further erode Pina's credibility. First, Pina did not come forward until a reward was offered. Second, his descriptions were inconsistent over time, thus casting doubt on the reliability of his entire

testimony. Third, Pina's testimony was bolstered by the equally unreliable testimony of Lillian Gonzales.

i. Pina did not come forward to identify any suspect until a reward was offered

The "court or jury may consider in determining the credibility of a witness any manner that has any tendency in reason to prove or disprove the truthfulness of his testimony... including...[t]he existence of a bias, interest, or other motive." (Evid. Code §780(f).) In evaluating the reliability of Pina's testimony, it is crucial to look at motive.

Pina did not come forward to say that he could identify witnesses in this case until a $40,000 reward was announced in the media. (26 RT 2718.) In fact, during his several contacts with police before the reward was announced Pina repeatedly offered no identification of the suspect he ultimately identified as appellant. When Pina finally came forward after having seen a picture of McClain on television during an advertisement which also contained pictures of appellant, and after having been shown a newspaper containing the identical picture of appellant, Pina seized on the opportunity to collect reward money by suddenly informing the police that now he could identify two suspects. Pina was compensated $4500 for his identification efforts.

ii. Pina's descriptions evolved over time

A witness' inconsistent statements are relevant to the truthfulness of his entire testimony. (Evid. Code §780(h).) As described more fully in Claim V above,

Pina's descriptions of the cars and the suspects involved were internally inconsistent and enhanced over time. It defies logic and human experience that he could produce detailed and incriminating information at trial when he could offer no details and advised police he had not been paying attention on the night of the offense.

iii. Pina's unreliable account was prejudicially enhanced by the equally unreliable testimony of Lillian Gonzales

When she testified before the grand jury, Gonzales stated she remembered **two** guys running toward the car. Thereafter she testified that she and Gabriel together went back to Gabriel's house. (2 CT 418, 420.) From her position, Gonzales could not see any faces. (2 CT 426.)

At trial, Gonzales testified that the cars were all dark colored. She saw one black passenger who she could not identify as male or female. Gonzales could not say in which car she saw this individual. (22 RT 2221-2222.)

Gonzales observed two cars pull up against the curb on the east side of the street. The occupants honked their horn and called to group of four or fives black males who were walking out of a driveway at the corner of Catalina and Emerson. Gonzales did not see any faces. (22 RT 2224-2226.) Gonzales was not positive that these two cars the same as those she had seen earlier. (22 RT 2249.)

The people from the driveway got into the cars. There was no one left after the cars picked them up. One person was dressed in what looked like a white ghost costume. (22 RT 2228-2229.)

Within 15 to 20 seconds, Gonzales heard gunfire. (22 RT 2231.) Within four or five seconds after the gunfire stopped, Gonzales looked to Wilson. At this point in her testimony, Gonzales made two observations which she had never testified to before, and in fact had only mentioned for the first time immediately prior to her testimony. Gonzales testified she saw a Black male, dressed in a trench coat, get into what she recalled was a Nissan Sentra -- and in this man's hand was a gun. (22 RT 2233-2234.)

At trial, Pina stated that he did not "really" discusses testimony with Gonzales. (25 RT 2637.) However, he explained that he and Gonzales concurred on the timing of various events. (26 RT 2685.) Gonzales acknowledged that she and Pina together talked to Pina's mother. (22 RT 41.) It seems remarkable that they both would suddenly remember the critical fact that the individual ultimately identified as appellant was wearing a trench coat – a singularly distinctive piece of clothing.

3. The Gun Use Allegation

The gun use allegation rests entirely on the last-minute testimony of Lillian Gonzales and appellant's alleged comments to Derrick Tate.

For all the reasons discussed above, in its entirety Derrick Tate's testimony should be discounted.

Lillian Gonzales' testimony likewise is lacking in any indicia of reliability. Gonzales failed to mention that the person she saw running around the corner

was carrying a gun at any of her prior interviews or her testimony before the grand jury. In other words, this very critical recollection was made for the very first time at appellant's trial. [96] Except during a conversation with the prosecutor a month earlier, her testimony at trial was also the first time she mentioned the individual she saw was wearing a trench coat. (22 RT 2265.)

When asked for a description, Gonzales stated that she could not describe the weapon. When pressed, she described it as a black handgun -- not long and not small. But because she was a block away she couldn't see any detail. By her own admission, Lilian Gonzales' vision was 20/400, which she agreed with extremely nearsighted, and she was not wearing glasses at the time of the incident. Gonzales testified that she could not see anybody very clearly. (22 RT 2242.) Although she could not identify any facial features of the individual allegedly wearing a trench coat, she testified this individual was carrying a gun.

The trial court seemed disinclined to permit further questions on the issue of a handgun or regarding a further description of the trench coat (22 RT 2258, 2266), and it appears counsel did not understand the critical nature of testimony which put his client at the scene with a gun in his hand. Remarkably, the record indicates counsel and the court joked about any further probing as to the

---

[96] Apparently, three days prior to her testimony she mentioned the gun to a coworker who was among a group of people with her supervisors discussing the incident. (22 RT 2254-2256.) Gonzales also mentioned the gun to the prosecutor the morning of her testimony. (22 RT 2258.)

description of the trench coat (22 RT 2266), and yet it was Gonzales's description of the individual wearing a trench coat and holding a gun which corroborated Pina's identification of the individual wearing a trench coat as appellant.

4. The evidence is legally insufficient to sustain the convictions

The evidence against appellant consisted of the unreliable testimony of a convicted felon, who sought favors and obtained benefits for his testimony and the combined testimony of two lay witnesses, both with disabilities which interfered with observation, memory, and/or their ability to recollect. The prosecution benefitted enormously from a joint trial which included allegations of gang affiliation, gang violence, and dubious claims of threats and violence.

The evidence was unconstitutionally insufficient to support appellant's convictions. Under the heightened reliability standards demanded by the Eighth and Fourteenth Amendments the United States Constitution, appellant's convictions cannot stand. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 304, 96 S.Ct. 2978.)

VII. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY INSTRUCTING THE JURY IN TERMS OF GUILT AND "INNOCENCE" UNDER CALJIC NOS. 1.00, 2.01, 2.51, AND 2.52

The court instructed the jury in terms of guilt and "innocence" in CALJIC Nos. 1.00, 2.01, 2.51, and 2.52, which provide, in relevant part, as follows:

> You must not be influenced by pity for a defendant or by prejudice against. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. *None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent.* You must not be influenced by more sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the people and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences. (6 CT 1481, CALJIC No. 1.00 [emphasis added].)
>
> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, *one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence*, and reject that interpretation which points to his guilt. (6 CT 1491, CALJIC No. 2.01 [emphasis added].)
>
> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. *Absence of motive may tend to establish innocence.* You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled. (6 CT 1513, CALJIC No. 2.51 [emphasis added].)
>
> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding *the question of his guilt or innocence.* (6 CT 1514, CALJIC No. 2.52 [emphasis added].)

In the CALJIC Sixth Edition, CALJIC Nos. 1.00, 2.51 and 2.52 were amended to replace the term "innocent" with "not guilty," apparently because the instructions as read to appellant's jury implies that the defendant must "prove

innocence."

One of the most fundamental principles of criminal law is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 686, 95 S.Ct. 1881, 1883, 44 L.Ed.2d 508 [holding unconstitutional jury instructions which shifted to defendant the burden of disproving implied malice by a "fair preponderance of the evidence"].) An essential rule that emanates from this burden is that the defendant need not prove his or her innocence, but need only raise a reasonable doubt as to guilt. (See *People v. Hall* (1980) 28 Cal.3d 143, 159; see also *People v. Adrian* (1982) 135 Cal.App.3d 335, 342; but see *People v. Wade* (1995) 39 Cal.App.4th 1487, 1491-1492 [holding that it was not error to give the "guilty"/"innocent" language, but failing to address whether the language should be changed upon request].) Hence, jury instructions which suggest that the jury must decide between "guilt" or "innocence" implicate the defendant's state and federal constitutional rights to due process and trial by jury. (See also Bugliosi, "*Not Guilty and Innocent -- The Problem Children Of Reasonable Doubt*" (1981) 4 Crim. Justice J. 349.)

People v. Estep (1996) 42 Cal.App.4th 733, 738-739, held that the failure of the trial court to sua sponte modify CALJIC No. 2.51 to replace the phrase innocent with not guilty did not violate due process. (See also *People v. Han* (2000) 78 Cal.App.4th 797, 809 [CALJIC No. 2.01].) Similarly, *People v. Frye* (1998) 18 Cal.4th 894, 957-958, held that in light of other instructions given in that

case, and the prosecutor's argument, use of the term innocence in CALJIC No. 2.51 regarding motive did not shift the burden of proof to the defendant to prove his innocence. In appellant's case, however, the jury was repeatedly instructed under the concept of guilt and innocence, improperly suggesting that appellant needed to prove his innocence. The court violated appellant's federal due process rights by giving these instructions.

VIII. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY GIVING CALJIC NO. 2.03

> The trial court instructed the jury under CALJIC No. 2.03 as follows:
> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination. (CT 1493.)

In *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127-128, this Court held that CALJIC No. 2.03 is not objectionable as argumentative or biased. *People v. Wright* (1988) 45 Cal.3d 1126, 1135, however, holds that a defense pinpoint instruction is improperly argumentative if it directs the jury's attention to specific evidence and "impl[ies] the conclusion to be drawn from that evidence." (*People v. Harris* (1989) 47 Cal.3d 1047, 1098, fn. 31.) A functionally equivalent *prosecution* pinpoint instruction must therefore be held improperly argumentative as well. "There should be absolute impartiality as between the People and the defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310, 15 S.Ct. 610, 39 L.Ed. 709; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 475, 93 S.Ct. 2208, 37 L.Ed.2d 82.)

CALJIC No. 2.03 tells the jurors that they may consider evidence that the defendant made a willfully false pretrial statement as tending to prove consciousness of guilt and, hence, as tending to show that the defendant is in fact guilty. Therefore, CALJIC No. 2.03 is objectionable under *Wright*. (But see

People v. Jackson (1996) 13 Cal.4th 1164, 1224 [CALJIC Nos. 2.03, 2.04, 2.06, and 2.52 are not improper pinpoint instructions because the cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory].) In *People v. Kelly* (1992) 1 Cal.4th 495, 531-532, this Court held that CALJIC No. 2.03 was not an improper pinpoint instruction, because it also informs the jury that the consciousness of guilt evidence "is not sufficient by itself to prove guilt." This Court believed that this language saved the instruction because the defendant did not quarrel with that language and "[i]f the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence."

Appellant respectfully submits that this Court's reasoning in *Kelly* is unpersuasive and mischaracterizes the issue, and urges this Court to reconsider its holding. The defendant's contention was that CALJIC No. 2.03 should not have been given at all. The fact that a portion of the instruction may have been acceptable to the defendant does not answer the argument. The trial court violated appellant's due process rights by giving this instruction.

The instructions made it appear the jury could infer a *general* consciousness of guilt from any false pre-trial statement. This Court agrees that it is reasonably likely a juror will draw such an inference from the instruction. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1, 33-34.)

It is reasonably likely, therefore, that one or more jurors interpreted CALJIC No. 2.03 as permitting the inference that appellant made prior statements indicating a consciousness of guilt that he had committed murder. Since, as discussed above, the inference was not a valid one, the instruction, so interpreted, effectively lessened the prosecution's burden of proof in violation of due process. (*Mullaney v. Wilbur, supra,* 421 U.S. at 699.) Alternatively stated, the instruction permitted the jury to infer a fact -- consciousness of guilt of murder -- that was *not* more likely than not to flow from the foundational "fact" -- appellant's alleged prior "statements." The instruction violated due process on that ground as well. (See *Leary v. United States* (1969) 395 U.S. 6, 36, 89 S.Ct. 1532, 23 L.Ed.2d 57 [permissive inference constitutional only if it can be "said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"]; accord, *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 155-157, 163, 99 S.Ct. 2213, 60 L.Ed.2d 777; see also *Miller v. Norvell* (11th Cir. 1985) 775 F.2d 1572, 1575.)

This Court has consistently held that specific instructions relating to the consideration of evidence which merely reiterate a general principle upon which the jury has already been instructed need not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 445-447.) That a consciousness of guilt may be inferred from the making of a false statement merely restate principles already set forth in the general instructions on

circumstantial evidence. (See CALJIC Nos. 2.01, 2.02.) In other words, the general circumstantial evidence instructions explain to the jury that it may draw inferences from circumstantial evidence and, hence, under the reasoning of *People v. Lewis supra,* 26 Cal.4th at 362-363, there is no need to specifically instruct the jury on any particular inferences. If the defendant is not permitted to obtain instruction on specific aspects of a general principle, then the prosecution should not be permitted to do so either. (See *Wardius v. Oregon*, *supra,* 412 U.S. at 475.)

The failure to adequately or correctly instruct the jury upon consciousness of guilt lessens the prosecution's burden and allows the jury to draw impermissible inferences of guilt in violation of the defendant's state (Art. I § 14 and § 15) and federal (Sixth and Fourteenth Amendments) constitutional rights to trial by jury and due process.

Defense counsel's failure to object to the erroneous and misleading instruction cannot be deemed a waiver. (Pen. Code § 1259.) The error cannot be dismissed as harmless. It contributed to a fundamentally unfair trial in which the jury's ability to fairly decide the close question of identity was repeatedly compromised. It is thus both reasonably possible and reasonably probable that, in the absence of the instruction, the vote of at least one juror would have been more favorable to appellant. (*Chapman v. California, supra*, 386 U.S. at 24; *People v. Watson, supra*, 46 Cal.2d at 836.) In violation of the Eighth Amendment,

furthermore, the error rendered the guilt verdict too unreliable to support the death sentence that was ultimately imposed. (See generally, *Beck v. Alabama, supra*, 447 U.S. at 638-638.) Appellant's convictions for capital murder must be reversed.

IX. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY GIVING CALJIC NO. 2.06 OVER APPELLANT'S OBJECTION

The trial court instructed the jury under CALJIC No. 2.06 as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration. (6 CT 1494.)

Appellant objected. (41 RT 4294.)

Defense counsel was correct that there was insufficient evidence appellant concealed any evidence. Assuming there was sufficient evidence to give the instruction in McClain or Newborn's case, because appellant was absented from the instruction error occurred.

Additionally, CALJIC No. 2.06 tells the jurors that they may consider evidence that the defendant concealed evidence as tending to prove consciousness of guilt and, hence, as tending to show that the defendant is in fact guilty. Therefore, CALJIC No. 2.06 is objectionable for the same reasons explained above with respect to CALJIC No. 2.03. [97]

In *United States v. Castillo* (9th Cir. 1980) 615 F.2d 878, 885, the Ninth Circuit held that "[a]n attempt by a criminal defendant to suppress evidence is probative of consciousness of guilt and admissible on that basis." In *United States*

---

[97] Appellant refers to and incorporates his argument set forth in Argument VIII and Argument I, section A 5 b.

v. Wagner (9th Cir. 1987) 834 F.2d 1474, 1484-1485, however, the court explained that it was improper for the trial court to give a "consciousness of guilt" instruction because the defendant's refusal to submit to a mental examination did not suppress evidence directly implicating the defendant in the underlying crime. The court explained that "the chain of inferences between a defendant's refusal to be examined and his guilt of the underlying crime is, at best, much too attenuated and speculative to support a "consciousness of guilt" instruction. (*Id.* at 1485.) Reviewing for plain error in light of counsel's failure to object, the court found beyond a reasonable doubt that the erroneous instruction did not affect the outcome of the jury's deliberations.

In contrast, in appellant's case, counsel did object. There was no evidence that appellant attempted to suppress evidence connecting him to the murders.

In light of the above law and arguments, appellant Holmes respectfully requests this Court to reconsider *People v. Jackson, supra,* 13 Cal.4th 1164, 1225, which held that the defendant's false statement regarding the presence of evidence in his room justified the giving of CALJIC No. 2.06 regarding an attempt to suppress evidence as well as CALJIC No. 2.03 regarding a false or deliberately misleading statement. The Court held that there was no reason why a false statement designed to conceal inculpatory evidence cannot be the basis for the giving of both of these instructions. (*Ibid.*) The Court also held that these instructions are not improper pinpoint instructions. (*Ibid.*) In short, appellant

disagrees and urges this Court to hold that CALJIC No. 2.06 violated appellant's due process rights.

PENALTY PHASE ARGUMENTS

X. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

Appellant Holmes has demonstrated in Arguments I-IX, incorporated herein, that this Court should reverse his convictions because of substantial guilt phase errors that individually and jointly rendered his trial unfair and constitutionally unreliable. Those same errors also poisoned appellant's penalty phase defense. Should this Court hold that the guilt phase errors were harmless as to the guilt determination, it should nonetheless reverse the death sentence because of the prejudice those errors caused appellant at the penalty phase of his capital trial.

The jury was instructed by the trial court that not only should they consider the guilt phase evidence in deciding appropriate punishment, but that they were to assume there was additional direct and circumstantial evidence of appellant's guilt.

Appellant's Holmes' primary defense at the penalty phase was lingering doubt of his guilt. All of the evidence at the guilt phase that would have supported appellant's defense that he did not commit the murder was critical to appellant's penalty phase defense. Therefore, the multiple guilt phase errors that deprived appellant of the opportunity to introduce evidence of his innocence and permitted the introduction of incompetent evidence directly affected his defense at the penalty phase. In addition, even if the admission of incompetent testimony at the

guilt phase had been permissible under state law, that testimony was not sufficiently reliable to form the basis for a constitutionally sufficient death sentence.

This Court has recognized that guilt phase errors can prejudice the penalty decision, even in cases where evidence of guilt is overwhelming:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial . . . . [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial evidence of this sort at issue here renders the death sentence invalid. (*People v. Brown* (1988) 46 Cal.3d 432, 464; *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137.)

In *Satterwhite v. Texas* (1988) 486 U.S. 249, the Supreme Court considered the effect of constitutional error in the guilt phase upon the penalty determination. In *Satterwhite*, the Court held that the harmless error standard in *Chapman v. California, supra,* 386 U.S. 18 should be used to decide whether psychiatric evidence obtained in violation of the defendant's Sixth Amendment right to counsel and admitted at the penalty phase of a capital trial was prejudicial enough to require reversal of the death sentence. The Supreme Court stated that such error requires reversal of a death sentence unless the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Satterwhite, supra*, 486 U.S. at 256, quoting *Chapman, supra*, 386 U.S. at 24.)

In *Smith v. Zant* (11th Cir. 1988) 855 F.2d 712, *affd.* (1989) 877 F.2d 1407, the Eleventh Circuit followed *Satterwhite* and vacated a habeas corpus petitioner's death sentence because the defendant's written confession, obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, was admitted at the guilt phase of his trial. The Court found that the error was harmless as to the guilt determination, but the Court could not conclude beyond a reasonable doubt that the erroneously admitted confession did not influence the sentencing jury because of the difference in tone between the written confession and the defendant's more detailed and sympathetic trial testimony. (*Smith v. Zant, supra*, 855 F.2d at 722.)

Although *Satterwhite* and *Smith* involved Fifth and Sixth Amendment violations, appellant submits that a similarly stringent harmless error standard also must be applied in cases in which the Eighth Amendment requirements are violated, because the federal constitutional right to freedom from cruel and unusual punishment is equally worthy of protection.

This Court has adopted a "reasonable possibility" standard for assessing prejudice resulting from state law errors at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In *Chapman, supra*, the United States Supreme Court equated an almost identically worded standard adopted by it in *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, with the Chapman standard of "harmless beyond a reasonable doubt." The United States Supreme Court stated:

> There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility

> that the evidence complained of may have contributed to the conviction" and requiring the beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman, supra*, 386 U.S. at 24.)

Thus, the Supreme Court has recognized that the language of "reasonable possibility" and of "harmless beyond a reasonable doubt" implicate virtually the same standard and impose the same burden upon a "beneficiary of a constitutional error." This Court should similarly recognize that the "reasonable possibility" standard articulated in *Brown, supra*, is functionally equivalent to the "harmless beyond a reasonable doubt" standard adopted in *Chapman*. Under this standard, it is not certain beyond a reasonable doubt that the many guilt phase errors were harmless with respect to the jury's decision to impose a death sentence, despite what would have been a much stronger case for lingering doubt.

Thus, even if the guilt phase errors were harmless as to the guilt determination, the prejudice of those errors requires reversal of appellant's death sentence, particularly in light of the lengthy jury deliberations over three days. (See *In re Martin, supra*, 44 Cal.3d at p. 51 [lengthy deliberations]; *Karis v. Calderon* (9th Cir., 2002) 283 F.3d 1117, 1140-1141 [three days of deliberations]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 932 [reversible error in light of counsel's incompetence, a jury question, and one and a half days of juror deliberations].)

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL AND AN INDIVIDUALIZED AND RELIABLE PENALTY PHASE DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF A VIDEO TAPE OF HIS OUTBURST

A. Summary of Facts

On December 22, 1995, the jury in appellant's initial trial returned its guilt verdicts after 16 days of deliberation. The court first read the verdicts as to codefendant Newborn (45 RT 4734); then the verdicts as to codefendant McClain (45 RT 4743); and finally as to appellant Holmes. (45 RT 4752.) The clerk began, "We the jury in the above entitled action find the defendant, Karl Holmes, guilty of the crime of murder in violation of Penal Code section 187," at which time appellant interjected: "Fuck you, you mother fuckers. P-9 rules." Appellant's outburst was recorded on videotape by an authorized media cameraman in the courtroom. This jury, which had returned at the guilt verdicts, eventually could not reach a unanimous verdict on appropriate punishment as to appellant Holmes.

At the penalty retrial, on September 30, 1996, at a motion in limine, the defense moved to exclude evidence of appellant's outburst. (65 RT 6325.) The prosecutor argued that the profane statement to the jury "would be admissible to rebut mitigating evidence of remorse," and that the "latter portion where he claims P-9 affiliation is admissible as a circumstance of the crime." (65 RT 6328.) The prosecutor stated, "This outburst and display by Mr. Holmes demonstrates his P-9 affiliation and, therefore, is a relevant aggravating factor because it helps to

establish that he was part of the P-9 gang that retaliated for the earlier killing of Fernando Hodges, which is the heart and soul of the people's theory of the case and is thus a legitimate factor as a circumstance of the crime." (65 RT 6329.)

Appellant's trial counsel responded:

> With respect to the first part of that outburst, the obscenities that were yelled, [the District Attorney] views that as a lack of remorse; and I believe the law is perfectly clear that that is not an aggravating factor, so I will focus mainly on the second part which deals with the P-9. I would suggest to the court that one would still have to place that in some type of aggravating circumstance as defined by section 190.3. There doesn't seem to be any particular section in 190.3 with that statement, "P-9 rules," would fall into. This is basically a statement that he made right after the jury had come back, had very little to do with anything other than his displeasure at being found guilty. With respect to the argument... that my client has always denied any involvement with P-9, my client never took the stand. He never suggested that he was not a P-9 member. (65 RT 6329-6330.)

Appellant's trial counsel also objected to the late notice of the motion to admit this aggravating evidence. (65 RT 6330.)

The trial court permitted the prosecution to use the videotape.

> The Court: As to the videotape and as to the graffiti, the court is going to allowed it. I think it has, under 352, great impact. I think that the defendants are all members of the P-9's, as established by the evidence. They continue to do that. I think the thrust of the statement, "Fuck you, you mother fucker's," really has no impact other than taking it in the totality of the situation. When the verdict comes in, they found Mr. Holmes guilty, they are saying the jury find him guilty of murder in the first degree, and then you almost encompass or adopt that by saying, "P-9 rules." [98]

The court continued:

---

[98] At this point, appellant interjected that he did not say that. (65 RT 6336.)

> That is highly probative. It may be prejudicial; I think everybody is prejudiced, and the court warned all the defendants and the people here, your members of a gang, you are joined together, no severance is going to be allowed.... the adoption of making those statements that they are P-9's is significant to the court. I think, like the Polly Klass [sic] case, when the man says everything, the court considered it, although it is at sentencing. This is sentencing by the jury. I will allow [that] evidence. (65 RT 6336-6337.)

The prosecutor alerted the jury in his opening statement at the penalty retrial that "in addition to the evidence of Mr. Holmes' crime there, we will also show you a videotape of Mr. Holmes' reaction and **threats to the jury** after the guilty verdicts were read." (65 RT 6411.) The prosecutor's first piece of evidence at the penalty retrial was Exhibit 117, the video of the guilt verdicts. (65 RT 6411.) After the videotape was played to the jury, the prosecutor read the text of the outburst from the reporters transcript, because "there is a bleep in the tape." (*Ibid.*)

The prosecutor argued -- based on codefendant McClain's testimony -- that the three defendants "went out to smoke and kill Crips and you are here today as a result of that. Why did they do it? Because they P–9 gang members intent on retaliating for the death of a fellow P–9." [At that point, the prosecutor played the videotape of appellant's guilt verdict outburst.] The prosecutor continued his argument: "P-9. I won't repeat the deleted expletives uttered by Mr. Holmes, but it's all about P–9." (73 RT 7377-7378.)

Appellant's trial counsel responded that while an opening statement the prosecution referred to petitioner's outburst as a threat to the jury, they no longer were maintaining that position.

> Mr. Nishi: I think you'll agree with my characterization of that particular act. He was angry. He was offended. He was convicted. He was convicted on the evidence that the first jury heard. It doesn't mean he wanted to kill anybody. It doesn't mean he wanted to harm anybody. He was just angry that from that point on he knew that for his entire life he would be behind bars or he would be killed. (74 RT 7457-7458.)

The penalty phase jury began deliberating on October 22, 1996. On October 30, 1996, the jury asked to see again the videotape of appellant's outburst. (8 CT 2283; 75 RT 7550.)

B. The Trial Court's Errors

The trial court erred in permitting the prosecution to present the videotape to the penalty jury. It did not qualify under any statutory aggravating factor. The use of non-statutory factors in aggravation is prohibited under state law. (*People v. Boyd* (1985) 38 Cal.3d 76. The arbitrary deprivation of appellant's state law entitlement violated his federal due process rights as well as his right to reliable and non-arbitrary sentencing. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 304, 96 S.Ct. 2978.) The prosecution's asserted reasons for admission – a preemptive strike as to lack of remorse and affirmative evidence of P-9 affiliation are both unsupportable. The tape was the first item of prosecutorial evidence at the penalty phase, long before appellant had any opportunity present evidence of remorse – which he never did. With respect to appellant's membership in the P-9 gang, the prosecution presented ample evidence of that at the earlier trial, without the benefit of appellant's posttrial outburst. The evidence had the primarily

prejudicial effect of depicting appellant as an angry black male spewing profanity at the first jury. Even if proof of appellant's gang affiliation was a relevant factor at the penalty retrial – which appellant denies – this particular episode should have been excluded because of its overwhelming prejudicial impact.

The prosecution may not comment on a defendant's courtroom behavior or demeanor unless and until the defendant puts the question of his remorse in issue. (See generally *People v. Heishman* (1988) 45 Cal.3d 147, 197 [this Court held it was not misconduct for a prosecutor to comment on a defendant's demeanor off the witness stand because the argument was in response to the defendant evidence of positive character].) In the instant case, the prosecution introduced the evidence in support of a remorse argument *which was never made.*

Case law is clear. A prosecutor in a capital case may not argue that a defendant's post crime lack of remorse is an aggravating factor unless the defendant puts the question of remorse in issue. (*People v. Beardslee* (1991) 53 Cal.3d 68, 114.) Where a defendant denies guilt, as is his constitutional right, an alleged lack of remorse is as consistent with innocence as it is with guilt.

In *People v. Jurado* (2006) 38 Cal.4th 72, 141, this Court noted that "a prosecutor in a capital case may not argue that a defendant's post crime lack of remorse is an aggravating factor...." In *Jurado*, this Court did not find error as the prosecutor argued that lack of remorse was relevant to the evaluation of mitigating factors. (*Ibid.*) In the instant case, however, the prosecution first characterized to

this jury appellant's behavior and comments as **threats** to the previous jury – obviously an aggravating factor. Thereafter, the prosecution presented the evidence as part of its case of aggravating evidence. When it argued appellant's behavior and accompanying comments the prosecution tied it to gang membership, threats by McClain against courtroom staff and concluded with "what is fair for people like this?" (73 RT 7378.)

C. The Resulting Prejudice

Pursuant to California State law, the issue of whether a defendant was prejudiced by the erroneous admission of evidence is evaluated under *People v. Watson, supra,* 46 Cal.2d 818. This Court has held that an error of this type requires reversal only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) In this case, however, the error was also a violation of appellant's federal constitutional rights and for that reason be *Chapman* harmless error standard should apply. (*Chapman v. California, supra* 386 U.S. 18.) Under *Chapman*, the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Id.*, at p. 24.) In addition, the prejudicial impact of this particular error must be viewed in conjunction with that of other errors for determination of cumulative prejudiced. (See *United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 210, fn.3.)

The prejudice to appellant is evident from the combined factors that (1) the

evidence was inadmissible under any aggravating factor; (2) the prosecutor characterized it as a threat and argued it is relevant to the future dangerousness of all three defendants (74 RT 7377-7378); and (3) the jury asked to see the videotape again during jury deliberations and before reaching its verdict of death as to appellant.

In the instant case, because the prosecutor replayed the tape during his penalty argument to the jury; used it to emphasize his theme that the three defendants "went out to smoke and kill Crips and you are here today as a result of that"; and argued that "they are P-9 gang members intent on retaliating for the death of a fellow P–9," prejudice is apparent. The prosecutor clearly intended that the jury consider appellant's courtroom outburst as indicative of a violent gang mentality where appellant threatened jurors like themselves.

Additionally, the prosecutor bundled together its argument about the violent graffiti in the holding cell and McClain's alleged threats against courtroom staff with its characterization of Holmes' outburst as violent and threatening so to present the rhetorical question," What is fair for people like this?" (74 RT 7378.)

Under these circumstances, appellant was deprived of due process and a reliable and individualized penalty determination. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304; *Lockett v. Ohio, supra*, 438 U.S. at pp. 603-605.); *Beck v. Alabama, supra*, 447 U.S. at p. 638; *Penry v. Lynaugh, supra*, 492 U.S. at p. 328, abrogated on other grounds; *Atkins v. Virginia, supra*, 536 U.S. 304.)

XII. APPELLANT WAS DEPRIVED OF HIS RIGHTS TO PRESENT A DEFENSE, DUE PROCESS, A FAIR PENALTY TRIAL, AND A RELIABLE PENALTY DETERMINATION WHEN THE TRIAL COURT FORCED APPELLANT TO WEAR A STUN BELT AND ALLOWED DISCLOSURE TO THE JURY THAT APPELLANT WAS ELECTRONICALLY RESTRAINED

A. Factual Summary

1. The Trial Court's Decision to use Stun Belts

During the reading of the jury verdicts at the guilt phase, appellant Holmes and codefendant McClain both responded in a manner that the court later characterized as the use of "poor judgment." (45 RT 4784.) Holmes interjected, "Fuck you, you mother fuckers. P– 9 rules." [99](45 RT 4752.) McClain made an obscene hand gesture toward the jury. (45 RT 4783.)

When the court reconvened to address defense motions prior to beginning the penalty phase, codefendant Newborn argued for severance based, in part, on the prejudicial effect of codefendant McClain's testimony and counsel's "understanding that Mr. McClain utilized at hand gesture with the middle finger of the right-hand visible to the jury," (45 RT 4783.) The trial court commented that in its opinion "Mr. McClain used poor judgment and so did Mr. Holmes at that time. It doesn't help when you're taking a verdict in people have just listened to months of testimony and then to do those things. I didn't find it to be as blatant as maybe

---

[99] Newborn's counsel later argued that at the time of the verdicts appellate Holmes "rendered comments relating to the jurors inferior intellect, their lack of family values, their deviate heritage and their sexual perversity." Counsel's representation in that "there [was] more explicit language in the record" to support this representation was not true.

some of you did. I don't know if there was a P– 9 sign, if you can make it out clearly. Someone said there was a P– 9 sign. I saw the finger go up. And that is not so uncommon. I don't know what is going to happen with the jury, how they feel about it." (45 RT 4784-4785.)

The trial court denied Newborn's motion to sever and McClain's request that a new jury be impaneled for the penalty phase. (45 RT 4788.) [100]

Addressing all three defendants, the trial court complimented them on their behavior throughout the guilt phase:

> "... I complimented you many times. You sat there all the way through, and this jury sat and watched all of you. You took the stand; you made some profanity. Most of the time all of you were gentlemen." (45 RT 4788-4789.)

> "Listen gentlemen... my bailiffs you never gave them any trouble at all, neither have you. Stay on the same course. All right? They are just here to do their job.... you have always been gentlemen to my staff, and I appreciate that. So hang in there." (45 RT 4793.)

The proceedings were continued for one week, during which time defendants were notified that they would be required to wear stun belts during the penalty phase. (45 RT 4797, 46 RT 4798.) According to the court, "security is done by the security people involved, that is, the bailiffs." (46 RT 4799.) The court explained that "based on some activity," bailiffs requested appellants be

---

[100] Holmes joined McClain's and Newborn's comments and motions. (45 RT 4789.)

electronically restrained. (46 RT 4799.) [101] Each appellant stated they understood but did not agree with the terms of the Notification. (46 RT 4799-4800.)

> Deft. McClain: I want to say nobody trippin, but now all of a sudden, we get those belts. That is like a slap in my face. After all, I have been sitting here and I ain't done nothing hostile and none of that shit and still get that.
>
> The Court: Remember that security is done by the sheriffs and if they perceive things to jeopardize your safety or injury to you or them or any staff member, that is what the law provides. So we will review this later on. (46 RT 4800.)

There was no later review of the court's order and all appellants wore the stun belts throughout the first penalty trial.

Following the first penalty phase, which ended in mistrial, the issue resurfaced after the prosecution announced it would retry the case, and codefendant Newborn told the prosecutor to " fuck off" and "suck my dick." (60 RT 5769.) In response to Newborn's outburst, the trial court announced its tentative ruling that restraints would be used again. (46 RT 4770.) [102]

At a subsequent hearing, when denying defendants' motion to continue and

---

[101] The written warning referred to "an impulse of 50,000 volts" of electricity which would result in "instant and complete immobilization" of the defendant which would be activated based on "an attempt to escape, to make sudden or hostile movements, [or] to tamper with the belt, failure... to comply with verbal commands, [or] any overt acts of aggression or communication with persons in or around my immediate vicinity." (46 RT 4799.)

[102] Holmes' counsel was absent from this court hearing and Holmes was represented by McClain's counsel Harris. Holmes' trial counsel was later sanctioned by the trial court for failing to appear. (46 RT 5768, 5773.)

Newborn's renewed motion to have Newborn and Holmes' penalty retrial severed from McClain, the trial court informed defendants they would wear stun belts.

> The Court: They won't be severed. I don't find any rationale for that argument at all. I am not mad at you. I am not happy with their attitude. They are not going to run this court. I am going to run this trial. Have you got the word? And you will be belted. (46 RT 5775, 5778.)

There were no further hearings regarding the use of stun belts at the penalty retrial. However, during a 402 hearing involving alleged threats made by codefendant McClain which appellant Holmes was not present for and did not participate in, the following exchange occurred:

> Mr. Nishi: My client was out here when his statements were being made.... he is not back there making those particular statements.... the problem that we have is especially with the statement, "you have to do us all," my client didn't join in that statement, didn't make that statement. (73 RT 7312, 7313.)
>
> The Court: I didn't say he did.
>
> Mr. Nishi: And I think more importantly, "we'll all have weapons next time" suggest they had weapons the first time and my client was not there. What I'm asking the court to do is consider sanitizing it.... if the court won't sever, what I'm asking the court to consider is, one, instructing that it only applies to the declarant and, secondly, sanitize it so it doesn't impact on my client. (73 RT 7313.)
>
> The Court: I gave a little a cure here almost every day. I say, "how are you doing? Be careful what you say." Even counsel I've warned. Then they go off on the bailiffs who take care of them, the very people that secure the safety for this courtroom. They've not injured these people, they have not hurt these people. The belts, I made the decision on that based on their conduct. They don't make that decision; I make that decision. That's even for their benefit. Do you understand? (73 RT 7314.)

Mr. Nishi: I understand, your Honor.

The Court: They know the belts around; I know the belts around. It's a tempering thing. It's a philosophy of getting along. There is a reason why that belt is on. (73 RT 7314-7315.)

Ultimately, the trial court permitted Browning's testimony regarding codefendant McClain's threat. "It is repulsive to me that you or anyone else threatened to kill them or injure them in any way, [and] I think the jury should hear it." (73 RT 7327.) [103]

2. Disclosure of the Stun Belts to the Jury

After completion of prosecution and defense penalty phase evidence, but prior to instructing the jury, the trial court held and Evidence Code section 402 evidentiary hearing regarding "what some of the defendant said to the deputies." (73 RT 7296.) The court continued "if that complies with 190.2 or .3 the court is going to allow it. I think it does comply." (*Ibid.*) During the hearing appellant Holmes objected that the effect of Browning's testimony would be very prejudicial to all defendants. (73 RT 7312.)

In the presence of the jury, the prosecution called deputy Robert Browning. Browning testified that every morning the deputies "put an electronic device on each one of the defendants." (73 RT 7331, 7332.) Appellant Holmes requested

---

[103] The court sanitized McClain's use of the plural pronoun "we" to "I." (73 RT 7329.)

an instruction that the jury not use electronic device against any of the clients stating before the jury " it is just basically a procedure the sheriffs use in these types of cases." (73 RT 7332.) Instead, the trial court informed the jury: "The court makes a decision, based on things the court knows, whether or not to wear this device. It is a security device to assure tranquility in the court, security for everyone. It does not mean that they are guilty or not guilty." (73 RT 7332.)

The prosecution questioned Browning further about the use of the stun belts on these defendants. (73 RT 7332-7333.)

During his closing argument McClain responded to the prosecutor's argument by stating to the jury:

> Deft. McClain: " I don't care what he thinks or what these people think, you know: and if I didn't have this belt on, I would be able to express it a lot more boisterous than I am now." (74 RT 7420.)

Sua sponte, the trial court interjected:

> The Court: You are wearing a belt because you have acted up in this courtroom. Don't tell this jury without that belt what you might do. (74 RT 7420.)

Speaking for himself only, McClain responded that he had never been violent in the courtroom. (*Ibid.*)

B. The Trial Court Abused its Discretion and Violated Holmes' Constitutional Rights by Requiring Holmes to Wear a Stun Belt

In *Deck v. Missouri* (2005) 544 U.S. 622, the United States Supreme Court

reversed a death sentence because the defendant was shackled during the penalty phase of his capital trial. A majority of the United States Supreme Court held that the use of physical restraints on a criminal defendant visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial (such as courtroom security and the risk of escape), violates a defendant's rights under the Fifth and Fourteenth Amendments.

Justice Breyer explained that "the criminal process presumes that the defendant is innocent until proved guilty. Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." (*Id.*, at p. 630.) Justice Beyer further noted that unjustified shackling can interfere the defendant's right to counsel and a meaningful defense. (*Id.*, at p. 631) Last, he asserted that the routine use of shackles in front of a jury undermines the dignity of the courtroom and the ability of the judicial system to maintain public confidence in its ability and authority to provide justice. (*Id.*, at p. 626, 630, internal citations omitted.)

The issue of shackling has particular significance at the penalty phase a death penalty case. This is so because, "[t]he appearance of the offender during the penalty phase in shackles...almost inevitably implies to a jury, as a matter of common sense that the court authorities consider the offender a danger to the community - often a statutory aggravator and nearly always a relevant factor in

jury decision-making, even when the state does not specifically argue the point." (*Id.*, at p. 633.) In fact, the harm is greater here than in other jurisdictions because future dangerousness is not a statutory aggravating factor and may not be considered in determining punishment. (*People v. Boyd, supra*, 38 Cal.3d 76.)

By adversely affecting the jurors' perceptions about a defendant's character, shackling undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death. In these ways, the use of shackles can be a thumbs up on the death side of the scale. (*Ibid.*)

The general principles that apply to the use of traditional types of physical restraints also apply to the use of a stun belt. Thus, under California law, a trial court may not compel a criminal defendant to wear a stun belt without a finding of a "manifest need" that justifies the use. (*People v. Mar* (2002) 28 Cal.4th 1201, 1261, 1220.)

Resolving a conflict between the Courts of Appeal, in deciding *Mar*, this Court reaffirmed the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. As noted by this Court:

> "We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support

> our continued adherence to the *Harrington* rule. We reaffirm the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*Id.*, at p. 1216.)

This Court articulated circumstances which demonstrated such a need. (See for example, *People v. Kimball* (1936) 5 Cal.2d 608, 611[defendant expressed intent to escape, threatened to kill witnesses, secreted lead pipe in courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [defendant had written letters stating that he intended to procure a weapon and escape from the courtroom with the aid of friends]; *People v. Hillery* (1967) 65 Cal.2d 795, 806 [defendant had resisted being brought to court, refused to dress for court, and had to be taken bodily from prison to court]; *People v. Burnett* (1967) 251 Cal.App.2d 651, 655 [evidence of escape attempt]; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-863 [defendant attempted to escape from county jail while awaiting trial on other escape charges]; *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and threw himself on the floor].) (*Id.*, at pp. 1216-1217.)

Citing its decision in *People v. Duran* (1976) 16 Cal.3d 232, this Court also noted that "in any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*Loomis, supra,* at p. 1217.)

Manifest need exists if there is a serious security threat at trial. However, neither charged emotion nor undercurrent of tension are in themselves sufficient to support a finding of manifest need. (*People v. Mar, supra*, 28 Cal.4th at pp. 1220,1221.) Similarly, a trial court's belief that electronic restraint is in the defendant's best interest does not demonstrate manifest need, even when the trial court's belief is objectively true. (*Id.*, at p. 1223.)

A trial court may not adopt a policy of forcing all inmates accused of certain crimes to wear a stun belt. The determination must be made on a case-by-case basis. Additionally, a trial court must make its own due process determination on the record and may not delegate this duty to law enforcement, the prosecutor, or security personnel. (*Id.*, at p. 1218.) If the trial court determines that extra security measures are warranted, it must use the least restrictive alternative. (*Ibid.*)

Finally, "[t]he showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record, and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. In those instances when visible restraints must be imposed the court shall instruct the jury *sua sponte* that such restraints should

have no bearing on the determination of the defendant's guilt. (*Id.*, at p. 1217.)

In this case, the trial court abused its discretion and violated Holmes' constitutional rights in requiring Holmes to appear before his penalty jury in a stun belt. Here, the trial court made no findings on the record as to why the stun belt on appellant Holmes was necessary. In fact, also in violation of *Mar,* the trial court delegated the decision of whether to use a stun belt on Holmes to courtroom staff.

To the extent that the trial court exercised any independent discretion whatsoever, the record is clear there were no facts to support such a decision.

Appellant Holmes engaged in no violent or assaultive conduct in the courtroom. Rather, at the reading of his guilt verdict, before a different jury, Holmes uttered an obscenity. This was conduct that the trial court itself repeatedly characterized as " not uncommon," " not blatant," and at worst an exercise of "poor judgment." (75 RT 4784-4785.) Under *Mar*, this conduct, is insufficient to warrant the use of a stun belt. (See *Hawkins v. Comparet-Cassani* (2001) 251 F.3d 1230, 1223, 1240 ["there is an important difference between verbal disruption and conduct that threatens courtroom security...."] Holmes verbal disruption was insufficient justification for abridgment of his state and federal constitutional rights.

Additionally, when reminded by the trial court that Holmes was not present in the holding cell at defendant McClain's alleged threat, the trial court implicitly

found that Holmes had not engaged in threatening behavior. (75 RT 7312) To the contrary, but for that single verbal outburst, the court praised Holmes his behavior during the entirety of his trial. (75 RT 4788-4789.)

C. The Trial Court Violated Holmes is Constitutional Rights by Erroneously Permitting Testimony Informing the Jury that Holmes was wearing a Stun Belt

Through Deputy Browning's testimony, if they were not already aware, the jury was specifically informed that Holmes and his codefendants wore stun belts. Prompted by the prosecutor's unnecessary questioning, Browning discussed in some detail the daily ritual off putting stun belts on the defendants. Appellant Holmes argues that evidence of whatever threats defendant McClain may have made against Browning, did not require the prosecutor to elicit that the behavior occurred while the defendants were being put in stun belts. Moreover, appellant Holmes was further prejudiced by the court's comments, both in response to Holmes's counsel's request for a cautionary instruction and in response to defendant McClain's argument to the jury for life. The trial court's comments emphasized that there had been "acting up" and hinted at much more dangerous behavior only the court knew.

Encouraging the jury to improperly base its decision on speculation, the trial court's cautionary instruction indicating that wearing stun guns in no way indicated Holmes was guilty or not guilty, did not advise the penalty jury how they should weigh that evidence when making a determination between life and death.

Improper and irrelevant indications that appellant Holmes posed a violent threat to courtroom custodial staff (and potentially jurors who were in the courtroom), coupled with the prosecution's arguments that his codefendants were dangerous and violent inmates – without excising appellant Holmes from those comments -- constituted affirmative evidence of future dangerousness.

Finally, any failure of trial counsel to specifically object to the introduction of testimony indicating appellant Holmes was wearing a stun belt on grounds of relevance, prejudice and violations of due process, was the result of ineffective assistance. Alternatively, any more specific objections by appellant Holmes counsel would have been futile. Counsel for appellant asked for a cautionary instruction, asked that the deputies testimony be sanitized, and requested his client he severed from defendant McClain.

D. Standard of Reversal

In *Mar*, this Court determined the error in restraining that defendant was prejudicial even under the *Watson* standard. Appellant maintains that in the instant case this Court should apply the harmless error analysis because appellant was forced to wear the stun belt without an adequate showing of danger, the jury was expressly apprised of the fact that he was wearing a stun belt and the court's comments coupled with McClain's alleged threat to Browning could reasonably be construed as reflecting appellant had made physical threats against court staff.

Under either standard reversal is required. Here, the first penalty jury

could not reach a verdict – indicating the decision regarding appropriate penalty was far from clear-cut. The prosecutor's evidence in aggravation against Holmes, particularly as to prior acts of or threats violence was nearly nonexistent.

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE ERRONEOUS EXCLUSION OF EVIDENCE OF FAVORABLE DISPOSITIONS GRANTED TO CODEFENDANTS BAILEY AND BOWEN, AND BY THE UNFAIR PROSECUTORIAL MISCONDUCT IN EXPLOITING THE EXCLUSIONARY RULING

A. Summary of the Facts

The prosecution moved to exclude the disposition of codefendants Bailey and Bowen, and the trial court granted that motion. (65 RT 6338.) The prosecution's motion to exclude the evidence, filed September 23, 1996, following the penalty mistrial, noted that "[t]wo codefendants, Bailey and Bowen, subsequently entered into negotiated dispositions in the instant matter. " (8 CT 2089.) The prosecution cited *People v. Carrera* (1989) 49 Cal.3d 291, 343, for the proposition that "[t]he punishment meted out to a codefendant is irrelevant to the decision the jury must make at the penalty phase: whether the defendant before it should be sentenced to death," and also cited" *People v. Belmontes* (1988) 45 Cal.3d 744, 810.

Codefendant McClain, in pro per, raised the issue again during penalty trial, and the court reiterated its ruling. (71 RT 7101-7102.)

B. The Trial Court's Error and Prosecutorial Exploitation of that Error Violated Appellant's Right to Due Process and his Right to a Proportionate, Non-arbitrary Sentence under the Eighth Amendment

Appellant's federal right to due process in capital sentencing was violated when the trial court refused to allow appellant to inform the jury making his penalty

determination of a negotiated dispositions given to two of his codefendants. (*Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735.) Moreover, Eighth Amendment principles eschewing the arbitrary or disproportionate imposition of the death penalty were violated because appellant was sentenced to death and codefendants whose culpability was alleged to be greater than or equal to appellant's were given favorable negotiated dispositions. (*Furman v. Georgia (1972) 408 U.S. 238*; *Enmund v. Florida (1982) 458 U.S. 782.*)

In a recent case, the Sixth Circuit reversed a death sentence on the basis of *Furman* and *Enmund* where the trigger man in a murder for hire a was given a harsher sentence (the death penalty) than the person who hired him (life imprisonment). (*Getsy v. Mitchell* (6th Cir. 2006) 2006 U.S. App. LEXIS 19472.) Getsy's capital sentence was reversed on the basis of the lack of symmetry between his and his codefendants relative culpability and their sentences. *(Ibid.)* Following *Furman*, the *Getsy* court held that " inconsistent and disproportionate sentences in the same case violate the clearly established *Furman* arbitrariness principle and hence the Eighth Amendment." *(Id.*, at p. 23.) The *Getsy* court also based its conclusion on the Eighth Amendment principle of proportionality embodied in *Enmund* and observed that the Eighth Amendment is "violated when defendants with ' plainly different' culpability receive[] the same capital sentence. It requires proportionality comparison with others participating in the same crime." (*Id.*, at p. 26.) Applying this principle, the court held that "in a capital case with

respect to the *very same crime* stemming from the *very same facts*, the Eighth Amendment does not permit codefendants with plainly similar culpability to receive different sentences – especially when the defendant was arguably less culpability receives the harshest of all sentences, the death penalty." (*Id.*, at p. 31, emphasis in original.)

In the instant case, these principles were violated when Bailey, who was alleged to be one of the shooters in the Halloween crime as well as an active participant in planning or retaliatory action for the death of Fernando Hodges as described by the overt acts alleged as to the conspiracy charge, was given a favorable negotiated disposition, and by contrast, appellant Holmes, whose participation in the alleged planning, if any, was comparatively minimal and whose identification as a shooter rests solely on the incredible testimony of one witness, was given the death penalty.

In *Morris v. Ylst*, *supra,* 447 F.3d 735 the Ninth Circuit too addressed the question of the unfairness of leaving jurors ignorant of favorable dispositions granted to codefendants. *Morris* granted penalty relief to petitioner because of the *Brady* violation, and Judge Ferguson filed a concurring opinion in which he expressed concern about the inherent unfairness and prosecutorial discretion in pursuing the death penalty against some capital eligible defendants, forgoing it against equally culpable others, and leaving the capital jurors ignorant of this process. Judge Ferguson's solution to this inherent anomaly is that "[t]he jury

must be permitted to consider, as a mitigating factor in its determination of whether to impose the death penalty, the government's admission that singled out Morris for capital punishment among three equally guilty perpetrators." (*Id.*, at p. 748.)

Applied to this case, the trial court erred in refusing to permit the defense to present evidence of the favorable dispositions to Bailey and Bowen and further refusing to instruct that the jury it could consider as a mitigating factor the prosecution's determination to pursue the death penalty against Newborn, McClain, and Holmes while foregoing it against codefendants Bailey and Bowen, who are alleged in the indictment of playing equally or more culpable roles in the charged crimes. [104]

Although the gun use allegation alleged to appellant Holmes was found to be true, the jury did not find the arming allegation true and thus did not find him to be a principal to the crimes. Additionally, overt acts which alleged Holmes discussed retaliation for the murder of Fernando Hodges, Holmes was in the presence of a conspirator who stated " let's go get the guns," Holmes was among those making a decision to target Crip gang members, Holmes caravaned to the intersection of Emerson Street and Wilson, and parked their cars in order to

---

[104] Bailey was alleged to have personally used a firearm in the events leading to the death of the victims. (3 CT 631-639.) The jury found true an overt act alleging that no one had fired a 9 mm gun at or near the residence of individual believed to be Crip. (6 CT 1695.)

ambush individuals believed to be Crips, Holmes positioned himself in bushes with the intent to ambush, and Holmes executed and/or the victims *were all found not to be true.*

In addition, the inherent unfairness of this practice is particularly acute in a case like this where the prosecutor improperly capitalized on and exploited the exclusion order. Here, the prosecutor argued that the three defendants convicted of these crimes were so bad."only death will make it just." After laying a foundation that the death penalty is reserved for the "worst of the worst," (74 RT 7398), and that codefendants Newborn and McClain, and appellant Holmes were the worst of the worst, the prosecutor continued:

> I'm asking you to give [the death penalty] and most of all on behalf of yourselves, because if you look into your heart these are the worst of the worst. Their crimes are the worst of the worst, and they killed some of the best of the best. And only death can make it fair; only death will make it just. (75 RT 7415.)

Given the prosecution's offer of a very favorable plea bargain to both Bailey and Bowen whose culpability for the murders was equal or greater, this is a patently misleading and hypocritical argument. It would seem, as to those two, a punishment far less than death was sufficient to make it "fair" and "just" in the prosecution's opinion. Nevertheless, the prosecution argued a contrary opinion to appellant's jury to improve the prospects of a death sentence. Where, as here, the prosecution's rhetoric in support of the death penalty is premised on a patently false factual premise of the prosecution's own making, the prosecutor

cannot simultaneously resist the efforts of the defense to provide relevant factual information. The prosecution must either forego that inflammatory rhetoric, or permit the jury to be accurately apprised of how justice was equally distributed by the prosecutor in the case.

There is an analogy here to due process violation condemned by the United States Supreme Court in *Simmons v. South Carolina* (1994) 5112 U.S. 154, 165. In *Simmons, the prosecutor successfully persuaded the court not to instruct the jury that if given life imprisonment, the defendant would be ineligible for parole and would spend the rest of his life in prison.* Having obtained that ruling, the prosecutor then implied to the jury that the death penalty was the best choice to prevent a defendant from committing further acts of violence generally. The due process violation occurred because "[t]he State raise the specter of petitioner's future dangerousness generally, but thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he would never be released on parole and does, in his view, would not pose a future danger to society." The Supreme Court noted that " the State is free to argue that the defendant will pose a danger to others in prison," but "the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility." *(Id.*, at p. 165 fn. 5.)

The analogy here is that the prosecutor concealed information about the favorable life dispositions conferred with prosecutorial blessing to codefendants

Bowen and Bailey, and then argued to the jury that the death penalty was the only penalty appropriate for the defendants as they were the worst of the worst. (See also *People v. Varona* (1983) 143 Cal.App.3d 566 [reversible error for the prosecutor to successfully urged exclusion of evidence and then argue that the jury should penalize the defense because of the absence of that evidence]; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825 [federal constitutional error for prosecutor to assert unproven facts under the guise closing argument].)[105]

The prosecutorial misconduct here is also analogous to that which required reversal of the death sentence in *In re Sakarias* (2005) 35 Cal.4th 140. There, the prosecutor, in sequential trials of two codefendants argued "significantly inconsistent and irreconcilable" versions of the offense to pitch rate each defendant as the actual killer. This Court concluded that the prosecutor's undisclosed embrace of two incompatible positions violated the defendants' due process rights as to penalty. (*Id.*, at p. 165.)

Here, the prosecutor endorsed a position in front of appellant's jury that the crime for so heinous that "only death" was fair and just as a penalty. In contrast, the prosecutor took the contrary and irreconcilable position at Bailey and Bowen's disposition than noncapital outcome was entirely consistent with the interests of justice. Had appellant's jury known of the prosecutor's actions with respect to

---

[105] *Gaines* found that the error required reversal under the *Chapman* standard.

the Bailey and Bowen dispositions, those actions would have spoken far louder in mitigation than the prosecutor's words in aggravation.

C. The Requirement of Reversal

Reversal is required here because the prosecutor's argument was based on false factual basis that the prosecutor created through an artful manipulation of the evidence. Having first successfully excluded any evidence or defense reference to the prosecutorially- approved noncapital dispositions of Bailey and Bowen, the prosecutor then hypocritically argued to the jury with impunity that only death was a fair and just punishment for the perpetrators of the crimes for which the defendants were convicted. Bailey and Bowen were convicted of the same crimes and their culpability was equal or greater that appellant. This combination of judicial error and prosecutorial misconduct cannot be deemed harmless beyond a reasonable doubt, given the closeness of the penalty decision in this case. [106] (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Arizona v. Fulminante, supra*, 499 U.S. at pp. 306-307.)

Moreover, in light of the favorable dispositions given to his codefendants with equal or greater probability, appellant's death sentence must be vacated under the principles of proportionality and consistency inherent in the Eighth Amendment. (*Furman v. Georgia*, *supra*, 408 U.S. 238; *Enmund v. Florida, supra*,

---

[106] The jury in appellant's first trial deliberated fourteen days and could not reach a penalty decision.

458 U.S. 782.)

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND A RELIABLE PENALTY DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO SEVER HIS PENALTY RETRIAL FROM THAT OF IN *PRO PER* CODEFENDANT MCCLAIN

A. Summary of Facts

At the March 21, 1996, pretrial hearing , following the mistrial declared after the first jury was unable to reach a penalty verdict, when asked what evidence the prosecution intended to put on at the penalty retrial, the prosecutor responded:

> Mr. Myers: We will probably be putting on much of the circumstances surrounding the commission of the crime, Your Honor, which would be something to the effect of a little bit of the Hodges murder, a little bit of what happened at the hospital, maybe the incident at Mr. McFee's, certainly the caravan of the cars that went through mountain and Marengo. (60 RT 5776.)

Counsel for codefendant Newborn, responded:

> Mr. Jones: Last thing, Judge, we have extensive motions in this case. One thing is to get away from Mr. McClain. I don't want to go to trial with Mr. McClain and, if I do, I don't want them reading the testimony that he gave during this case. And they think we have a very good argument that we, "we" Newborn and Holmes, should not be saddled with the obscenities and the profanities that Mr. McClain used during the first trial – (60 RT 5776-5777.)

The trial court agreed.

Counsel for codefendant Newborn went on to explain that his client and Holmes should also not be saddled with McClain's confession, by the way of prior testimony, that he possessed the intent to kill with premeditation and deliberation.

To this the trial court responded:

> The Court: And then they shouldn't be saddled with your client's loudmouth remarks last week. They are all together. They told the court this and the jury, they are P-9's, they're damn proud of it. They won't be severed. I don't find any rationale for that argument at all. I am not mad at you. I am not happy with their attitude. They are not going to run this court. I'm going to run this trial. Have you got the word? And you will be belted. (60 RT 5778.)

Counsel for both Newborn and appellant Holmes moved to be relieved. Codefendant McClain's counsel moved to be relieved for health reasons. (60 RT 5778.) [107]

The trial court was disinclined to relieve counsel and appoint substitute counsel commenting: "If you want to be relieved and have someone else prepare the case again, that takes more time. No one knows the case better than the three of you. Listen, you think I will enjoy doing this case again? We have been on many cases. All of us, together. This is not fun for me to do."

When codefendant McClain commented that the court should not make this personal, the court chastised codefendant McClain saying he didn't want to hear from him and that he had a lawyer. "We've heard all we want to hear from you. Take these guys out here." (60 RT 5780-5781.)

By the next court appearance on March 25, 1996, codefendant McClain's counsel had filed a written motion to be relieved based on health reasons. The court granted Harris' motion and, over Holmes' objection, continued the matter

---

[107] At this point in the proceedings, McClain was still represented by attorney Harris.

and appointed Richard Leonard as new counsel for McClain. (60 RT 5783-5786.)

Two days later, on March 27, 1996 at trial setting, codefendant McClain announced his intention to proceed in pro per. Over appellant Holmes' objection, the trial court continued the matter to consult with security and for McClain to file written points and authorities. (60 RT 5789, 5791-5797.) The court again expressed its intention not to sever the matters and chastised defendants for their behavior. (60 RT 5792, 5797.)

On April 2, 1996, appellant Holmes filed a written motion to sever his penalty trial from both Newborn and McClain. (7 CT 1928-1942.) Appellant Holmes argued that his Eighth Amendment right to an individualized sentencing hearing would be violated by a joint penalty trial which would include the aggravating evidence against codefendants and the prior trial conduct – and anticipated penalty retrial conduct – of codefendant McClain. Specifically, Holmes pointed out that during the guilt phase portion of the trial codefendant McClain consistently and persistently exhibited inappropriate conduct, particularly during the testimony of prosecution witnesses; that his demeanor and attitude while testifying himself as a witness were inflammatory; and that through his testimony necessary elements of the murders were established. Appellant Holmes pointed out that it was anticipated that codefendant McClain would testify at the penalty retrial and that even if he did not testify the prosecution would read his testimony into evidence. All of these circumstances which would certainly be

prejudicial to appellant Holmes would only be exacerbated by codefendant McClain's claim stated intention to proceed in *pro per.* Counsel for Holmes rightly predicted "it is doubtful that [Mcclain] could conduct himself in a professional manner." (*Ibid.*)

The prosecution opposed appellant Holmes' motion to sever and after citing page after page of the antics of Mr. McClain contained in the trial transcript -- in filed points and authorities supported codefendant McClain's motion to proceed in *pro per.* (7 CT 1946, 1956.) [108]

At the next hearing (April 5, 1996), with no discussion whatsoever the court denied Holmes' renewed request to sever his penalty trial. (60 RT 5799.) The court expressed concerns with security should codefendant McClain proceed in pro per. (60 RT 5801.)

On April 9, 1996, codefendant McClain was formally granted pro per status. (60 RT 5824.) The trial court commented that his decision would be over the objection of other counsel who he characterized as having "no real standing on your right to go pro per." (60 RT 5824.)

---

[108] The prosecution noted instances where McClain yelled out profanities at testifying witnesses, noted McClain admitted he was an "untrustworthy liar," offered examples of McClain's inability to act civilly, exercise self-restraint and self-control – which led to continual chastisement by the court against all defendants for disruptive behavior and noted the court cautioned defense counsel that McClain was dangerous to both court staff and the jury. (7 CT 1957-1961.) Each of the incidents outlined by the prosecution were incorporated by reference into Holmes' motion to sever. (60 RT 5804, 5827.)

McClain explained he could be ready to proceed to the penalty retrial in less than a week, which would require a waiver of time. (60 RT 5824-5825.) Appellant Holmes and codefendant Newborn announced ready and objected to any postponement of the penalty retrial. (60 RT 5827-5828.) Over objection to the court continued the retrial stating "I can't find any prejudice, especially in the penalty phase." (60 RT 5832.) Jury selection for the penalty retrial began on August 13, 1996. (60 RT 5869.)

On September 30, 1996 during pretrial motions, defense counsel moved again for severance. (65 RT 6323, 6324.) With respect to gang-related graffiti found in the holding cell adjacent to the court room, counsel argued "in a one defendant case this argument would have no applicability, and when you have three people here and motions to sever have been denied and you have a piece of evidence like this that the people want to taint all three defendants with, I think it is a real problem." (65 RT 6323.)

Toward the conclusion of pretrial motions, the trial court addressed codefendant McClain:

> The Court: Mr. McClain, you have a tough burden here. Understand? You have the assistance of a great counsel, and you get the feeling of what the other lawyers are concerned about. Mr. Jones, an experienced lawyer – and it is nothing personal – is very concerned. He has a duty, takes an oath to protect his client. If anything you did – and it is your statement, what you did at the sentencing – impacts the other defendants, you have to be very careful. All of you have done something to contribute to that . So I will put you on notice that you will kind of live by the the sword. If you say something or do something, all of you will suffer for it, that's it. (65 RT 6338-6339.)

1. McClain's Courtroom Behavior at the Penalty Retrial

Codefendant McClain made an opening statement to the penalty retrial jury. During his comments, he was repeatedly interrupted by the trial court which admonished the jurors and/or McClain. Like his testimony at the guilt phase, McClain's opening comments were peppered with profanity and disdain for the legal system. (65 RT 6398-6401.) [109]

During his examination of prosecution witnesses, McClain professed his innocence and offered other testimony. (66 RT 6505, 71 7156.) He demonstrated his knowledge of the inner workings of various street gangs (66 RT 6465-6468, 6476); questioned surviving victims about their own gang membership (67 RT 6488, 6523-6524, 6538-6539, 6549-6550) and generally elicited that witnesses could not identify the shooters. (67 RT 6550, 6601, 68 RT 6763.)

The prosecution called Joseph Pettelle to testify to aggravating evidence which concerned codefendant Newborn only. (69 RT 6894.) However, following this testimony, the district attorney informed the court that as the witness was leaving the courtroom codefendant McClain threatened to kill him. (69 RT 6902.)

---

[109] A few examples include: "whether those kids was nine years old or 57 years old, the shit was tragic", "no matter how much yelling and screaming and knocking shit over and yelling I do, it's like don't nobody believed me. It's like I'm being smothered. And I'm telling you people over and over I didn't do the shit." "If I'd done it, I wouldn't have no problem telling you and say, "fuck it, I did do it" But because I'm a gang banger– basically I'm not going to waste your time on the rest of the shit, man." (65 RT 6398-6401.)

Pettelle was called to the stand and, first before the court, then in the presence of the jury testified that McClain unequivocally said "I'll kill you." (69 RT 6904, 6923.)

The trial court permitted this testimony to be introduced as an aggravating factor under Penal Code section 190.2 (b). The court acknowledged that codefendant McClain did not understand the proceedings and that although he may not have meant to, had hurt Newborn. (69 RT 6908.)

Over objection, the prosecution was permitted to have the court reporter read selected portions of codefendant McClain's guilt phase trial testimony. (69 RT 6929, 70 RT 7014, 7017-7026.) The portions read included McClain's former testimony that he was a gang member; he knew codefendant Newborn but not appellant Holmes as a gang member; that after he had heard Hodges had been shot by Crips he wanted to find some Crips in order to "smoke them, kill them" that he had paged "Lorenzo" and others for this purpose, and that he was armed with a .44 caliber weapon (70 RT 7018, 7022, 7023 7026.)

The jury was instructed the codefendant McClain's testimony should not be considered against the other defendants. (70 RT 7016.)

At the penalty retrial, Gabriel Pina was called by both the prosecution and the defense. During Pina's prosecution testimony, codefendant McClain elicited an in court identification of appellant Holmes. Which prompted a request from Holmes' trial counsel to approach the bench where the following discussion took place:

Nishi: How much further are you going to get into this, Herb? We are going outside the scope of his direct.

McClain: I guess until I get my point across. I don't know.

Leonard: He is not going outside the scope of his direct.

Nishi: I am.

Leonard: You could; he's not. You said he was going, Mr. McClain is going. He is not going outside the scope of the direct.

Nishi: He was.

The Court: Are you asking me or telling me? I am not accustomed to being told, but I will listen to you. He has asked the question if he saw him in the car.

Nishi: No. These are questions that I'm going to get into myself later.

Court: He has a right to do that. He is a pro per defendant and anytime you have multiple defendants you have a risk, but that is the problem having pro per defendants. We all know that; we have talked about that several times. There will come a time I will admonished the jury that if there are objections and stop that it is his choice. I will do that. But you will just have to wait until you get your chance. I know multiple defendant cases are always that way. (67 RT 6634-6636.)

McClain was permitted to continue his questioning regarding Pina's identification of appellant Holmes. (67 RT 6636-6641.)

During cross-examination of Pina, after he had been called by appellant Holmes, codefendant McClain elicited that Pina was intimidated by the defendants. (71 RT 7122.) McClain called Pina a liar. (71 RT 7127, 7134.)

During codefendant McClain's attempts to impeach Pina, the trial court stepped in:

The Court: He [Pina] stated three times at the shooting he identified three people – two people. He told Mr. Uribe on the phone after watching television he saw one of them. He didn't say he saw two that time. He said he could identify two. He said he could identify possibly to people, not from the radio; TV.

McClain: I see you got a lot of help now.

Court: Mr. McClain –

McClain: I don't like this mousetrap shit.

Court: I will tell you what I will do: I will let you ask all the questions you want. You're ready put your foot in it. Keep on going.

McClain: Let me put my foot in it. I don't need you to help me.

Court: You put your foot in it all the time because you don't know what you're doing. I told you from the beginning you have other defendants here you have to take care of.

McClain: He is lying and you are letting him off the hook. He is lying through his teeth.

Court: Let me tell this jury: what Mr. McClain says is not evidence. This is very good for him not to be able to take the stand and testify under oath. Do you understand that? (71 RT 7134.)

The prosecution introduced additional evidence tending to establish that codefendant McClain was a killer, or at the very least presented a significant threat to witnesses, including the court's on security staff.

Near the close of the defense penalty case the courtroom deputies reported that McClain had made a threat of violence to them in a holding cell. [110]

Out of the presence of the jury, Deputy Browning testified that on the previous

---

[110] Appellant incorporates by reference Argument XII.

day he was in the holding cell before court putting the electronic stun belts on each defendant. Appellant Holmes was belted and in the courtroom. As McClain was being belted he asked why his belt was so warm, and Browning responded that they had tested it. As Newborn was being belted McClain said "if you do one of us, you will have to do us all." Browning said " What?" Newborn repeated McClain's statement and then McClain said "Don't get within two feet of me or I'll kill you." And "We'll all have weapons this time." (73 RT 7303-7305.)

Trial counsel once again move for severance on behalf of appellant Newborn, as did counsel for appellant Holmes . (73 RT 7311.)

> Nishi: I think I am placed in the more difficult situation.... My client was out here when the statements were being made. The problem that I have is, one, it has such a prejudicial effect against all defendants –
>
> Court: It certainly does.
>
> Nishi: – and especially when my client is out here, he is not back there making those particular statements. I would ask the court reconsider severing this particular case. If the court is not inclined, somehow there has got to be a remedy to indicate to the jury that my client had nothing to do with this.
>
> Court: Lets put it this way: there are times in the trial and Mr. McClain did nothing in other defendants did things.... Isn't that true, one time in your client did something that Mr. McClain had to suffer for?
>
> Nishi: But the problem that we have is especially with the statement, "you have to do us all," my client didn't join in that statement, didn't make that statement.... And I think more importantly, "we'll all have weapons this time" suggest they had weapons the first time and my client was not there. (73 RT 7313-7314.)

After chastising the defendants and counsel both the trial court ruled:

Court: What you want is a severance. And any severance motion at this time is untimely and ridiculous and I will not even consider it. (73 RT 7315.)

The section 402 to hearing continued with codefendant McClain calling deputies who did not hear the comment "I'm going to kill you" One deputy called by McClain did hear McClain's comments "You get within two feet of me" and "this time we'll all have weapons." (73 RT 7319-7322.) McClain attempted to call defendant Newborn as a percipient witness to the incident. Newborn's counsel exercised his right against self-incrimination. (73 RT 7324.)

Ultimately the trial court permitted the deputies to testify before the jury but ordered the statement the sanitized to strike the word "They." (73 RT 7329.) However, when Deputy Browning testified to the jury he stated that codefendant McClain made the statement "if you do one of us, you'll have to do us all." (73 RT 7336.) Thereafter codefendant Newborn repeated codefendant McClain's statement and added " if you push one button, then you better push all three, because you know what I'm going to do." (*Ibid.*) At this last comment, Browning looked at Deputy Admire "as to say" "be careful because something is going to happen." (*Ibid.*) Then McClain made another statement in response to Newborn's statement "don't get within two feet of me or I'll kill you, and we will have weapons this time." (*Ibid.*)

At the court prompting, Browning stated McClain said "I'll have." (73 RT 7337.) After the deputies' testimony the trial court instructed the jury that the evidence admitted against McClain was not to be considered as an aggravating

factors against codefendant Newborn or appellant Holmes. (73 RT 7347.)

2. Further severance motions

When discussing the format for closing arguments the court anticipated difficulties would arise during codefendant McClain's argument. "[T]here is a crossover problem we have had since the beginning of this trial, people not thinking what they are saying, incriminating other defendants." (74 RT 7352.) Preceding codefendant Newborn's renewed motion to sever or to revoke McClain's *pro per* status, the court commented:

> Court: The court anticipates, based on what I have seen in the trial so far and my experience with a person in pro per – the jury has been admonished at least 25 times that what he says is not evidence. It is just delightful for a defendant to be able to not be under oath, to stand in front of a jury or ask questions from his position and get things into evidence even though the court admonishes the jury is not admissible. (74 RT 7354.)

In response to defendants' motion for severance the trial court commented:

> Court: Lets go back over the punishment. So far each one of the defendants at sometime during the trial has done something that reflects on the other defendants. They have been warned. They have been told not to do anything, not to threaten the deputies, not to accost witnesses, not make signs or gestures at the jury . They continue to -- (74 RT 7354-7355.)

Defense counsel's motion for severance was once again denied. (74 RT 7356.)

3. Prosecution Argument

During his closing argument the prosecutor focused on codefendant McClain's testimony at the guilt phase which he read back to the jury in its entirety.

(74 RT 7373-7377, 7396.) The prosecutor reminded the jury of McClain's threat against Deputy Browning and then joined the other defendants to the conduct by arguing immediately thereafter "what is fair for people like this?" (74 RT 7378, 7396.) The prosecutor highlighted with McClain's threat to kill Mr. Petelle (74 RT 7387), and discussed each of the aggravating incidents offered against McClain in detail. (74 RT 7393-7398.)

The prosecution argued:

> Myers: That's what Herb McClain did with his homies, Lorenzo and Karl Holmes. They went out to smoke and kill Crips and you are here today as a result of that. (74 RT 7377.)

4. McClain's Argument

McClain argued in *pro per* before the other defendants. Before McClain argued he was admonished by the court he would not be permitted to testify. (74 RT 7417.) During his argument, McClain admitted his gang affiliation, prior convictions and past use of weapons. (74 RT 7418, 7421 .) His argument was peppered with profanity. (74 RT 7419, 7421, 7422, 7424, 7425.) McClain admitted his intention on Halloween night was "to go out and kill." (74 RT 7422.)

McClain himself recognize the damage that he had done to his codefendants.

> McClain: I am arguing lingering doubt because I didn't do that shit. And if the first jury – if I wouldn't have been so stupid, if I wouldn't have been so stupid to come up in here with that horse shit, you know, that hard-core gang membership, where I'm trying to prove that I'm hard to these people, if I came up in here and was using my head and would just explain it the way I'm trying to do it now, I would have been a lot better off. But instead I had

> animosity, man. I had animosity pent up, built up because of this case, because they're taking my life for nothing, man. So the way I came across to them, not only – not only really fucked me, but it made people see me how I am; and with my codefendants not saying nothing, it made them look at them, too. You know what I'm saying? I'm the reason that we all got found guilty. I'm the reason that were in here, because I got on the stand and said some stupid – it and they'd just rearranged it and fixed it up. It came from my mouth, true enough. Even if it wasn't said like that, it came from my mouth like that. (74 RT 7425-7426.)

Addressing his comments to someone in the prosecution side, perhaps even the prosecutor, McClain stated:

> McClain: But after talking to this dude right here – and this is a dirty dude. Even though I know people might like him and you might already dislike me, that's cool. But this is a dirty dude, man, because he's only going to paint the picture how he wants you want to see it and damn what I'm talking about. He feels that since justice is on his side and you all got his back, society, working-class people got his back, that he can basically fuck over me.

After this comment, the trial court admonished codefendant McClain not make personal attacks on lawyers and threatened once again to revoke McClain *pro per* status.

Nevertheless McClain continued his downward spiral:

> McClain: All right. So probably before I get finished with this they are probably going to take my status, right. Well, before I can finish telling you all how I feel about this, that's cool, that's cool, because I ain't giving a fuck.

After being told by the court to sit down, McClain continued:

> McClain: And he can eat one up, to.... I said you and the jury, too, can eat one up.... You're washing up innocent people. You're washing up innocent people. That's bullshit. Their washing up innocent people, and they don't even care about the shit. They don't want the real people who did that shit. They just want some gang bangers. (74 RT 7427-7428.)

Ultimately the trial court excused the jury. Out of the presence of the jury, McClain continued to profess his innocence and complained that he was only arguing what he had testified to earlier, and that the court had precluded him from presenting his defense. (74 RT 7429, 7432.)

> McClain: First I get found guilty for some shit I didn't do, then you want me to come in here and sit down and act like some dignified person. You got the monster fucked up. I ain't coming in here, sit in here like I don't care, because I do care about my life. I didn't do shit and on not going to sit here and act like I did do shit. You want me to sit down and act like I'm accepting it, and I am not accepting it. (74 RT 7432.)

Following Newborn's counsel's request for a break so that the situation could cool down, the trial court responded, apparently to Newborn's counsel:

> Court: We all anticipated this. You are a lawyer and you are an experienced, qualified lawyer. You should have anticipated this. The court anticipated it. Mr. Nishi anticipated it; the prosecution anticipated it, and so did the court. And I am sure Mr. Leonard did also. (74 RT 7432-7433.)

After a cooling off period, the trial court rescinded its revocation of McClain's *pro per* status and request that standby counsel Leonard finished the argument and permitted McClain to argue again. (74 RT 7433.) McClain's continued attempts to testify were objected to and those objections were sustained. Ultimately codefendant McClain appealed to the jury as follows:

> McClain: I mean all you guys are all middle-class people, and I know I – I'm not from the slums or no shit like that, you know. I got a good mama who worked for a living. And my daddy worked for a living. I do what I can for my kid, you know. I try to spend time with her every time that I can, you know. I'm not saying we're the same type of people, but I'm not ashamed of being a gang member. But I love my homeboys and everything that we do ain't bad, you know. We don't go around killing people. You know, it ain't like no movies where gang people is bad and this and that. Man, it's not

nothing like that really. But you're only going to see the bad parts. I don't know what else to say, you know. I wrote some shit to you on here, but I'm not even going to go through all that. Basically it's that I hope that you guys can be able to just read into what's presented. That's all I ask. If you see – if you see that it's something in there that makes me incriminated outside that I'm a gang member or some stupid shit that I said on the stand, then do me, don't show me no love. If you think I went around and killed innocent kids – because they're not innocent kids – get me. If you think I threatened people, talking about "I'm going to kill you" to the bailiff and to the other, I mean to me that's a lot of talk. If I was half of the gangster that this dude makes me, I wouldn't be doing all that talking, you know. I mean I don't see the point of warning nobody, you know, about what you're going to do so they got me mixed up with somebody else.... I never knew I was going to be found guilty for this, never. I never could have imagined in a million years that I'll ever be giving up my life for something that I didn't do, and I just can't sit here and be nice, man.... I mean what little life I did have it was mine come you know. I got to go and come as I pleased, basically do what I want. Now that's been taken away. Because I gang bang, because I'm from P-9 and my homeboy, Fernando Hodges, got killed on Halloween two hours before them kids got killed, automatically I had to be the person to do it because I've been arrested with guns, because I got a fucked up attitude....(74 RT 7436-7439.)

McClain asked the jury not to hold his actions against his codefendants.

McClain: Whatever I've said and done, I hope you all don't penalize my codefendants no more than they already been penalized because on the reason that we got found guilty without a doubt, without a doubt. (74 RT 7439.)

Citing the code of the streets and the gang mentality to which not only he but the codefendants allegedly ascribed to, some of codefendant McClain's testimony and argument may have been interpreted by the jury to imply that the victims asked for their fate:

McClain: But it's some things that I wasn't able to present, like the blue rags they was wearing. One testified about the blue rag on his head. Now, I'm not trying to condone in no kind of way about them little young dudes getting killed, because no matter how you slice it, that was cold, man. No matter

how you slice it, that was cold. It in the streets, industry to put a blue rag on your head, man, than people out there any ask them for no ID, then getting out and asking you "how old are you?" Before they blow your brains out. You just are going to catch one. That's how it is out there. I wish that them dudes would have had better sense than to just go out like that, man, you know. (74 RT 7440.)

B. The Trial Court's Errors [111]

Foremost, there is no procedural bar to appellant's renewed motion to sever. A motion to sever must be supported by adequate grounds existing at the time the motion is heard. (*People v. Miranda, supra,* 44 Cal.3d at p. 78 ; see *People v. Cummings* (1993) 4 Cal.4th 1233, 1286-1287, fn. 26; *People v. Pinholster* (1992) 1 Cal.4th 865, 932.) If further developments occur during trial that a defendant believes justify severance, he must renew his motion to sever. (*People v. Ervin, supra,* 22 Cal.4th at p. 69.) In the instant case, counsel for appellants Holmes and Newborn argued for severance from the time the first penalty jury hung and continued to argue throughout the entire course of the subsequent pretrial proceedings , during the penalty retrial, at argument, and in a motion for a new trial. Thus, appellant Holmes is entitled to raise this claim on appeal.

In *United States v. Green* (D.Mass.2004) 324 F.Supp.2d 311, the Court granted severance of two defendants for a federal death penalty trial because of potentially conflicting defenses in that "an aggravating factor for one defendant is

---

[111] Appellant incorporates by reference all of the applicable legal authorities referenced in Argument I.

a mitigating factor for the other." (*Id.*, at p. 325.) In Green, the court noted that one defendant was likely to present ostensibly mitigating evidence in the form of a good family upbringing, while the other defendant was likely to present evidence of a deprived family upbringing, and that the jury would be hard-pressed to give each type of presentation individualized attention, given in effect, the offset each other. Moreover, court was very concerned about a "classic trial by ambush" because again, "while the government has to give notice of aggravating factors, a codefendant does not," leading to potential Sixth Amendment confrontation issues and "Eighth Amendment concerns about individualized treatment at the punishment phase." (*Id.*, at p. 326.)

This is exactly what happened in the instant case. As argued above, evidence of appellant Holmes' gang affiliation was slight. By contrast, codefendant McClain represented himself to be a gang member and proud of it. Appellant Holmes presented evidence of a sympathetic childhood including the untimely death of his mother and the inability of his father to care for appellant and his siblings. By contrast, McClain made no apologies for his lifestyle, readily admitted his criminal background and prior use of weapons.

In addition to presenting a sympathetic background, appellant Holmes presented significant evidence to support lingering doubt. McClain's repeated assertions that he was intent on committing a murder to avenge that of Fernando Hodges, and that he actively sought out his homeboys, one of which by extension

would have been understood by the jury to be appellant, to do so, negatively undermined appellant's attempts to present a case of lingering doubt.

The jury could be expected to attribute McClain's foul language, disdain for the court process, repeated threats to the safety of witnesses and court staff to appellant, particularly in light of appellant's exercise of his right not to testify.

Moreover the trial court was aware of this inevitability. It repeatedly agreed with defense counsel's observation and concerns that codefendant McClain's presentation would have and did have a negative and prejudicial effect on his codefendants. The trial court ignored the constitutional imperatives requiring Eighth Amendment reliability and individualized sentencing in favor of convenience. The trial court's laments that the defendants were stuck with each other and that the other defendants had somehow prejudiced Mcclain's case evidences a deep misunderstanding of the right to individualized sentencing. The trial court failed to ensure a fair and reliable proceeding by refusing to consider the reasons why severance was required.

The trial court's failure to sever the defendants at the penalty phase requires reversal of appellant's death judgment.

XV. THE TRIAL COURT'S EXCLUSION OF APPELLANT'S PROPOSED LINGERING DOUBT EVIDENCE, THE PROSECUTOR'S MISCONDUCT IN ARGUING LINGERING DOUBT, AND THE ERRONEOUS JURY INSTRUCTIONS ON LINGERING DOUBT VIOLATED APPELLANT'S FEDERAL AND STATE LAW RIGHTS.

A. The Proceedings Below

At the outset of the penalty retrial, counsel for appellant Holmes informed the trial court that he intended to present evidence of lingering doubt. The prosecution acknowledged that lingering doubt is a defense at the penalty phase and that to establish such a defense defendants would be required to call the necessary witnesses. (64 RT 6315-6316.) Codefendants McClain and Newborn similarly informed the court that they would present evidence of lingering doubt. (64 RT 6314; 65 RT 6377.)

In the middle of opening statement on codefendant Newborn's behalf, when his counsel announced his attention to present evidence "directed to the concept of lingering doubt," the trial court interrupted and held a hearing out of the presence of the jury regarding the permissible scope of lingering doubt evidence. Counsel for Newborn pointed out that the prosecution spent most of the morning discussing the underlying facts and circumstances that led to the conviction of the defendants and because of that defendants were entitled to argue that between reasonable doubt which is sufficient for a conviction there is lingering doubt which

may be sufficient to prevent execution. (65 RT 6377-6378.)[112]

The trial court directed all counsel to file trial briefs. (65 RT 6383.) [113]

The prosecution presented extensive guilt phase evidence including and large transcripts of codefendant McClain's guilt phase testimony, testimony of three medical examiner's, a fire arms examiner, paramedic and law enforcement personnel who responded to the Hodges crime scene, the child whose party the victims attended before they were killed, a security guard at Huntington Memorial Hospital, Gabriel Pina, who purportedly identifed McClain and Holmes at the crime scene, people who lived near the crime scene, "gang expert," testimony of children who attended and left the party with the victims, and numerous photographs of the deceased victims. (66 RT 6415-6490; 67 RT 6511-6558, 6581-6583, 6592-6645; 68 RT 6733-6766; 69 RT 6865-6889, 6909-6921, 6966-6985; 74 RT 7373-7377, 7383-7384.)

During cross-examination of Pina, when he was called as a witness by the prosecution, codefendant McClain was permitted to question Pina regarding is identification of the individual identified at the guilt phase to be Holmes. (66 RT 6634-6641.)

At the conclusion of codefendant McClain's cross examination, counsel for

---

[112] Certainly, lingering doubt may have been a factor in the previous jury's inability to reach a verdict.

[113] The prosecution filed a trial brief on October 2, 1996. Appellant Holmes filed a trial brief on October 7, 1996. (8 CT 2134, 2141.)

Holmes informed the court that he had some cross examination a substantial number of questions that went outside the scope of the direct examination by the prosecution. After an unreported conference, Pina's prosecution testimony was concluded and he was placed on call. (67 RT 6645-4456.)

At the conclusion of the prosecution's case, appellant Holmes was permitted to call Pina, and law enforcement personnel whose testimony dealt directly with Pina's identification. (71 RT 7064, 7136, 7157, 7162.) Codefendant Newborn was permitted to call officer Korpal, who testified as to the times of reports of shootings in the vicinity of Blake Street. Codefendant McClain was precluded from presenting expert eyewitness evidence and from calling severed codefendants Bailey and Bowen. (69 RT 6852-6853; 71 RT 7101-7102.) The trial court commented:

> Court: I don't find in this case that identity is an issue at this time in a case where you have been found guilty of three counts of murder, special circumstances were true, five counts of attempted murder. We are in the penalty phase and the court is not even sure about lingering doubt. The court has read the cases that counsel have given me. I'm not even sure that the prosecution has to put much forward on that. Since you opened the door a little bit and I told Mr. Jones in his opening statement I would allow some, I am hung out to dry here. Same thing with you Mr. Nishi... I don't find identity is an issue in this. I am not going to do it. (69 RT 6853.)
>
> And later,
>
> Court: It goes again to lingering doubt, which this court has repeatedly said I have not made a decision. (72 RT 7191.)

However, the trial court did make a decision which ultimately restricted the defendant's ability to present evidence of lingering doubt . The court's ruling were

based on its finding that certain evidence was not at issue – such as identity (69 RT 6853) – and that therefor the evidence could be limited under Evidence Code section 352. (72 RT 7254.) The trial court further found the evidence was not timely. (72 RT 7255.)

Following the penalty phase testimony, the District Attorney was permitted over defense objection to argue the lack of evidence supporting any lingering doubt.

> Myers: And you may hear an argument about lingering doubt.... But ultimately has there been any evidence to indicate that these defendants were anywhere but here on Halloween night? Has there been anything to cause a doubt that lingers? Has there been anything to say somewhere, somehow there is some other evidence that the most heinous crime in the history of Pasadena was misinvestigated, was bungled, that there was no delay in reaching a judgment in this case, that the prior jury had convicted these defendants did so in an unfair fashion? There is only one thing ever that has been proven beyond a lingering doubt in any courtroom, and in this case that one thing is that these kids aren't going to be trick-or-treating this Halloween. They are not coming back. That has been proven beyond a lingering doubt. We have given them the opportunity to present evidence to show that they weren't there, but no such evidence has been presented. (74 RT 7371 emphasis added.)

Codefendant McClain immediately objected, stating that he was not given the opportunity to present such evidence. (74 RT 7372.) Counsel for appellant Holmes added that the defense has no burden. (*Ibid.*) The prosecutor responded, "They have no burden, but they have the opportunity." (*Ibid.*) The trial court instructed the prosecutor to continue his argument.

> Myers: If they're going to try to tell these jurors... that there is a reason you should have a lingering doubt, they should give you a reason, and they haven't. And you'll receive an instruction that will be given to you by this

court, and is going to say for the purposes of this penalty phase of the trial you must accept the verdicts and findings rendered by the jury in the guilt phase of his trial. That is, you must accept that the defendant had been proved guilty beyond a reasonable doubt of three counts of murder in the first degree, five counts of willful, premeditated and deliberate attempted murder and one count of conspiracy to commit murder, as set forth in the information. The court will also tell you the guilt phase has not been retried, therefore as the penalty phase jury you must accept the guilt phase verdicts and findings. The court will also define to you what reasonable doubt is and lingering doubt. (74 RT 7372-7373.)

When describing the unreliability of Pina's testimony the following discussion occurred in front of the jury:

Nishi: But what did he tell you during this trial? He told you something completely different, something that I had never heard before, something no one in this court room heard before –

Myers: Well, objection.

Court: Sustained. Mr. Nishi said "the first trial." There is no first trial. It is a prior proceeding on the guilt phase. The defendants were found guilty and the special circumstances were found to be true. This is the penalty phase.

Nishi: I thought I did bring it out.

Court: No, you did not, sir.

Nishi: Well, Mr. Pina did say that he ran down the street and hid behind some type of tree. And I think he pointed to this particular area.... We know he didn't tell that to Detective Ireland; we know he didn't say that in the grand jury; we know he didn't say that during the first trial. Should he be believed? Do you have enough confidence in his ability to recollect so that you could vote death for someone?

Myers: That mistakes their duty.

Nishi: Your Honor, that is something that they can consider.

Myers: The conviction was based not entirely on Mr. Pina's testimony.

> Court: That is the issue. Lingering doubt – your argument is lingering doubt as to a particular witness. The trial had many witnesses, circumstantial evidence. In here that. They had a mini trial of just some witnesses. You can argue only that point that is all they heard. (74 RT 7453-7454.)

Codefendant McClain's attempts to profess his innocence and argue lingering doubt were repeatedly denied. (74 RT 7418-7441; see too Argument XIV.)

After argument, counsel for appellant Holmes (joined by McClain) objected on the record to the court's comments regarding lingering doubt noting "the jury may be misled into believing that lingering doubt no longer exists." (75 RT 7491, 7494.) The court's response clearly indicated its continued confusion regarding the admissibility of evidence of lingering doubt at the retrial penalty phase of a capital trial.

> Court: I am still not convinced lingering doubt is an issue in this case. I'm not convinced there is any law in this land that says lingering doubt from a prior jury can be brought to this jury so they have a lingering doubt. I am not convinced personally. (75 RT 7491.)

Counsel for appellant Holmes continued to express his concern:

> Nishi: The way this comment is structured it's taking away the concept of lingering doubt.

> Court: No, it is not an instruction. That is my comment on it.

> Nishi: But you are asking them to speculate on something they didn't hear....I stand by my original statement that there are no facts, facts, other than Mr. Pina connecting my client with the crime. And, again, for the record, what this instruction says is that that was only part of the evidence at trial, that there are other pieces of evidence. (75 RT 7494.)

Over the objection of the defense, the trial court instructed the jury as follows:

> Court: On the issue of lingering doubt, the court stated at the time of opening statements that I would be commenting on that concept. You will get a jury instruction on that. There are numerous comments about Mr. Pina's identification in this case. The court stated yesterday that is only part of the evidence in the guilt phase. There is direct and circumstantial evidence and there were guilty verdicts. Therefore, you should not speculate as to what evidence the jury and the guilt phase based its verdicts on. For the purposes of your duties in his trial he must accept the fact that there was evidence presented beyond a reasonable doubt to convict the defendants of the charges against them. (75 RT 7498-7499.)

The trial court also read jury instructions, which provided in part:

> Court: The guilt phase has not been retried; therefore as a penalty phase jury, you must except the guilt phase verdicts and findings... Reasonable doubt is not at issue in the penalty phase; the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt... Lingering doubts as to guilt may be considered as a factor in mitigation. A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the juror a reasonable doubt. (8 CT 2171-2172; 75 RT 7503-7505.)

The day after its deliberations began, the jury sent the trial court some questions. The jury asked, "Can the jury request testimony from the prior trial and see it?.... If so, was there any other eyewitness testimony or independent investigation?.... Also, can we see the newspaper with the photos?" (75 RT 7545.) The trial court denied the jury's requests and added:

> Court: [O]n this issue of lingering doubt, the court stated at the time of opening statements that I would be commenting on that concept. There have been numerous comments about Mr. Piña and his identification in this case. As the court stated yesterday, that was only part of the evidence at the trial of the guilt phase. There are other types of evidence, including direct evidence and circumstantial evidence. Therefore, you should not

speculate as to what evidence the jury in the guilt phase based its verdicts on. For purposes of your duties in his trial it must accept the fact that there was sufficient evidence beyond a reasonable doubt to convict the defendants of the charges against them. Secondly, as to one of your special jury instructions... I will reread it for you. It says: for the purposes of the penalty phase of the trial you must except the verdicts and findings rendered by the jury in the guilt phase of the trial. That is, you must except the defendants have been proved guilty beyond a reasonable doubt...[T[he reasonable doubt of guilt and truthfulness of the charges... shall not be re-examined by this jury, you. The guilt phase has not been retried. Therefore, as a penalty phase jury you must accept the guilt phase verdicts and findings... lingering doubt as to guilt may be considered as a factor in mitigation. The lingering doubt, is defined as a doubt, however slight, which is not sufficient to create in the mind of a juror a reasonable doubt. (75 RT 7545-7548.)

The jury deliberated for nearly 3 days before it returned to judgments against the defendants. (75 RT 7552-7555.)

B. The Trial Court Erroneously and Prejudicially Excluded Evidence of Lingering Doubt

In a capital penalty phase, the defendant has state law and federal constitutional rights to present and havew the sentencer consider all relevant mitigating evidence including that not enumerated by statute. (U.S. Const., 6th, 8th, & 14th Amends.; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114; *Lockett v. Ohio, supra,* 438 U.S. 586, 604.) Under state law only statutory factors in aggravation are allowed, but mitigation is broad in scope. Factor A of section 190.3, the circumstances of the offense may be aggravating or mitigating.

This Court has long recognized the relevance of lingering doubt as mitigating evidence. (*People v. Blair* (2005) 36 Cal.4th 686, 750-751; *People v. Davenport* (1995) 11 Cal.4th 1171, 1193; *People v. Cox, supra*, 53 Cal.3d 618,

677; *People v. Fierro* (1991) 1 Cal.4th 173, 241-147; *People v. Terry* (1964) 61 Cal.2d 137, 145-147, overruled on other grounds.) A defendant may not be precluded from offering lingering doubt evidence or arguing its relevance in mitigation. (*People v. Cox, supra*, 53 Cal.3d at p. 677; *People v. Terry, supra*, 61 Cal.2d at pp. 145-146.) " Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible." (*People v. Terry, supra*, 61 Cal.2d at p.) Because doubt is an inherent part of the system, a penalty "jury should have before it not only the prosecution's unilateral account of the offense but the defense's version as well; the jury should be afforded the opportunity to see the whole picture..." (*Id.,* at p. 141.)

"If the same jury determines both guilt and penalty, the introduction of evidence as to defendant's asserted innocence is unnecessary in the penalty phase because the jury will have heard that evidence in the guilt phase. If, however such evidence is excluded from the penalty phase, the second jury necessarily will deliberate in some ignorance of the total issue." (*Id.*, at p. 146.)

The Terry Court went on to note:

> "Section 190.1 specifically sanctions the presentation of evidence as to "the circumstances surrounding the crime ... and of any facts in ... mitigation of the penalty." This language can hardly exclude defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty. Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting to the defendant the opportunity of presenting his claim of innocence. " (*Ibid.*)

For these reasons, when a capital defendant has separate guilt and penalty phase juries, he must be "able to introduce to the penalty phase jury guilt evidence intended to show a lingering doubt." (*People v. Hawkins* (1995) 10 Cal.4th 920, 967; *People v. Davenport, supra*, 11 Cal.4th 1171, 1193, *Terry, supra*, 61 Cal.2d at p. 146.)

In *Oregon v. Guzek* (2006) ___ U.S. ___, 126 S.CT 1226, 1230-1231, United States Supreme Court held that states may limit the introduction of lingering doubt evidence that was available but not introduced at the defendant's guilt phase. That court noted that Guzek would not be prejudiced because Oregon law ensured a defendant his right to present to the jury all the evidence of innocence from the original trial. That court did not resolve whether a capital defendant has an Eighth Amendment right to introduce evidence of residual or lingering doubt at the capital penalty phase. Nor did it determine whether the defendant was entitled to introduce the evidence to impeach witnesses called by the government at penalty phase. (*Id.*, at pp. 1211-1233.) The court restated that the Eighth Amendment insists on both the reliable capital penalty determination and the right to a sentencing jury able to consider and give full effect to mitigating evidence about the defendant's character or record or the circumstances of the offense. (*Id.*, at p. 1232 citing *Penry v. Lynaugh, supra,* 492 U.S. 302, 328.)

In the instant case, the prosecution's case against Holmes rested on a single unreliable witnesses testimony and the statement of a witness with less a

than clean background and an incentive to lie. And while the prosecutor was permitted to pick and choose among the guilt phase evidence and present what ever it wanted, the defense was permitted to present only the testimony of Pina and Korpal. The court's error in denying codefendant McClain's right to present expert eyewitness testimony prejudiced appellant Holmes. Appellant had called Kathy Pezdek, Ph.D., at the guilt phase as an expert in memory and eyewitness identification to help the jury assess the credibility of prosecution witness Gabriel Pina. As discussed above, Pina was the only witness who claimed to have seen Holmes at the scene of the crime and his testimony -- which continued to evolve and become more elaborate, more detailed, and more unbelievable – ultimately included was that he saw appellant Holmes holding a gun. This was the only evidence that would have led to a true finding of personal use of a weapon, a fact -- highlighted by the court in its comments that the jury should consider the verdicts as proof of guilt – which was undoubtedly was considered by the penalty jury to be an important factor in weighing whether appellant should receive a death sentence. [114] At the very least, the trial court should have distributed to the jury transcripts of Dr. Pezdek's guilt phase testimony.

The trial court's denial of the defendants' right to present eyewitness

---

[114] By comparison, appellant Holmes' personal history, as presented here, was more sympathetic than that of either Newborn or McClain and his criminal history was far less serious -- virtually nonexistent. The sentencing jury must have placed great weight on the fact that the prior jury had found appellant to be one of the actual killers in determining appellant deserved the death sentence.

identification evidence is particularly confusing in light of the fact that it permitted some defense challenge to Pina's identification. As noted above, the trial court was clearly confused asked to the parameters of evidence of lingering doubt which was admissible. It arbitrarily permitted some, as in to directing cross examination of Pina, but not other evidence which would have assisted the jury in evaluating Pina's identification testimony. Then, having put the defense in the impossible position of presenting only a portion of the lingering doubt defense, it commented to **and** instructed the jury that there was other evidence besides Pina's testimony of appellant's guilt.

The trial court's denial of appellant's right to present a complete defense at the penalty phase deprived appellant of compulsory process, of a fair and reliable penalty determination, of equal protection under the law, and his right to due process.

C. The Prosecutor Committed Misconduct

When he argued to the jury the lack lingering doubt evidence, the prosecutor committed misconduct.

A prosecutor may not use "deceptive or reprehensible methods to attempt to persuade... the jury" to impose death. (*People v. Avila* (2006) 38 Cal.4th 491, 610.) To sell may render in the penalty trial fundamentally unfair under the Due Process Clause of the Fourteenth Amendment. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-647.)

The prosecutor's goal is not to convict, but to seek the truth. (*People v. Superior Court* (Greer) (1977) 19 Cal.3d 255, 266; ABA Code of Professional Responsibility, Ethical Consideration 7-13.) The U.S. Supreme Court has held that:

> "The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor. . . . But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. U.S.* (1935) 295 U.S. 78, 88 79 L.Ed.1314, 55 S.Ct. 629.)

At argument, the prosecutor may draw inferences from the evidence, however, the prosecutor may not misstate, mischaracterize, or go beyond the admitted evidence given at trial. (*U.S. v. Marques* (9th Cir. 1979) 600 F. 2d 742, 749; *U.S. v. Reinsdorf* (9th Cir. 2000) 210 F. 3d 387; *U.S. v. Carrillo* (9th Cir. 1994) 16 F.3d 1050; *People v. Avena* (1996) 13 Cal. 4th 394, 420; *People v. Purvis* (1963) 60 Cal.2d 323, 343.)

In this case, the prosecutor was permitted to argue that the defendants' had given the jury no reason to doubt their guilt; that the guilt phase was not retried; and that "for the purposes of this penalty phase," it "must accept the verdicts and findings rendered by the jury in the guilt phase of the trial." (74 RT 7372.) In short, he exploited the erroneous ruling of the trial court to persuade the jury it must assume the worst about the circumstances of the offense in order to

gain an unfair advantage and receive a death verdict at the expense of the individualized and non arbitrary sentencing to which appellant was entitled.

During his argument against death, whenever he attempted to persuade the jury that they should consider a lingering doubt as to Holmes' guilt, counsel for Holmes was repeatedly interrupted by protection objections that were sustained by the trial court. (74 RT 7443, 7444, 7451, 7452) The court repeatedly admonishment that there was more evidence, circumstantial and direct which proved appellant's guilt. (74 RT 7444, 7452.) The reprehensible misconduct of the prosecution, aided by a trial court with no interest in the reliability of the verdict must be condemned by this Court.

D. Reversal is Required

Each of the errors pertaining to appellant's lingering doubt defense prejudiced him. Moreover, each error compounded the impact of the others. The trial court excluded relevant, admissible, and crucial lingering doubt evidence and deprive the jury of the evidence introduced at the guilt phase. Then, the prosecution untruthfully argued that the defense had an opportunity to present such evidence. The trial court instructed the jury that while it could consider lingering doubt, it had to assume that sufficient direct and circumstantial evidence was presented at the guilt phase. Appellant maintains the state cannot prove that the errors individually or in combination was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 381 U.S. 18, 24.)

After lengthy deliberations on guilt, the first jury was unable to reach a verdict on penalty. The penalty retrial jury also engaged in lengthy deliberations and requested evidence from the guilt phase. The death verdicts must be reversed.

XVI. THE TRIAL COURT'S VIOLATED APPELLANT'S FEDERAL AND STATE LAW RIGHTS IN PERMITTING HIS JUVENILE ADJUDICATION FOR WEAPON POSSESSION TO BE OFFERED IN AGGRAVATION.

A. The Proceedings Below

On July 18, 1994, the district attorney provided written notice that it intended to offer an August 3, 1990, Penal Code section 12031, carrying a concealed weapon violation in aggravation against appellant Holmes. (7 CT 1746.)

On January 19, 1996, at the hearing on defendants' motions to exclude incidents in aggravation, counsel for Holmes argued the concealed weapon incident occurred when Holmes was a juvenile, was remote, more prejudicial than probative, and did not constitute an incident involving violence or the threat of violence. (50 RT 5071-5072.) As an offer of proof, counsel stated that when asked why he had the weapon, Holmes indicated he had been robbed by a gang member and that he had the weapon for his own protection. (50 RT 5072.)

In addition to disputing remoteness, the prosecutor offered as further grounds of relevance that Holmes had "the misfortune to have been found to have personally used a weapon to kill the victim in this case, and that [was] something he [was] going to have to deal with in the penalty phase." (50 RT 5073.) Appellant's motion to exclude the incident was denied. (50 RT 5076.)

At the original penalty trial and the retrial, the prosecution presented the testimony of Pasadena Police Officer Tory Riley. Riley testified that on August 3, 1990, that while on duty at a carnival at Jackie Robinson Park he was notified by

someone who saw appellant Holmes with a gun. On approaching Holmes, Riley saw the handle of a gun protruding from his pant pocket. A loaded blue steel revolver was recovered and Holmes was arrested. Holmes was not seen to threaten anyone with the gun and did not exhibit the gun in a rude or threatening manner. Holmes was cooperative and did not attempt to evade police. Holmes was a juvenile at the time of the incident. (68 RT 6796-6798.)

During his opening statement, the prosecutor infomed the jury that Holmes had "a conviction or was caught with a gun at Jackie Robinson Park in Pasadena in 1990." (65 RT 6371.) In closing, he argued, "Mr. Holmes had on prior incident in which he was caught with a gun. That's a crime of implied violence. That was the gun at the park, carnival, Jackie Robinson Center." (74 RT 7386.)

B. Applicable Law

Evidence which is not relevant to a statutory factor in aggravation is inadmissible under state law. (*People v. Boyd* (1985) 38 Cal.3d 762.) Penal Code section 190.3 (b) permits evidence of "criminal activity... which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code §190.3.)

Although juvenile adjudications do not qualify as prior convictions under section 190.3, factor (c), and may not be admitted during the penalty phase, evidence of juvenile criminal conduct may be considered as an aggravating factor. Prior violent juvenile misconduct, regardless of conviction, may be admitted as

evidence of "criminal activity... which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code §190.3 (b); see too *People v. Burton* (1989) 48 Cal.3d 843, 862.)

"A threat of violence which is not in itself a violation of a penal statute is not admissible under factor (b)." (*People v. Boyd, supra*, 38 Cal.3d at 776.) Likewise, a violation of a penal statute which did not constitute the use or attempted use of force or violence or the express or implied threat to use force or violence is also inadmissible under factor (b).

In *People v. Boyd, supra*, this Court held that evidence of escape attempt that did not involve the use of force or violence against persons with not within the scope of criminal act to the contemplated by factor (b), and was therefore inadmissible. (*Id.*, at p. 776-777.) In so holding, this Court rejected an argument the term "force or violence" could be construed to mean a violent injury to property, such as the removal of a metal grating to an air vent in that case." (*Ibid.*)

In *People v. Jackson, supra,* 13 Cal.4th 1164, this Court discussed Jackson's contention that the introduction of evidence of the seizure of a loaded .38 caliber revolver in Jackson's suitcase as factor be evidence was error. This Court was persuaded that the factual circumstances surrounding the possession, i.e.,the fact that defendant was an escaped prisoner fleeing from a murder charge at the time he was discovered with a gun, that the possession could be said at the very least to have been undertaken with an implied threat of force or violence. (Id.,

at p. 1235.) This Court reiterated however "firearm possession is not, in every circumstance, an act committed with actual or implied force or violence." (Id., at p. 1235.)

In *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589, this Court held that the defendant's possession extra razors and razor blades *while in custody* at the California Youth Authority was unlawful and involved an implied threat of violence. Each of the three cases cited by this Court in support of this position (*People v. Ramirez* (1990) 50 Cal.3d1158, 1186-1187; *People v. Lucky* (1988) 45 Cal.3d 259, 291-292; *People v. Harris* (1981) 28 Cal.3d 935, 962-963), involved possession of a weapon by the defendant while *in custody* – circumstances that this Court has repeatedly found sufficient to support a finding of *implied* threat of violence because the possession of a weapon in a custodial setting raises serious concerns specific to that setting. In every case following *Tuilaepa*, except the Jackson case, in which the defendant was an escaped ex felon who had just committed a rape, only where the defendant is in custody, whether it be state prison, county jail, or the California Youth Authority, does possession of the weapon rise to the level of a crime involving an implied threat of violence. (See *People v. Hines* (1997) 15 Cal.4th 997, *People v. Smithey* (1999) 20 Cal.4th 936, *People v. Guiterez* (2002) 28 Cal.4th 1083, *People v. Nakahara* (2003) 30 Cal.4th 705, *People v. Pollock* (2004) 32 Cal.4th 1153, *People v. Jurado, supra*, 38 Cal.4th 997; *People v. Lewis and Oliver* (2006) 39 Cal.4th 1053.)

In the instant case, appellant Holmes was not in custody and he was not an ex felon on the run or otherwise. He was merely standing in public at a carnival, with the weapon concealed in his pocket. The activity engaged in by appellant Holmes, carrying a concealed weapon, may have been a violation of a penal statute but under the facts here it did not constitute the use or attempted use of force or violence or the express or implied threat to use force or violence.

C. Reversal is Required

On appeal, only where there is substantial evidence from which the jury could conclude beyond a reasonable doubt that violent criminal activity occurred, should a claim that the challenged evidence does not satisfied the "crime" and or "violence" requirement of factor (b) succeed. (*People v. Boyd, supra*, 38 Cal.3d at p. 772-778.) Here, the jury could not conclude beyond a reasonable doubt, that appellant's mere possession of a concealed weapon, some six years earlier while he was a juvenile attending a carnival, was a crime which involved a threat of violence.

Moreover, the prosecutor's characterization of appellant's activity during its closing argument – as a "conviction" -- would have contributed to a jury's use of this incident as aggravation. Finally, by the prosecution's own offer of proof to the court the prejudice in permitting this incident to go before the sentencing jury was enhanced by the very fact that appellant had been found to have personally used a firearm during the commission of the instant offenses.

XVII. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Inter-Case Proportionality Review Is Constitutionally Required

Twenty-nine of the thirty-four states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726]." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198, 96 S.Ct. 2909, 49 L.Ed.2d 859.) Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review[TTT]

[TTT] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen.

Section 190.3 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 sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it; the prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries is strictly the product of this Court.

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192, citing *Furman v. Georgia, supra*, 408 U.S. at 313 [White, J., conc.].) This failure also violates the

---

Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).
See also *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41, 51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

Comparative appellate review is not required by the Eighth Amendment "where the statutory procedures adequately channel the sentencer's discretion." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 306, 107 S.Ct. 1756, 95 L.Ed.2d 262, citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29.) Comparative review is therefore necessary under the 1978 law to prevent the "wanton" and "capricious" imposition of the death penalty and thus to ensure that the state statutory scheme is in compliance with the requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See generally, *Proffitt v. Florida* (1976) 428 U.S. 242, 260.)

This Court has rejected the argument, holding that a defendant must prove by other means that a death statute operates in an arbitrary and capricious manner. (*People v. Crittenden* (1994) 9 Cal.4th 83, 157.) Comparative appellate review, however, is the most rational means, if not the only effective means, by which to demonstrate that the scheme as a whole is producing arbitrary results. That is why 90% of the states sanctioning the death penalty require intercase review.

Appellant requests this Court to conduct a proportionality review, like the Florida supreme court does, which would mandate a reversal of the death penalty

in his case. In *Woods v. State* (Fla. 1999) 733 So.2d 980, 990, the Florida Supreme Court that proportionality review arises in part by necessary implication from the mandatory, exclusive jurisdiction [it] has over death appeals. After finding the cold, calculated and premeditated murder aggravator was not supported by the evidence, leaving only the aggravator of prior crime of violence which was predicated on contemporaneous shooting of the murder victim's husband, the Florida Supreme Court concluded that the death sentence was disproportionate in that case, in part because the defendant "suffers from borderline intellectual functioning due to an I.Q. of only seventy-seven." (*Woods v. State*, *supra,* 733 So.2d at 992; see also *Snipes v. State* (Fla. 1999) 733 So.2d 1000, 1007-1009.) Similarly, in light of appellant's sympathetic life history and the lack of evidence of guilt, appellant does not deserve the ultimate penalty. For all of the foregoing reasons, appellant submits that proportionality review is both feasible and a sine qua non of the constitutionality of the Briggs Initiative.

B. The California Sentencing Scheme Violates The Equal Protection And Due Process Clauses Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

Appellant is entitled to equal treatment with other inmates convicted of crimes occurring at the same time as those of which he has been convicted, i.e., the benefit of a determination of whether his "sentence is disparate in comparison with the sentences in similar cases." (Pen. Code § 1170(f).) Since, under the Fifth and Eighth Amendments, capital defendants are entitled, if anything, to more

rigorous protections than those afforded non-capital defendants (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836) -- and, since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir.1990) 897 F.2d 417, 421) -- intercase proportionality review is required here. Failure to provide persons sentenced to death with the same proportionality review given to all other persons sentenced to California's state prisons also violated appellant's right to substantive due process, which requires that significant benefits -- here, life itself -- not be arbitrarily withheld from either individuals or classes of convicted defendants.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not

create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra,* 17 Cal.3d at 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 86 L.Ed. 1655, 62 S.Ct. 1110.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be more strict, and any purported justification by the State of the discrepant treatment must be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *People v. Prieto, supra*, 30 Cal.4th at 275, this Court found that "the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." Similarly, in *People v. Snow, supra*, 30 Cal.4th at 126, fn. 32, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another:

The final step in California capital sentencing is a freeweighing of all the

factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.

If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 442, subd. (e) provides:

> The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies on basic procedural protections are

skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. Because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, however, the Court's reasoning was necessarily flawed.

In *Allen*, this Court held that no equal protection problem arises from section 1170(f). Appellant begs to differ. First, the Court held that, if a disparity was found to exist, it would be unseemly for a judge to second-guess what the jury would do if confronted with the disparity. (*Id.* at 1286-1287.) Appellant submits that, in the face of a disparity -- objective evidence of a substantial possibility that the defendant was sentenced to death for arbitrary or impermissible reasons -- concerns regarding the role and feelings of the jurors must be secondary. Moreover, jurors are not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in

prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

Second, the *Allen* Court stated that, because death and life without the possibility of parole are the only possible sentences for a capital offense ["the range of possible punishments narrows to death or life without parole"], a death sentence would be in the "normal range" no matter what kind of disparate treatment was shown. (*Id.* at 1287.) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court:

> "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].)

Finally, the Court held that the normative nature of the jury's decision to impose a death sentence makes it more difficult to assess the reasons for a disparity than under the determinate sentencing law. (*People v. Allen*, *supra,* 42

Cal.3d at 1287.) Appellant respectfully suggests that a more likely reason for any such difficulty is the fact that the capital sentencer, unlike the non-capital sentencer, is not required to state reasons for its sentence choice. The fact that this Court has been able to conduct harmless error review for penalty phase errors in so many cases since *Allen* was decided, moreover, indicates that the Court -- much more so than it believed possible in *Allen* -- in fact has the capacity to understand (or make a respectable guess at) the reasons a particular jury imposed a sentence of death. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 261.) Moreover, disparate sentence reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335.)

Moreover, jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp, supra,* 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia* (1977) 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861) or offenders (*Enmund v. Florida, supra,* 458 U.S. 782.) Juries, like trial courts and

counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp, supra*, 481 U.S. at 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes. The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

California does impose on the prosecution the burden to persuade the

sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the scrutiny that should be applied by this Court when a fundamental interest is affected. Thus, appellant's death sentence must be reversed.

C. Because Intra-Case Proportionality Review Is Constitutionally Required, Appellant's Constitutional Rights Were Violated By The Failure Of The Jury And The Trial Court To Consider In Mitigation The Fact That Bailey and Bowen both Received Preferential Treatment which included not having to face the Death Penalty

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 [plurality].)

Soloman Bowen and Aurelius Bailey were arrested for the same crimes as appellant. The evidence in this record of Bailey's and Bowen's involvement indicates that each of these individuals had greater culpability if appellant Holmes had any at all. Pursuant to guilty pleas, Bailey and Bowen received minimal sentences. The gross disparity between the death sentence given to appellant

and Bailey and Bowen suggests the decision to execute appellant was based not on reason but on improper considerations.

While the Supreme Court has held that the Eighth Amendment does not require cross-case comparisons of the penalties imposed on similar defendants in similar cases, the Court specifically left open the question of whether a state must consider intra-case proportionality. (*Pulley v. Harris* (1984) 465 U.S. 37, 42, fn. 5.) The Court also left open the possibility that a capital sentencing system could be "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at 51.)

Requiring intra-case proportionality is consistent with the Supreme Court's clear stance regarding capital sentencing: "If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460 & fn.7, 104 S.Ct. 3154, 82 L.Ed.2d 340 [citations omitted]; see *Penry v. Lynaugh, supra*, 492 U.S. at 319.)

In *Enmund v. Florida, supra,* 458 U.S. 782, 797, 73 L.Ed.2d 1140, 102 S.Ct. 3368, the Supreme Court ruled that identical treatment of robbers, who killed victims, and the accomplice, who did not kill or attempt to kill and did not intend to participate in or facilitate murder, and attributing to the accomplice the culpability of those who killed the victims, was impermissible under Eighth Amendment for

purposes of imposing the death penalty.

In *Parker v. Dugger* (1991) 498 U.S. 308, 314-315, 112 L.Ed.2d 812, 111 S.Ct. 731, the United States Supreme Court concluded that there was "no question" the defendant had presented valid nonstatutory mitigating evidence in a case in which the defendant's attorney "emphasized to the jury that none of Parker's accomplices received a death sentence (and the defendant's accomplice), who admitted shooting (the victim), had been allowed to plead guilty to second degree murder." The Court commented: "[E]very court to have reviewed the record here has determined that the evidence supported a finding of nonstatutory mitigating circumstances. . . . We agree." (*Id.* at 314-315; but see *People v. McDermott* (2002) 28 Cal.4th 946, 1004-1005 [rejecting *Parker v. Dugger* argument]; *People v. Dyer* (1988) 45 Cal.3d 26, 70; see also *People v. Bemore* (2000) 22 Cal.4th 809, 857-858 [sentence received by accomplice is not constitutionally or statutorily relevant as factor in mitigation]; *People v. Riel* (2000) 22 Cal.4th 1153, 1198 ["[t]he punishment meted out to a codefendant is irrelevant to the decision the jury must make at the penalty phase: whether the defendant before it should be sentenced to death"].)

Appellant Holmes was prejudiced by the failure of the jury and the trial court to consider the fact the prosecutor extended beneficial plea bargains to Bailey and Bowen. That the system failed to avail the sentencer of this knowledge made the determination of appellant's penalty unfair and unreliable. (See Pen. Code §

190.3(j) [in "determining the penalty, the trier of fact shall take into account . . . (j) "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"].)

Thus, the court and the jury's failure to consider Bailey and Bowen's pleas denied appellant the benefit of factor "j" and his 8th and 14th Amendment rights to jury consideration of any valid mitigation.

XVIII. IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS, CALIFORNIA GIVES INDIVIDUAL PROSECUTORS UNBOUNDED DISCRETION TO DECIDE IN WHICH SPECIAL-CIRCUMSTANCE MURDER CASES THE DEATH PENALTY WILL BE SOUGHT

Under California law, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. This Court has held such delegation of power constitutional. (*People v. Crittenden* (1994) 9 Cal.4th 83, 152.) Appellant Holmes requests that the question be reconsidered.

First, as Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, so empowering prosecutors creates a substantial risk of county-by-county arbitrariness. There can be no doubt that, under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. "Capital punishment [must] be imposed . . . with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1981) 455 U.S. 104, 112.)

Second, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race, economic status and the fact that one of the victims was an employee of the District Attorney. To seek the death penalty on the basis of "factors that are constitutionally impermissible . . ., such as . . . race," violates the

Fifth, Eighth, and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 885.)

Further, under this Court's expansive interpretation of the lying-in-wait theory of first-degree and special-circumstance murder (*People v. Morales* (1989) 48 Cal.3d 527, 557-558) prosecutors are free to seek the death penalty in the vast majority of murder cases. The latter fact enhances the potential for abuse of the unbridled discretion conferred on prosecutors under the law.

Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. 280, 303, the arbitrary and wanton prosecutorial discretion allowed by the California scheme -- in charging, prosecuting and submitting a case to the jury as a capital crime -- is contrary to the principled decision making mandated by the Fifth, Eighth, and Fourteenth Amendments. (*Furman v. Georgia, supra,* 408 U.S. 238).

The judgment of death in this case is the end result of the unconstitutional system described above. For that reason, it may not stand.

XIX. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICTS AND THE JUDGMENT OF DEATH AND DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND PENALTY PHASE

If this Court does not agree that any one guilt phase error or any one penalty phase error requires reversal when considered by itself, then it is necessary to assess their cumulative impact. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15, 56 L.Ed.2d 468, 98 S.Ct. 1930 [reversing because "cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"].)

State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-288; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Greer v. Miller* (1987) 483 U.S. 756, 764, 97 L.Ed.2d 618, 107 S.Ct. 3102; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-644, 40 L.Ed.2d 431; 94 S.Ct. 1868.)

The Ninth Circuit has repeatedly noted that while some errors standing alone may be harmless, in connection with other errors they may render a trial so unfair that reversal on the basis of cumulative error is required. (*McDowell v. Calderon* (9th Cir. 1997) 107 F.2d 1351, 1368 [although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial]; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [while individual errors may not rise to level of

reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal]; *Mak v. Blodgett, supra*, 970 F.2d at 622 [cumulative effect of several errors, including deficient performance by counsel and faulty jury instruction, justified relief in habeas corpus death penalty case]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475 ["Although each of the above errors . . . may not rise to the level of reversible error, their cumulative effect many nevertheless be so prejudicial to the appellants that reversal is warranted."].) The cumulative effect of the multitude of errors in this case violated the due process guarantee of fundamental fairness and requires reversal of appellant's conviction. Where a court finds prejudice as the cumulative result of multiple errors, the court need not analyze the individual effect of each error. (See Harris by and through *Ramseyer v. Wood, supra*, 64 F.3d at 1439; *Mak v. Blodgett, supra,* 970 F.2d at 622.)

In *People v. Hill* (1998) 17 Cal.4th 800, 845, this Court found numerous instances of prosecutorial misconduct and other errors occurring at both stages of the death penalty trial were cumulatively prejudicial. That is, the combined, aggregate, prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone.

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Wagner* (1975) 13

Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.) Additionally, in a close case, the cumulative effect of errors may constitute a miscarriage of justice. (*People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Cruz* (1978) 83 Cal.App.33d 308, 334; see *United States v. McLister* (9th Cir. 1979) 608 F.2d 785.) The combined effect of instructional errors and/or evidentiary errors may create cumulative prejudice. (*People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520; *People v. Ford* (1964) 60 Cal.2d 772, 798.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 457, 469-470.) Finally, there were cumulative errors in this case that infected the trial with unfairness requiring reversal. (See *United States v. Frederick* (9th Cir. 1996) 78 F.3d 370, 381 [cumulative effect of various constitutional errors, including improper comments by prosecutor, prosecutorial vouching and the admission of prejudicial testimony, was prejudicial requiring reversal on appeal].)

In cases where multiple errors of the same type have occurred, the appropriate standard of review is, logically, the pertinent prejudice standard. (See, e.g., *Kyles v. Whitley, supra,* 514 U.S. 419, 421-422 [cumulative effect of exculpatory evidence suppressed by the government in violation of *Brady* raised a reasonable probability that the outcome of the trial would have been different and warranted habeas relief]; *Harris, supra,* 64 F.3d at 1438 [cumulative impact of

multiple deficiencies in counsel's performance prejudiced defense]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1325, cert. denied (1995) 513 U.S. 1120 [cumulative effect of counsel's errors during the penalty phase created reasonable probability that, absent errors, result of penalty phase would have been different]; *McKinney v. Rees*, 993 F.2d 1378, 1386 (9th Cir.) cert. denied (1993) 510 U.S. 1020 [concluding that it was "highly probable" that evidence erroneously admitted throughout the trial had a "substantial and injurious effect or influence" on jury]; *Mak, supra*, 970 F.2d at 622 [performing cumulative error analysis of ineffective assistance of counsel claims under Strickland]; *Kelp v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 [cumulative effect of instances of prosecutorial misconduct denied defendant a fair trial and justified granting habeas relief]; *Walker v. Engle, supra*, 703 F.2d at 963 [cumulative effect of evidentiary errors warranted habeas relief].)

The Tenth Circuit has twice stated that, if any of the errors are constitutional errors, the *Chapman* harmless beyond a reasonable doubt standard should apply to the cumulative error analysis. (See id. at 1486 n.4, citing *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 470 n.6.) The Ninth Circuit also has cited *Rivera* for the proposition that, if any constitutional errors exist, then cumulative error analysis must be performed under the *Chapman* standard. Since appellant's case involves a number of constitutional errors, the appropriate standard for harmless error review here is the *Chapman* standard. Under *Chapman,* the state cannot establish that the cumulative effect of the multiple

constitutional errors in the guilt and penalty phases was harmless beyond a reasonable doubt. Under any standard of review, relief must be granted because the cumulative effect of all of the constitutional and nonconstitutional errors in this case clearly had a substantial and injurious effect or influence in determining the jury's verdicts in both phases of appellant's trial.

As discussed, this was in fact a close case. The evidence was entirely circumstantial. The prosecutor relied on improperly admitted evidence and improperly given instructions. Further, there was a combination of constitutional and other errors in this case. Therefore, all errors should be reviewed under a *Chapman* standard. Appellant has previously established that, in the absence of error, a juror in this case reasonably could have found appellant not guilty or that a life without parole was the appropriate sentence in this case. In light of that fact, and in light of the nature and seriousness of the errors noted above, it is both reasonably possible (*Chapman v. California, supra*, 386 U.S. at 24) and reasonably probable (*Strickland v. Washington, supra*, 466 U.S. at 693-695) that any combination of those errors adversely influenced the guilt verdicts and the penalty determination of at least one juror. It certainly cannot be found that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at 341.) The judgment of death must be reversed.

XX. CLAIMS RAISED IN THE HABEAS PETITION ARE INCORPORATED HEREIN BY REFERENCE, BUT ONLY IF THIS COURT DETERMINES THAT SUCH CLAIMS SHOULD HAVE BEEN RAISED ON APPEAL

Appellant intends to file a habeas petition related to his conviction before this Court decides this direct appeal. Appellant believes that the habeas claims are appropriately raised in the habeas petition, because they rely, at least in part, on extra-record facts or claim ineffective assistance of counsel, often for failure to properly preserve appellate issues. Thus, if this Court determines that any habeas claims should have been raised in this appeal, appellant incorporates each and every allegation based on the trial and appellate record raised in support of these claims by reference as if fully set forth herein. Moreover, appellant does not wish to burden the Court with possibly unnecessary briefing that is simply duplicative of his habeas petition.

CONCLUSION

Appellant respectfully requests this Court to reverse the judgment below and grant him a new trial, or, at a minimum, reverse the judgment of death and remand for a new penalty hearing.

Dated:
11/25/07

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Karl Holmes
By Appointment Of The Supreme Court

CERTIFICATION OF WORK COUNT
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 13

I certify that Appellant Holmes Opening Brief consists of 77,295 words.

Dated: 11/20/07

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Karl Holmes
By Appointment Of The Supreme Court

CERTIFICATION OF WORK COUNT
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 13

I certify the claims joined by Holmes From Appellant Newborn's Opening Brief consist of 17,458 words.

I certify the claims joined by Holmes From Appellant McClain's Opening Brief consist of 24,573 words.

Dated: 11/25/07

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Karl Holmes
By Appointment Of The Supreme Court

PROOF OF SERVICE

I am a citizen of the United States and am employed in the Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

APPELLANT HOLMES' OPENING BRIEF

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Modesto, CA addressed as follows:

California Attorney General
300 S. Spring 5th Fl.
Los Angeles, CA 90013

Eric S. Multhaup, Esq.
20 Sunnyside Ave., Suite A
Mill Valley, CA 94941

Kathy Andrews, Esq.
6331 Fairmount Ave.
El Cerrito, CA 94530

Debra Sabah Press, Esq.
12142A Walnut St #311
Berkeley, CA 94709

Karl Holmes K38500
San Quentin Prison
San Quentin, CA 94974

Addie Lovelace
Los Angeles Superior Court
210 West Temple Room M-3
Los Angeles, CA 90012

Thomas Nishi Esq.
1000 Wilshire Blvd #600
Los Angeles, CA 90017

I, K. Kelly, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 11/29/07 at Modesto, California.