IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

vs.

KIONGOZI JONES,

Defendant and Appellant.

CRIM. S075725

Los Angeles
Superior Court
No. NA031990-01

APPELLANT'S REPLY BRIEF

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

The Honorable Bradford L. Andrews

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE/S

FEDERAL CASES

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

PAGE/S

TABLE OF AUTHORITIES

PAGE/S

TABLE OF AUTHORITIES

PAGE/S

TABLE OF AUTHORITIES

PAGE/S

STATUTES

JURY INSTRUCTIONS

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellants view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

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I.

THE TRIAL COURT'S CONTINUOUS REFUSAL TO PERMIT FULL CROSS-EXAMINATION OF THE STATE'S WITNESSES VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND RESULTED IN A MISCARRIAGE OF JUSTICE.

The facts relevant to this issue are not in dispute. Appellant sought repeatedly to cross - examine several prosecution witnesses about the substance of a conversation between DDA Patrick Connolly (hereinafter "Connolly" or "the DDA") and witness Veronica Munguia, but the trial court in both the original trial and the retrial steadfastly maintained that the evidence was inadmissible hearsay. In both trials, the court would not permit the defense to conduct any cross-examination which would elicit the critically important words that Connolly spoke to Munguia.[1]

The trial court's refusal to allow this absolutely essential cross-examination was error. What Connolly told Munguia, which Munguia then repeated to her sister, Anna Granillo, was *not hearsay* because it was not being offered for the truth of the matter asserted. Rather, in each instance the defense sought to introduce the DDA's words only to show their *effect* on the person who heard them. In each instance, that purpose was highly relevant to the issue of appellant's guilt or innocence. Specifically, the DDA's words motivated Munguia to contact Granillo and persuade her to become a witness. Those same words, when repeated to Granillo, motivated her to completely change her story about what she had seen on the night of the crime,

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[1]DDA Connolly told Munguia that unless she could locate percipient witnesses to the shooting,"there was a possibility that the defendant would be walking out the door at the end of this trial." (6RT 1764.)

and also caused her to agree to testify falsely against appellant. What the DDA said to Munguia was thus highly relevant to the credibility of the only witness to connect appellant to the murder of Mario Lopez.

The trial court, in forbidding the defense from questioning any of the State's witnesses about the substance of this conversation, deprived appellant of his right to effectively challenge Granillo's devastating, but highly suspect, testimony. Without knowing precisely what the DDA had said, the jury could not properly evaluate Granillo's credibility. Had the jury known that she only came forward at the eleventh hour and only after learning that the prosecutor feared appellant "would be walking" unless at least one witness placed him at the scene, the jury may well have concluded that Granillo's testimony was fabricated. Moreover, Granillo's last-minute identification of appellant as having been present just before the shooting, came only *after* Granillo had been told that *appellant* was on trial for her brother's murder. The jury should have considered all of this evidence before evaluating Granillo's credibility.

Specifically, appellant had a right to present evidence that (1) Connolly told Munguia appellant might "be walking," unless they could find a witness; (2) that Munguia repeated this conversation to Granillo, and (3) that only after Granillo learned of the DDA's assessment about the weakness of the case did Granillo change her story and become the sole witness to implicate appellant in the Lopez murder. Had appellant been permitted to fully cross-examine Munguia, Granillo, and Detective Collette (who heard Munguia recount the same conversation in a defense interview), it is reasonably likely that the jury would have reached a different verdict. Without any credible witness linking appellant to the crime, appellant

may well have been acquitted, just as the prosecutor had predicted. The trial court's refusal to allow this vital cross-examination deprived appellant of his Sixth Amendment right to confront and challenge the most critical witnesses against him and, and a result, his right to a fair trial. The error resulted in a miscarriage of justice.

Respondent makes no attempt to defend the trial court's ruling that the DDA's conversation was inadmissible hearsay. Indeed, as appellant has already fully explained (AOB 44-50), the DDA's words were not being offered for their truth (i.e., that the case against appellant was weak). Rather, the defense sought to introduce the DDA's conversation only to show the *effect* of his words on Munguia. Similarly, the defense sought to introduce Munguia's conversation with Granillo (repeating the DDA's words) to show the *effect* of the same words on Granillo. The DDA's words were thus not hearsay and were admissible to show motive and effect on the hearer. (*People v. Bolden* (1996) 44 Cal. App. 4th 707-714-715 [evidence offered to show motive is not hearsay]; see also *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [evidence of declarant's statement is not hearsay when offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief].) Exclusion on hearsay grounds of what the prosecutor said to Mungia about the state of the evidence was therefore erroneous. (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1392 [court erred in excluding as hearsay evidence that was offered for limited purposes of impeachment].)

The law is also clear that appellant had a constitutional right to cross-examine each of the witnesses involved about what the DDA said, and how his statement affected their testimony. (See AOB 45-

46, citing *Davis v. Alaska* (1974) 415 U.S. 308, 316-318 [exposing a witness's motivation to lie is always relevant and jurors were entitled to make an informed judgment based on full cross-examination].) Rather than address the substantive legal argument, respondent attempts to avoid the issue altogether by simply arguing that appellant failed to preserve the issue for appeal. (RB 36-37.) However, respondent is wrong. The issue was well-preserved, pursuant to Evidence Code section 354.

The issue was argued extensively in the first trial and to a lesser extent in the retrial. However, since Judge Bradford Andrews presided over both trials, he was fully apprised of the arguments made by the parties throughout both trials. In both proceedings Judge Andrews explicitly ordered the defense to avoid any questions which would elicit the contents of the DDA's conversation. (6RT 1775; 7RT 1929-1930; 17RT 4463-4464.) As explained fully herein, the issue was well-preserved pursuant to the applicable law, Evidence Code section 354.

A. Respondent's Argument That Appellant Has Forfeited This Claim Is Based Upon The Wrong Section of The Evidence Code. Section 353 Does Not Control; Rather, This Claim Is Governed by Evidence Code Section 354.

Respondent properly cites *People v. Clark* (1990) 50 Cal.3d 583, 623-624 and *People v. Richardson* (2008) 43 Cal.4th 959, 1002, for the proposition that *objections* to evidence raised and ruled upon at a first trial must be reasserted, or deemed waived, in a subsequent retrial. This is an accurate statement of the law, interpreting California Evidence Code section 353,[2] regarding the

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[2]Section 353 provides:

(continued...)

erroneous *admission* of evidence. Under this section, the reviewing court will not set aside a verdict based on the trial court's erroneous admission of evidence unless a timely, clear and specific objection to the evidence appears on the record. Appellant has no quarrel with this requirement, or the principles set out in the *Clark* and *Richardson* cases. However, those cases and section 353 simply do not apply to the current situation, in which the error involves not the erroneous *admission* of evidence, but the erroneous *exclusion of evidence*. When evidence has been improperly excluded by the trial court, another section, Evidence Code section 354 controls. As discussed herein, appellant has fully complied with that section.

Evidence Code section 354 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, *by reason of the erroneous exclusion of evidence* unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the

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[2](...continued)

> A verdict for finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the *erroneous admission of evidence* unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice. (Evid. Code §353, emphasis added.)

questions asked, an offer of proof, *or by any other means*;

(b) The rulings of the court made compliance with subdivision (a) futile; *or*

(c) The evidence was sought by questions asked during cross-examination or recross-examination.

(Evid. Code §354, emphasis added.) This section, like section 353, requires that the trial court error result in a miscarriage of justice but, unlike section 353, does not require that an *objection* be posed. Rather, in order to preserve a claim that the trial court erroneously *excluded* evidence, the party challenging the ruling need only meet *one of the three criteria* set out in subdivisions (a), (b) and (c), *supra*. Since the statute presents these requirements in the disjunctive, appellant need only show that he complied with one of these three criteria, a showing he can easily make. In fact, as will be discussed below, appellant can establish compliance with all three of these criteria, something he need not do but which he can do, simply to show the strength of his position that the claim has been preserved.

1. Appellant's reason for wanting the jury to hear the contents of the DDA's conversation "was made known to the court" many times, in many different ways

Under subdivision (a) of Evidence Code section 354, this Court may review a trial court's decision to exclude evidence if "the substance, purpose, and relevance of the excluded evidence" was made known to the trial court either by an offer of proof, through the questions asked of the witness, or "by any other means." (Evid. Code §354, subd. (a).) Here, the evidence which appellant's counsel sought to introduce through cross-examination – the substance of DDA Connolly's conversation with Munguia – was made known to the trial court repeatedly. Trial counsel made at least two offers of

proof (1RT 197; 1RT 222) and following jury selection, DDA Connolly made his own offer of proof. (6RT 1766.)

As both parties have explained, appellant did not learn that Anna Granillo would be testifying against him until the second day of trial. (1RT 162-163.) It was at that very late hour that appellant also learned for the first time that Granillo would be completely changing the story that she gave to the police, and instead would be claiming she could identify appellant as having been at the scene of the crime minutes before the shooting. Appellant also learned that Granillo's change of heart, and her change of story, *had been the direct result of a conversation that DDA Connolly had had the day before* with Granillo's sister, Veronica Munguia.

Upon learning about this, defense counsel made a vigorous argument that appellant should be allowed to fully explore the circumstances which led to Granillo's sudden change in testimony, including a full recounting of exactly what the DDA had told Munguia about the case, its weakness, and the need to find witnesses. Defense counsel made the following offer of proof and argument:

> It is clear that Mr. Connolly went to Veronica Munguia and told her about the case, told her that he didn't have the evidence, told her he needed more evidence, needed additional witnesses. [Munguia] presents her sister [Anna Granillo.]

(1RT 196-197.) The defense also argued that this evidence was so critical that, under these new circumstances, the defense would have to "be subpoenaing the district attorney, Mr. Pat Connolly, to testify" as a witness:

> I think the jury has a right to hear how this particular statement transpired. The jury has a right to hear that Mr. Connolly went to a victim and told the victim that he didn't have enough evidence in this case. That he needed additional witnesses, and hence now you have

> the statement of the particular witness, who is completely contradictory to the statement that she gave the day of the [murder.]

(1RT 197.) A short time later in the proceedings, the defense renewed this same argument in support of the evidence:

> Your honor, I think that [the conversation] is . . . crucial . . . to the defense in that once we began this trial, the People went to a witness and said, you know, "I need more witnesses. We need more witnesses in this case," whatever he told them but – then they come up with some witness that is now the sister of two victims. She now has testimony that attempts – I think that is crucial information. I think the jury should hear that.

(1RT 222.)

Several weeks later in the proceedings, just before the start of the prosecution's case, DDA Connolly attested to the contents of his conversation with Veronica Munguia, referring to it as his own "offer of proof." (6RT 1766.) DDA Connolly, in speaking of Ms. Munguia, confirmed that on the first day of the trial,

> [s]he came in. I believe Detective Remine was also there and perhaps [Detective] Collette. [Munguia] came in. She had been subpoenaed. I spoke with her in my office *and told her that there was a possibility that the defendant would be walking out the door at the end of this trial and I needed [witnesses]* . . . . Casper and Joker . . .I told her that I wanted her to find where Casper was. If she could, call around, find out where Joker is.

(6RT 1764, emphasis added.) The DDA went on to explain that Ms. Munguia called him back that night to say she had failed to locate the witnesses he wanted "but that her sister might have some information." (*Ibid.*) The DDA quickly sent an investigator to meet with Granillo, whereupon she immediately identified appellant, who was already known by Granillo to be the defendant in the pending capital trial, as having been present at the scene just before the

shooting.

The defense's theory, that Granillo only came forward with new evidence after being told that the case might be lost, was thus confirmed by the DDA himself. Up until Granillo came forward, no one had identified appellant as having been involved in the shooting of Mario Lopez. However, after Granillo suddenly changed her story, the DDA was able to cobble together the critical testimony he needed to support a conviction. The jury should have been made aware of these obviously relevant circumstances, since they had a direct bearing on the credibility of Anna Granillo's testimony.

Although DDA Connolly admitted that this conversation had taken place, he argued that his words were inadmissible hearsay and strenuously objected to the defense revealing his words to the jury. (6RT 1766 ["Of course, there would be an objection to hearsay on all of those, which I could not even fathom not being sustained."].) Despite the defense's correct response that the words were *not hearsay* because they were only being offered to show the effect on the hearer and "the state of mind of this particular witness," (6RT 1796), the trial court ruled that the evidence would be excluded. (6RT 1775-1776; 1778.)

The trial court's ruling only allowed the defense to reveal that the DDA had met with Munguia, and that Granillo had changed her story. However, the trial court was emphatic that the defense could go no further, and specifically *ordered the defense* to refrain from asking any questions which would reveal to the jury the DDA's actual words:

> You can certainly cross-examine [Ms. Granillo] concerning the circumstances under which she is now coming forward. It is her testimony and her credibility that is at issue. . . . [To the extent] Miss Granillo's

> testimony is new or different from statements previously made. . . You can tell the jury that you expect that she will be cross-examined on those issues, and that you anticipate her testimony will be different from testimony or statements previously given. You can alert the jury to that [but]. . . . *[w]ith respect to the conversation by the People with Ms. Munguia, I don't believe that would be admissible.*

(6RT 1775-1776, emphasis added.) Minutes later, the trial court reiterated its position:

> I am going at this point in time at least absent further foundation *preclude the testimony of a conversation between Mr. Connolly and Ms. Munguia.* Evidence of that conversation *will be excluded* at this time absent further foundation with that witness.

(6RT 1778, emphasis added.) Thus, in the first trial, the trial court was made well aware of the issue regarding the admissibility of the DDA's conversation. The court had several offers of proof, including confirmation by the DDA himself, as to what appellant sought to introduce and why. Nevertheless, the trial court incorrectly adopted the prosecution's position that the words actually spoken by the DDA were inadmissible hearsay.

The link between what the DDA told Munguia, and Granillo's sudden change of story, was obviously relevant and admissible evidence and something which the defense knew had to be presented to the jury, either by subpoenaing the DDA to testify as a defense witness,[3] or by cross-examining the witnesses involved, i.e., Munguia, Granillo and Detective Collette.[4] Thus, under Evidence

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[3]On December 10, 1997, the second day of the first trial, the defense served DDA Connolly with a subpoena to testify. (1 RT 198.)

[4]Initially, the trial court expressed its agreement that the

(continued...)

Code section 354, subdivision (a), the "substance, purpose, and relevance" of the DDA's conversation with Munguia, including its repetition to Ms. Granillo, were repeatedly made known to the trial court through the offers of proof made by both the defense and the DDA himself.

While respondent insists that appellant's efforts to introduce this evidence, including the offers of proof, took place almost entirely in the first trial and therefore have no bearing on what took place upon retrial, the argument fails. First of all, Judge Andrews presided over both trials, and the trials were held just five months apart. Judge Andrews was fully apprised of what appellant sought to introduce and why. Even if the judge had never discussed the admissibility of the DDA's conversation in the retrial (but he did in fact rule again), it was apparent to all concerned that because of the lengthy discussions in the first trial, Judge Andrews considered the contents of the DDA's conversation entirely off limits.

More importantly, Judge Andrews *confirmed his position* in the

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[4](...continued)
evidence – what Connolly actually told Munguia – was relevant and admissible, even suggesting that the defense might present the evidence through stipulation:

> "With respect to the motion to call Mr. Connolly as a witness, in order to put before the jury the way in which this information came forward, I don't know that it would be necessary to call Mr. Connolly as a witness if ultimately that information may be presented to the jury. *Maybe just simply done by way of a stipulation as to how the information – when and how the information came to light* if that becomes necessary at all."

(1RT 220, emphasis added.) The trial court also confirmed that the information could be presented through cross-examination of the particular witnesses. (1RT 220.) Ultimately, however, the trial court ruled that the conversation itself was inadmissible. (6RT 1778.)

retrial, in a context that made it obvious that everyone concerned – the parties and the trial court – considered his previous order to still be in effect. In short, Judge Andrews made the same ruling in the retrial – that the DDA's conversation was inadmissible – as he had made in the original trial.

In the retrial, the defense made several failed attempts to elicit the substance of the DDA's conversation, through the examination of several different witnesses. It was apparent from the questions posed in cross-examination, that the defense wanted the jury to understand the gist of what the DDA had said, without violating Judge Andrews' previous rulings that the words the DDA used could not be uttered. For example, in cross-examining Veronica Munguia, appellant attempted to convey to the jury that Munguia had met with the DDA, and then immediately met with her sister to let her know that the DDA believed the case was weak and needed help. However, given the trial court's previous ruling, the defense did not ask Munguia *directly* what the DDA had told her, but only asked whether, after speaking with the DDA, Munguia believed the case was weak:

> Q Is it also true that as a result of that conversation with Pat Connolly, the district attorney, on December 8th, 1997, that you were of the state of mind that the reason that you needed an additional witness was because the case was weak, correct?

(14RT 3709.) However, even this attempted "end run" around the trial court's previous ruling caused the prosecutor to object, this time on the grounds that the question called for speculation. The trial court sustained the objection. (*Ibid.*)

In fact, this ruling, too, was in error. The question did *not* call for speculation since it merely asked the witness to confirm her own

state of mind (that the case was weak) after meeting with the DDA. Had the trial court permitted the defense to ask Munguia about her opinion of the case, the defense could then have asked the follow-up question – *why* Munguia was of that opinion. Munguia would have explained that DDA Connolly had specifically told her that appellant might "walk," if they were not able to locate a witness to identify him. However, even before the defense could get into that line of questioning, the trial court once again stopped appellant from pursuing any questions which appeared to be headed in that direction. Judge Andrews made clear, then and later, that he would not permit any question which would elicit the content of the DDA's conversation.

It is apparent from the record of the retrial that trial counsel was attempting to find some creative way to present the information to the jury without violating the trial court's previous order precluding this evidence. It is equally apparent that the trial court was not going to allow that to happen. When the defense approached the subject matter, the prosecution promptly objected, and the trial court just as promptly sustained the objection.

While respondent may argue that Judge Andrews never intended his earlier rulings to be applicable in the retrial and that appellant should have simply forged ahead with the same cross-examination as before, as if those orders had never been made, later rulings by Judge Andrews in the retrial make it obvious that he *did* consider his previous rulings on this issue to be applicable. Judge Andrews made it very clear that he continued to view the substance of the DDA's conversation inadmissible.

While there are several examples of the defense trying to find ways to present the evidence without violating the trial court's

rulings, the best example is found later in the retrial, during the defense's cross-examination of Detective Collette. Collette had been present when defense counsel interviewed Veronica Munguia outside of the jury's presence. During Collette's examination, the defense came close to eliciting the contents of the conversation, but once again the trial court stopped the defense from proceeding along those lines:

> Q (by defense): Do you recall Miss Munguia expressing to my office, to myself and my investigator, that she felt obligated as a result of the conversation she had with the District Attorney regarding the evidence in this case?

(17RT 4460.) When the witness asked for the question to be repeated, the prosecutor asked for a sidebar conference, complaining that the defense was "trying to move into an area where she is going to get a characterization or opinion of the district attorney as to the relative strength of the case and suggest to the jury. That's my concern." (17RT 4461.) The defense explained her strategy to the trial court:

> Your honor, where I was going to go with respect to the conversation – – [the detectives] were present. Veronica Munguia did, in fact, indicate that Pat Connolly told her that this was a weak case and, unless they got additional witnesses, that my client would be walking out the door. . . . Now a lot of that goes to state of mind. . . . It goes to the fact as to why Veronica Munguia went to her sister Anna and it brings up that whole thing. She told Anna this is a very weak case, we need somebody to come forward. Anna says, "Okay, I saw everything." It goes to that, your honor.

(17RT 4462-4463.) The defense's analysis as to why the evidence was relevant and admissible was correct, but the trial court once again took exactly the same position in the retrial that it had taken repeatedly in the first trial. Once again Judge Andrews responded:

> *I am not going to permit any questions of this witness concerning an opinion offered by Mr. Connolly concerning the strengths or weaknesses of the case. . . .* You can ask him about his interview with Miss Granillo and the rest of that, as long as we *don't get into eliciting any opinion about the case from Pat Connolly.*

(17RT 4463-4464, emphasis added.) Given the trial court's response to defense counsel's repeated efforts to present the contents of the DDA's conversation with Munguia, it is beyond dispute that Judge Andrews understood very well *what evidence* appellant sought to introduce, and *why* appellant sought to introduce it. The trial judge, however, was firm in his rulings that the evidence was inadmissible, and that the defense would not be permitted to be reveal the contents of the conversation to the jury, either in the original trial, or in the retrial.

Appellant thus fully complied with subdivision (a) of Evidence Code section 354, which requires that the appellant establish that the "substance, purpose, and relevance of the excluded evidence" be made known to the trial court through the questions asked, an offer of proof, or any other means. Appellant accomplished this by many means, including lengthy and repeated arguments in the first trial accompanied by offers of proof, but also by raising it again, through questions and argument in the retrial. In both proceedings the trial court maintained its position that the defense could not present this evidence. Appellant has preserved this issue for appeal many times and in many ways. It has not been forfeited.

2. The trial court's rulings in the first trial made compliance with the requirements of subdivision (a) futile for purposes of the retrial, but were nevertheless still met

Appellant has demonstrated in the preceding argument that he

fully complied with Evidence Code section 354, subdivision (a), for preserving this issue on appeal. However, even if this Court were to find that appellant should have repeated his offer of proof in the retrial, Evidence Code section 354, subdivision (b) relieves a party from going through such formalities if "the rulings of the [trial] court made compliance with subdivision (a) futile." Again, it is absolutely clear from this record that the trial court had no intention of allowing appellant to delve into the substance of the DDA's conversation with Munguia. When appellant approached the topic at the retrial, in cross-examination of Detective Collette, the prosecution objected, and the trial court explicitly ruled that the conversation could not be presented to the jury. (17RT 4463.) Under the circumstances, pushing Judge Andrews any further on this point would have been futile, and perhaps would have even caused the trial court to publicly scold defense counsel. Judge Andrews had made his ruling clear many times, telling trial counsel exactly what could and could not be asked of the witnesses with respect to Munguia's meeting with the DDA.

The record shows repeated attempts by the defense to work within the framework of the trial court's orders, while still affirmatively seeking ways to present the evidence through other means. Each time the defense made such an attempt, however, it was met with strong objection and unfavorable rulings by the trial court. Although the defense had made repeated attempts to introduce the evidence in the first trial, in the retrial it was apparent that the defense understood those repeated efforts would fail. Appellant sought twice in the retrial to bring in the DDA's conversation and both times appellant was stopped and ordered to refrain from that line of questioning. (14RT 3709; 17RT 4463-4464.) Nothing further was

required to preserve this argument and doing more clearly would have been futile. Appellant met the criteria set forth in Evidence Code section 654, subdivision (b).

3. Appellant sought to introduce this evidence through cross-examination

Since appellant sought to introduce the DDA's conversation through questions asked of the State's witnesses during cross-examination, appellant has also met the criteria of Evidence Code section 354, subdivision (c), which allows review of a trial court's ruling when the evidence "was sought by questions asked during cross-examination." In the retrial appellant cross-examined Veronica Munguia about the change in Granillo's description of what she had seen. Munguia confirmed that, prior to the shooting, Granillo had been inside the house, in a bedroom with another person, Gregory Sinsun. Even though Munguia herself had been shot in the leg when she ran outside to grab her child, she admitted that she could not see the shooter and that Granillo had remained inside the bedroom throughout this entire period, including before and after the shooting. Munguia also confirmed that a year after the shooting, she had had a conversation with DDA Connolly. After that conversation Munguia provided the DDA with an additional witness, namely her sister, Anna Granillo. (14RT 3707-3708.) Prior to that conversation, Granillo had not come forward as a witness, but after the conversation Munguia agreed that she was "of the state of mind that [she] needed to obtain an additional witness." (14RT 3709.)

When asked whether, after the conversation, Munguia was of the state of mind that the case was weak, the prosecutor objected on the grounds that the question called for speculation, and the trial court sustained the objection. (14RT 3709.) Although this ruling was

erroneous, it stopped appellant from asking the obvious next question ("Why did you believe the case was weak?"), a question which would have elicited the contents of the DDA's conversation. By then it was apparent that the trial court was remaining firm in its view that such evidence was inadmissible. Evidence Code section 354, subdivision (c)'s requirement that the evidence be sought through cross-examination was thus met in this case.

Similarly, when the defense cross-examined Anna Granillo, it elicited testimony from her that she had waited a full year before coming forward with the new testimony identifying appellant. On direct examination Granillo testified that she had not come forward with "the truth" about what she had seen for an entire year because she was upset and angry and she "didn't like cops." (15RT 3775.) On cross-examination, however, Granillo admitted that she had previously testified that the reason she had not come forward with her claimed identification of appellant was because she had "completely lost her memory" between December 7, 1996, the date her brother was killed, and December 8, 1997, the date she found out about her sister Veronica's meeting with the DDA. (15RT 3800-3801.)

Through these questions the defense was able to let the jury know that Granillo had originally said she saw nothing, waited a year to come forward with the new identification, and that her "lapse of memory" ended abruptly after she had learned about her sister Veronica's meeting with DDA Connolly at the start of the first trial. Presenting just those facts conformed to the trial court's ruling that it would not allow the defense to take the questions any further. It was clear from the cross-examination, however, that had it not been for the trial court's previous order, the defense would have asked

Granillo the next question, namely, "What did your sister, Veronica Munguia, tell you about her conversation with DDA Connolly?" Instead, the defense stopped short, obviously mindful of the trial court's previous rulings on this issue.

Nevertheless, when Detective Collette was being cross-examined, the defense once again attempted to inquire into the substance of the DDA's conversation, and once again, the trial court ruled that the evidence was prohibited. (17RT 4463.) Appellant attempted, through the cross-examination of three prosecution witnesses, to present to the jury the substance of the DDA's conversation. Each time the trial court consistently ruled that the evidence was not admissible and prevented the defense from continuing with that line of questioning. Appellant has thus met the requirements of all three subdivisions of Evidence Code section 354. The statute only requires a showing that appellant met one of the three criteria, in order to preserve the issue for appeal. The issue has not been forfeited.

B. The Trial Court Erred In Ruling That Munguia's "Lay Opinion" About the Strength of the Case Was "Speculative." The Question Was Proper, Did Not Call For Speculation, and Was Leading Up to The Ultimate Issue: What The DDA Told Munguia

Respondent seeks to avoid the real issue – whether the DDA's conversation with Munguia was admissible – by focusing on the trial court's ruling on a preliminary issue – whether Munguia's opinion about the case was speculative. As explained previously, defense counsel sought many times to introduce the content of the DDA Connolly's conversation with Munguia, in which he told her that appellant might be "walking" unless Munguia could locate a

percipient witness to identify appellant at the scene of the crime. After being ordered by the trial court in the first trial *not* to delve into the substance of the conversation, in the second trial the defense understandably began its cross-examination of Munguia by testing the waters with the trial court. Rather than begin by asking Munguia directly what the DDA had told her, the defense asked Munguia whether, after speaking with the DDA, Munguia was "of the state of mind that you needed to obtain an additional witness." Munguia affirmed that this was true. (14RT 3709.) The defense then followed up with the next question, whether Munguia, after speaking with the DDA, was "of the state of mind that the reason you needed to obtain an additional witness was because the case was weak." (*Ibid.*) The prosecution objected, claiming that the question called for speculation.

The question, however, was proper. It sought to elicit Munguia's *own state of mind* prior to approaching her sister. The question did not call for speculation, since Munguia would not have been speculating about her own state of mind. She was fully capable of characterizing it, and her state of mind was certainly relevant. If her state of mind was one of concern that the case was weak and that appellant might be acquitted unless a witness came forward, then that may have provided a motive for Munguia to pressure her sister to come forward and provide evidence, whether the characterization was true or not.

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In sustaining this objection, the trial court erred. Moreover, the ruling signaled to the defense that the trial court would not permit further inquiry into the content of the DDA's conversation with Munguia. This conversation was, of course, the point of the cross-examination. It was clear, however, that the trial court had no intention of changing its previous ruling regarding this evidence, and its later rulings confirmed that this was so.

Nevertheless, respondent argues that Munguia's "lay opinion" about the strength of the prosecution's case was properly excluded by the trial court. Respondent is incorrect. First of all, the prosecutor's objection – that the question called for speculation – was in error. Ms. Munguia did not need to speculate about her own view of the case. After meeting with DDA Connolly and hearing him tell her that he feared appellant "would be walking out the door" unless she could find a percipient witness, Munguia had solid reasons for believing that the case was weak. She had been told it was weak by the prosecutor. In fact, DDA Connolly feared that appellant would "walk" if a witness did not come forward and identify appellant. As of the date of Munguia's meeting with the DDA (the opening day of trial), not a single witness placed appellant at the scene of the Lopez murder.

Thus, trial counsel's question to Munguia as to whether she was of the state of mind that she needed an additional witness because the case was weak, was an appropriate question. The jury had a right to know that Munguia then had a motive to approach her sister, Anna Granillo, and convince her to come forward and testify against appellant. The question did not call for speculation; rather, it asked the witness to verify her own state of mind, after meeting with the DDA and prior to meeting with Granillo. The prosecution's

objection – that it called for speculation – and the trial court's sustaining of that objection, was in error.

Because the trial court sustained this objection, defense counsel was precluded from asking the *next* question, which would have been to inquire of Munguia as to *why* she was of the state of mind that the case was weak. Had the defense been permitted to ask the next question, the jury would have understood that DDA Connolly had in fact told Munguia that appellant would likely "walk" unless Munguia could come up with a witness to identify him. Had there been full disclosure to the jury of the circumstances underlying Munguia's conversation with the DDA as well as her subsequent conversation with Granillo, repeating what the DDA had said, the jury might well have discredited Granillo's testimony entirely. What the DDA told Munguia, and what Munguia then passed on to Granillo, was strong evidence that Granillo had fabricated her testimony at the last minute, so that appellant would not be "walking out the door" as the DDA had predicted.

Respondent frames this issue as one of "lay opinion" versus "expert opinion." (RB 37-41.) However, the point of trial counsel's question was not to elicit Veronica Munguia's "lay opinion" about the strength of the prosecution's case. The question did not seek the truth of the matter as to whether the case was weak or not. The point was that the DDA had *told* Munguia that the case might be lost, and this had an effect on what Munguia then did with that information. Munguia's opinion about the strength of the case was based entirely on what Connolly had told her. After hearing from him that the case might well be lost, unless she herself could find a witness, Munguia's opinion about the strength of the case was simply the first of a series of questions meant to show that Munguia

had a motive to influence Granillo to come forward and testify against appellant.

C. The Trial Court's Errors Were Not Harmless. The Prosecution's Own Assessment of The Case – That Without an Identifying Witness, Appellant Might Be "Walking" – Demonstrates That The State's Case Was Weak Prior To Granillo Being Persuaded to Come Forward as The Sole Witness Connecting Appellant to The Lopez Murder

The prejudice caused by this erroneous evidentiary ruling is apparent from the substance of the excluded evidence itself. DDA Connolly fully admitted that on the day the first trial was to begin, he expressed his fear to one of the victims that appellant would be acquitted of the murder unless someone came forward actually identifying appellant. The crime had taken place at night, in darkness, and not a single witness had placed appellant at the scene. In a last desperate attempt to come up with an eyewitness, the DDA summoned the victim's sister, also a victim of a gunshot wound by the same shooter, and explained the difficulty. In short, the DDA told Munguia that the case was weak. It was so weak that there was a good chance the defendant "would be walking out the door" at the end of trial.

After learning that the State's case was in trouble, Munguia set out to prop it up, by convincing someone to come forward and identify appellant. She found a willing participant in her own sister, Anna Granillo. Although Anna had confirmed many times that she had seen nothing, and could be of no assistance in solving the mystery of her brother's death, on the eve of trial, all of that changed. After being persuaded by her sister to testify, so that the man on trial would not "walk," Granillo formulated an entirely new story that, not coincidentally, included a positive identification of appellant.

The difference between a case that includes a positive identification and one that does not is so dramatic and obvious that little more need be said. Going into the first trial, the prosecutor knew he had no evidence to connect appellant to the Lopez murder and that the evidence in the Villa murder was also extremely weak.[5] The case against appellant was pieced together from beginning to end, with the flimsiest and most suspect of testimony. It was then held together with the highly prejudicial "glue" of appellant's previous history of gang affiliation. Throughout the trial, erroneous evidentiary rulings deprived appellant of his ability to show the jury that the inherent weakness of the State's case. Witnesses were coached and persuaded to identify appellant simply because he was the person sitting in the defense seat, even after having failed to identify him in the first instance.

Appellant's ability to present an effective defense to these charges was further exacerbated by the trial court's error in rejecting the testimony of appellant's expert witness – someone who could have verified that appellant was no longer an active gang member, and therefore had no motive for carrying out clearly gang-related murders. (See Argument II.) The result of these errors was that the jury was left with an entirely one-sided view of the evidence, as well as a one-sided impression of appellant, and left appellant defenseless against the State's machinery.

Appellant should have been able to fully impeach the most critical witness against him – Anna Granillo – by exposing the

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[5]Initially, the charges against appellant for the Lopez murder were dismissed after a preliminary hearing in which Jaramillo identified Melvin Sherman instead of appellant as the shooter, and Hernandez testified that he could not be sure that appellant was the shooter.

information she was fed by the prosecution just prior to her sudden and complete turnabout. The jury heard only partial information, relevant to Granillo's credibility. She admitted she had changed her story, but the jury had incomplete information as to *why* she changed her story. The prosecutor recognized, as did the trial court, that the substance of the DDA's conversation with Munguia would likely have a strong impact on the jury. The prosecutor vigorously sought its exclusion and the defense argued just as vigorously for its admission.

The trial court erred in excluding the only evidence which would have fully explained *why* Anna Granillo suddenly came forward with an entirely new story. Her purported reasons – her drinking, her loss of memory and her upset over the death of her brother – likely persuaded the jury that her new claim of being able to identify appellant, was true. However, had the jury known the whole truth, and possibly the *only truth*, that Granillo changed her testimony so that the person whom the *prosecutor believed was guilty* would not be set free, there is a strong possibility that appellant would have been acquitted of this crime, just as the prosecutor had predicted.

Appellant was deprived of Sixth Amendment right to fully confront and cross-examine the witnesses against him. In this case, his Sixth Amendment right involved the most critical witness against him – the only person who positively identified him as being present moments before the shooting of Mario Lopez. The jury had a right to know, and appellant had a constitutional right to let them know, that this witness came forward because of the information provided to her and her sister by the prosecution.

The trial court's refusal to allow appellant to present a complete defense, particularly in a capital murder case where his life

hung in the balance, stripped appellant of his right to a fair trial, to due process of law, and to a reliable guilt and penalty determination, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (*Chambers v.* Mississippi (1973) 410 U.S. 284 [right to present a defense and due process of law]; Davis *v. Alaska*, *supra*, 415 U.S. 398; *Banks v. Dretke* (2004) 540 U.S. 668, 688 [right to cross-examine prosecution witnesses to challenge credibility]; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [right to reliable guilt and penalty determinations].)

Had appellant been able to fully defend himself, by fully cross-examining the critical witness against him about the basis for her change in testimony, the State would have had no evidence against appellant with respect to the murder of Mario Lopez and the attempted murder of Veronica Munguia, and appellant would most certainly have been acquitted of those offenses, just as the DDA predicted. Respondent therefore cannot establish that the court's error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Assuming this error was not of constitutional proportions, there is still more than a reasonable probability that appellant would not have been convicted but for the trial court's interference with appellant's right of full cross-examination. (*People v. Watson* (1956) 46 Cal.2d 818.) Appellant's conviction and death sentence must be reversed and a new trial granted.

* * * * *

II.

IN PRECLUDING THE DEFENSE'S GANG EXPERT FROM TESTIFYING, THE TRIAL COURT STRIPPED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE ON THE MOST CRUCIAL ASPECT OF HIS DEFENSE

A. Introduction

The prosecution's theory was that the murders in this case were motivated by gang rivalry. The evidence of this was entirely circumstantial, since there was no direct evidence as to any particular motive at all. Because the evidence connecting appellant to these crimes was also extremely weak, it was essential to the State's case that it be able to establish, and highlight, appellant's gang affiliation, the alleged motive. To that end, gangs and gang violence, was the theme of the State's case. (See e.g., 19RT 4847 [DDA tells jury this was a "gang case; one in which gang motivation, gang retaliation, and gang intimidation permeate."].)

The record establishes that in fact the State had *no evidence* that appellant was an active gang member when these crimes took place in 1996. However, by presenting testimony that appellant had admitted his gang affiliation to police officers in 1990, more than six years before these murders, and that appellant still had gang tattoos, the State was able to raise the inference that appellant was still an active gang member. In addition, the State's gang expert, Officer Freaman Potter, testified that one of the ways he would determine that someone was in a gang was by "observing them" and that, in appellant's case, on some unspecified occasion, Potter had observed him in the company of Rolling 20's gang members. Potter was not asked to place that observation in any time frame, and the

record provides no clue as to whether he observed appellant in recent years, or in 1990, as the other officers had testified.

To counter this inference that appellant was a gang member in 1996, when the crimes occurred, the defense sought to present its own expert, Gang Intervention Counselor Robert Robinson. Robinson had excellent credentials as a gang expert, working for many years alongside local authorities to quell gang violence in Long Beach. Based upon his thorough investigation into appellant's background, including conversations with appellant, numerous interviews with other members of the community including present and former gang members, as well as Robinson's own personal observations of appellant interacting with youth, Robinson had formed the opinion that appellant was no longer an active gang member, and therefore planned to hired him as a *gang prevention outreach worker* with his program. He would have done so but for appellant's sudden arrest in this case.

The trial court ruled to exclude Robinson's testimony in its entirety, and in doing so applied the wrong legal standard. Although the trial court found Robinson had "sufficient expertise" to qualify as a gang expert, it erroneously ruled that Robinson's expert opinion could not be based upon any type of hearsay. That meant that Robinson could not rely either upon appellant's statements or on any of the statements Robinson had solicited from members of the community, as part of his investigation into appellant's background. The trial court then concluded that an opinion "based on observation alone of the defendant's interaction . . .with person[s] on the street" would be an insufficient basis for Robinson's expert opinion. (18RT 4722-4723.) It therefore excluded Robinson's testimony in its entirety.

The trial court's decision, refusing to allow Robinson to offer his expert opinion that appellant was no longer a gang member, deprived appellant of his ability to counter the heart of the prosecution's otherwise weak case. Appellant had a constitutional right to prove to the jury that he was no longer a gang member and therefore had no motive for the crimes. The trial court's erroneous ruling deprived appellant of his constitutional right to present a defense, his right to a fair trial and to a reliable guilt determination.

In its brief, respondent brief expresses no support for the trial court's faulty line of reasoning, since to do so would ignore well-settled California law. However, respondent argues that the trial court was correct nonetheless in excluding Robinson's testimony, albeit for very different reasons from the one cited by the trial court.

Respondent argues that appellant has forfeited any claim that Robinson was an expert because "appellant did not seek to have Robinson qualified as an expert." (RB 54.) Respondent also argues that the trial court found Robinson to be merely a "lay witness who did not have the required expertise to opine that appellant was no longer a gang member *based on Robinson's observations alone*." (*Ibid*, emphasis added.)

Respondent's claims are not supported by either the record or the law. The trial court's erroneous decision, that Robinson could not render an opinion based partially upon hearsay, even though he had "sufficient expertise" to qualify as a gang expert, left appellant unable to refute the most prejudicial aspect of the State's case against him – his alleged gang membership – the purported motive for the murders.

B. The State, Not Appellant, Has Forfeited Its Right to Raise Claims About Robinson's Expert Credentials. The State Never Challenged His Expert Qualifications Below

Respondent argues that appellant failed to "have Robinson qualified as an expert" (RB 54), and has therefore forfeited the right to now argue that he was an expert witness. Respondent implies that a trial court must first declare an expert "qualified" before an expert may testify to his opinion. However, that is not the law. The procedure for presenting expert testimony is controlled by Evidence Code section 720, subdivision (a), which provides:

> *A person is qualified* to testify as an expert if he has special knowledge, skill, experience, training *or* education sufficient to qualify him as an expert *on the subject to which his testimony relates. Against the objection of a party*, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(Emphasis added.) On its face, this section deems a person qualified to testify as an expert as long as he has the necessary skill, knowledge or background to inform the particular opinion in question. There is no duty to establish the expert's credentials, unless the opposing party specifically challenges those credentials by posing an objection in the trial court. Appellant has not forfeited the right to claim Robinson was his expert. In fact, it is respondent who has forfeited the right to suggest he was not.

Claims that an expert was not qualified are waived on appeal, if not raised by objection below. (*People v. Dowl* (2013) 57 Cal.4th 1079, 1087 [California Supreme Court has "long and repeatedly held that a defendant who fails at trial to object that a witness lacks the qualifications to render an expert opinion may not on appeal contest

the opinion's admissibility."]; *People v. Gonzalez* (2006) 38 Cal. 4th 932, 948-49 ["Because defendant did not challenge Sergeant Garcia's qualifications at trial, he may not do so on appeal."]

In *People v. Dowl, supra,* this Court explained the purpose behind this rule. In that case, the defendant had been charged with unlawful possession of marijuana, for purposes of sale. Dowl claimed he was not selling, but had the drugs for lawful medical purposes. The arresting officer, Officer Williamson, offered his expert opinion that Dowl was holding the drugs for sale, not personal use. For his opinion, Williamson relied on his training and experience, and the "totality of the circumstances" at the time of the arrest. Following Dowl's conviction, he argued on appeal that Williamson lacked the expertise for such an opinion. That argument was rejected and Dowl's conviction was affirmed. This Court granted to review to address the effect on appeal of Dowl's "failure to object at trial to Officer Williamson's qualifications" to render the opinion. (*People v. Dowl, supra*, 57 Cal.4th at p. 1085.)

In ruling that Dowl had forfeited his challenge on appeal, this Court explained:

> Because a party offering expert testimony need not establish the witness's qualifications absent an objection [citations omitted], [Dowl's] failure to object at trial eliminated the incentive of the [proffering party] "to provide additional testimony to lay a foundation for [Officer Williamson's] testimony" [Citation omitted] and of the trial court to "take steps to prevent error from infecting the remainder of the trial" and to develop an adequate record. (Citation omitted.] *He therefore cannot now challenge on appeal the testimony's admissibility based on the officer's qualifications.*

(*People v. Dowl, supra*, 57 Cal.4th at p. 1088, emphasis added.) The *Dowl* rule applies here. Had the State raised an objection to

Robinson's expert credentials at time of trial, appellant would have had the opportunity to "provide additional testimony to lay a foundation" if that had been deemed necessary. (*Ibid.*) However, the State never objected to his qualifications as *Dowl* and Evidence Code section 720 require. While the prosecution argued long and hard that Robinson should not be permitted to testify about appellant's gang status, the record shows that none of those objections touched on Robinson's expert qualifications.

C. Robinson Was A Gang Expert , Fully Qualified to Gives His Opinion About Appellant's Current Gang Status

Robert Robinson's expert credentials were fully documented on the record. At the Evidence Code section 402 hearing [hereinafter "402 hearing"], Robinson testified that he was employed as a Gang Prevention Outreach Counselor with the Department of Parks, Recreation and Marine for the City of Long Beach. (18RT 4691.) He had been hired two years earlier by the program's founder and former probation officer, Alvin Bernstein. In that capacity, Robinson worked directly with gang members and ex-gang members. His duties included finding people jobs, resolving neighborhood conflicts and being out in the community every day encouraging young people to stay away from gangs. (18RT 4691-4692.) The central focus of his job was "stopping the violence in the streets among gangs." (18RT 4692.)

Robinson's familiarity with gangs and gang members was not limited to his professional work as a counselor. Years before, he had been a member of the 21st Street Gangsters.[6] (18RT 4696.) In fact,

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[6]At the time of the hearing Robinson was "in his forties" (18RT 4696), and indicated he had been a gang member many years

(continued...)

everyone working in Robinson's outreach program, with the exception of his boss, Alvin Bernstein, was a former gang member. (18RT 4695; 9RT 2374.)

The Long Beach Police Department, with whom Robinson worked closely, also recognized his expertise with gangs and gang members. (18RT 4692.) When the police were unable to identify a shooting victim, they often called on Robinson to assist with an identification. (*Ibid.*) The police would sometimes ask his opinion as to whether or not "the person [was] a gang member." (9RT 2372.) Law enforcement thus acknowledged Robinson as a local ally in its effort to contain gang violence and, of significance here, as someone they could consult in identifying gang members.

Robinson also had additional experience that made him particularly well-qualified, perhaps better than anyone in the area, including law enforcement, to offer an opinion as to whether appellant was an active gang member in December of 1996. As it happened, prior to appellant's arrest, Robinson had been looking to hire a *former* gang member to assist in his community outreach program. Robinson was particularly interested in hiring an older person (9RT 2374) and specifically a former member of the Rolling 20's gang. (9RT 2376.) Robinson had met appellant, interviewed him for a job and had conducted an investigation into his background including his current gang status. Robinson had even taken appellant out into the community to test his skills working with youth. Appellant was "number one" on Robinson's list of applicants (9RT 2376), and had planned to hire him. Had it not been for appellant's arrest in this case, he would have been working as a gang

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[6](...continued)
earlier in his youth.

intervention worker in Robinson's program. (18RT 4693.)

Since Robinson's job was working every day to end gang violence, he obviously would have had no interest in hiring someone who was still an *active* member of a street gang. As appellant's counsel pointed out to the trial court, Robinson needed to be as certain as he could that those he hired had truly abandoned the gang life. (18RT 4724 ["[Robinson's] not going to hire someone who he. . . feels is still a gang member. That's not going to happen."].) Robinson would have been personally motivated to conduct a thorough check into a potential employee's *current status* in the gang.

In appellant's case, the screening process began with a personal interview at which time appellant assured Robinson that he was no longer in the gang, that he had children to raise and that he was "trying to get his life together." (18RT 4695.) While such assurances were an obvious first step, Robinson did not simply rely on those assertions. Instead, he went out into the community and investigated further. He spoke to people on "both sides," that is, people affiliated with the Rolling 20's as well as their rivals, the Insane Crips. (18RT 4697.) Robinson talked to "so many different people" that he was unable to recall the names, (18RT 4698) but the consensus from people in the neighborhood was that appellant was not active in the gang. (18RT 4694.)

Robinson did not end his investigation there. As part of the screening process, Robinson asked appellant to come along with him to various outreach activities in the community so that Robinson could personally observe appellant interacting with young people out in the field. Based upon Robinson's many years of working alongside gang members and former gang members, from his own personal

experience as a gang member, and from his thorough investigation into appellant's background to determine if he were a suitable candidate for employment countering gang violence, Robinson concluded that appellant's "mind was in a different place," and that he was no longer an active gang member. (18RT 4699.) Robinson's boss, former probation officer Alvin Bernstein, had also interviewed appellant several times and felt he "could be part of our program," (9RT 2376) which necessarily required abandonment of the gang life. Bernstein and Robinson were hoping to hire appellant, but were unable to follow through only because appellant had been arrested for these crimes. (*Ibid*; 18RT 4695.)

Pursuant to Evidence Code section 720, Robinson was thus well-qualified to offer an expert opinion on the sole issue being asked of him: whether in December of 1996, appellant was still an active gang member or whether, in Robinson's opinion, appellant was on a better path. Given his background, experience in the community, and recent investigation into appellant's gang status, it is hard to imagine anyone *more qualified* than Robinson to offer an opinion about appellant's gang involvement just prior to these crimes.

Despite respondent's argument on appeal, that Robinson was not an expert, a review of the DDA's argument to the trial court shows that he assumed all along that Robinson *was* an expert, and only took exception to the *bases* on which Robinson sought to offer his expert opinion. In addition, the trial court's comments in ruling on the admissibility of Robinson's testimony show that the trial court also understood that Robinson was a gang expert. Although the trial court still ruled that Robinson's testimony was inadmissible, its ruling was not based on finding that Robinson *lacked gang expertise*. Its ruling, taken directly from the DDA's flawed analysis – was that

Robinson, as a gang expert, simply could not rely on what the defendant or others had told him, to support his opinion that appellant was not longer active in the gang. Left with being allowed to offer an opinion based only upon "observations," the trial concluded that such would not be a sufficient basis for an expert opinion. However, neither the prosecution nor the trial court ever questioned Robinson's credentials or status as a gang expert.

1. The DDA *Assumed* Robinson Was An Expert, And Only Objected to The "Means By Which" He Reached His "Expert Opinion"

The DDA's arguments against Robinson's testimony went only to the *bases* for Robinson's opinion; in fact, the State *assumed* that he was an expert. The DDA's remarks were replete with references to what *experts* could rely on for their opinion, and even specifically referred to Robinson's "*expert opinion.*" (18RT 4705.) To now claim, as respondent does, that neither the trial court nor the prosecution understood that the defense was offering Robinson as a gang *expert* is simply unsupportable. The State's principal argument in opposition to Robinson was that gang experts (or at least State experts who would *affirm* a defendant's gang membership) could rely on just two types of evidence for their opinion: an admission by the defendant that he was in a gang (per Evidence Code section 1220) and gang tattoos. (18RT 4704.) Arguing that the State's experts "would never be allowed" to rely on other types of evidence such as personal observations[7] (18RT 4703-4704 [how a person dresses or

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[7]In fact, this was not so, even in the case of the State's own gang expert, Officer Freaman Potter. When asked how he would identify individuals as being members of a particular gang, he

(continued...)

walks or "the people he talks to"]), the DDA argued that Robinson, also being a gang expert, should be equally restricted.

The DDA first began by arguing that the trial court had already ruled that Robinson's opinion was irrelevant (18RT 4702 [expressing agreement with purported previous ruling that Robinson's "plans to hire the defendant and all that had nothing to do with this case and was not relevant"].) The DDA then suggested that Robinson could testify only as a character witness. (18RT 4702-4703.) However, the crux of the DDA's argument (18RT 4703-4705) was that gang experts in general, *could never rely either on personal observations or on hearsay* in forming the opinion that someone was, or was not, in a gang:

> More to the point, insofar as what we're now hearing here, specifically, that this man is saying the defendant was not any longer an active Rolling 20, it's *because, one, in his opinion based on his observations of him he's not a Rolling 20, because of two, the defendant's statement, and three, statements of these unknown, unspecified other people, he's not a gang member.*
>
> Now, the issue isn't, well, the People were allowed to do that and, therefore, we should be allowed to do it, that's only fair. *The issue is what the Evidence Code says. Unfortunately for the defense, [Evidence Code section]*

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[7](...continued)
testified that in addition to talking to them and obtaining an "admission," he would also form his opinion by "observing them, *by talking with other gang members*" and by their tattoos. (17RT 4404, emphasis added.) After confirming that appellant's gang tattoos identified him with the Rolling 20's (17RT 4406) Officer Potter affirmed that he "recognized appellant as someone he had seen in the field *with Rolling 20's.*" (17RT 4407, emphasis added.) Contrary to the DDA's claim, its own expert affirmed that gang experts do inform their opinions about gang membership by talking to other gang members and personally observing the company they keep.

> *1220 is a one-way street.* [8] We're allowed to put on statements of the defendant within the limits of Miranda, voluntariness, and that which the court finds to be relevant.
>
> [Defendant's] statements – he cannot through another third or fourth person put on his own statements. And that's essentially what the defense is trying to do.
>
> As the court knows, *I would never be allowed to put up a gang expert to say, well, I've observed the defendant, and based upon the way he dresses and the way he walks and the people he talks to, he is, therefore, a Rolling 20's.*
>
> We're very limited in our ability to do it. *[Defendant] specifically admits to it and it comes in under 1220 or he's got tattoos on his body that show that and an expert can render that opinion.*
>
> What counsel is trying to do is put on statements essentially of the defendant through this [expert witness], which is hearsay, put on statements of other individuals – and we don't even know who they are – *which of course, are hearsay as well*, or, give an opinion which the court *would never allow an expert of the people to do.*

(18RT 4703-4705, emphasis added.)

Taking this reasoning to its logical conclusion would mean that a gang expert could only *confirm* a defendant's gang membership, and could never offer the opinion that the defendant was *not* a gang member. Apparently believing this to be the case, the DDA's only suggested solution in this case, was to disallow Robinson's expert opinion entirely. If appellant felt that were unfair, to let the State offer

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[8] Evidence Code section 1220 provides, in relevant part: "Evidence of a statement is not made inadmissible by the hearsay rule when offered *against the declarant* in an action which he is a party. . . ." (Emphasis added.)

a gang expert but deny the same for appellant, then there was a solution: appellant could take the stand and disavow the gang:

> And [defense] counsel is going to say, well, that's not fair. The People are allowed to [put on gang expert evidence]. The People can put on that [expert] evidence and we can't.
>
> That's not true. All [appellant] has to do is get up and walk those twelve steps and *get on the stand and testify.* It's his right. He doesn't have to if he doesn't want to, but – he's able to do that, but it has to be through some legally admissible way.

(18RT 4704, emphasis added.) In other words, the DDA's reasoning led him to conclude that gang experts, ultimately, can only testify that someone *is* a gang member. The principal method for making that determination is a defendant's own admission – normally inadmissible hearsay, but for Evidence Code section 1220.

However, if a defendant seeks to establish he is *not* a gang member, or so the prosecutor reasoned, the defense may not establish that through a gang expert, because to do so would require the expert to rely, at least to some extent, upon inadmissible hearsay. The DDA thus persuaded the trial court that if a defendant sought to establish he had quit the gang, the hearsay rule would prohibit an expert opinion on that issue. Moreover, the DDA argued, the only legally permissible way to establish non-membership would be for the defendant to take the witness stand and testify that he was not in a gang. The DDA even suggested that appellant's efforts to enlist a gang expert to support his claim was a ploy to avoid "taking the stand himself." (18RT 4704.)

> And what counsel is talking about *is hearsay, pure and simple, and avoiding taking the stand himself. And there is simply no reason to let him do that.*

The DDA concluded his argument to the trial court with the following summary:

> Nothing has changed from what happened here other than this witness [Robinson] being a little more specific and saying, I determined conclusively that [defendant's] not a gang member, *but the means by which [Robinson] did it, he was very clear: Hearsay from the defendant, hearsay from other unknown unnamed individuals, and his expert opinion on his observations if he's a gang member, which is not something I think any side would be allowed to do.*

(18RT 4704-4705.) Appellant has quoted the DDA's argument at length to demonstrate that the State raised *no objection* to Robinson's expert credentials and in fact *assumed* he was an expert. (18RT 4705 [acknowledging that he was being offered for "his expert opinion"].) Moreover, the trial court came to the same conclusion.

2. The Trial Court Found That Robinson Was An Expert

Respondent claims that "the trial court found that Robinson was a lay witness" (RB 54), but at no time did the trial court make such a finding. The trial court's decision is set out in its entirety in the AOB at pages 54-56, so will not be repeated here except for the final paragraph:

> And I don't believe that there is sufficient expertise established by Mr. Robinson. *He does have a significant history or involvement either personally with a gang or now more recently since he is no longer an active gang member – no longer a gang member at all, his work with gang members apparently on a daily basis gives him sufficient expertise I believe to be knowledgeable about gangs*, but not sufficient based on observation alone of the defendant's interaction – and we don't know on how many occasions – with person on the street to form that opinion."

(18RT 4723, emphasis added.)

A careful reading of this paragraph reflects that the trial court fully acknowledged that Robinson had "sufficient expertise" to be considered a gang expert. Indeed, as the trial court specifically noted, Robinson had a "significant history" of involvement with gang members, both from being personally involved in a gang as well as from "his work with gang members apparently on a daily basis." (18RT 4723.)

Nevertheless, because the DDA had led the trial court to believe that Robinson, as a gang expert, was prohibited from relying on hearsay statements made either by appellant or other members of the Long Beach community, the trial court reached an erroneous conclusion regarding the admissibility of Robinson's expert opinion. The trial court ruled that Robinson's could *not render an opinion* on appellant's gang membership *if that opinion were based strictly on Robinson's "observations."* (18RT 4723.)

However, the defense never sought to introduce Robinson's expert opinion based on his personal observations alone. By conflating Robinson's expert qualifications with the type of information an expert could rely upon in reaching an expert opinion, the trial court ended up with a completely incorrect interpretation of the law. Although Robinson's background "*[gave] him sufficient expertise* . . . to be knowledgeable about gangs, [that background was] not sufficient *based on observation alone* of the defendant's interaction with persons on the street, to form that opinion." (*Ibid.*, emphasis added.)

From this final statement by the trial court, two observations may be made: (1) the trial court found that Robinson had sufficient expertise to be a gang expert, but (2) he could not render an opinion about appellant's gang status if that opinion were based only upon

Robinson's personal observations of appellant. The trial court thus adopted the prosecutor's flawed reasoning, and ultimately refused Robinson's testimony altogether. However, at no time did the trial court make a ruling that Robinson was merely a lay witness. The trial court acknowledged that he was a gang expert, having had years of experience, both in a gang, and in gang intervention work. However, after adopting the prosecution's erroneous argument that a gang expert could rely neither on hearsay nor personal observations, the trial court erroneously excluded Robinson's testimony.

3. It Would Be Patently Absurd to Conclude That Robinson Was Not Qualified to Offer an Opinion About Appellant's Gang Status

Appellant has established that Robert Robinson was offered by the defense as a gang expert, that the DDA assumed he was a gang expert, and that the trial court found that he had "sufficient expertise" to be a gang expert. Moreover, the State raised no objections to Robinson's credentials. To come to any other conclusion except that Robinson was fully qualified to testify as a gang expert would be patently absurd.

At the section 402 hearing, Robinson testified that he had spent most of his life in Long Beach, in and around gangs. He testified that he was in a gang for three to four years as a young man (9RT 2382), and that he had been out of the gang for fifteen years. (*Ibid.*) He had been doing community work with ministers and the school district for seven years, and had been a counselor with the gang intervention program for two years, working alongside former probation officer Alvin Bernstein. (9RT 2382-2383; 18RT 4690-4699.) One of Robinson's duties was to hire outreach workers to work alongside him in the community. To carry out this part of his

job, he had to screen, interview and investigate the background of potential employees. To be sure, he could not afford to hire someone who was active in the gang, since that would obviously defeat his purpose. In the case of appellant, Robinson not only had significant personal contact with appellant, but he had also thoroughly investigated his background, including learning about his reputation and determined his suitability for the job.

Robinson's background made him exceptionally well-qualified to offer an opinion as to whether appellant was active in the gang. Compared to most law enforcement officers, Robinson was equally, if not more qualified, to render an opinion about the gangs in the area. Growing up in a gang, he needed no formal training on how to identify gang members since that culture was part of his own life. As an adult, his job involved daily interaction with gang members and potential gang members, not unlike law enforcement officers working the gang unit. When it came to appellant specifically, none of the officers who testified in the case could compare to Robinson, in terms of his knowledge and experience.

There simply was no basis, on this record, of finding Robinson any less qualified to render an opinion about appellant's gang status than any of the law enforcement officers who testified for the prosecution. Indeed, none of those officers could claim any particular *recent* knowledge of appellant's status in the gang, other than the fact that he still had his gang tattoos from his youth. None of the officers who testified had any specific information about appellant's gang involvement after May of 1990, more than six years before the crimes in this case took place; and only one had ever had personal contact with appellant in 1990. (15RT 3936.) On this record, it would be completely unreasonable to conclude that

Robinson was not qualified to offer an opinion about appellant's gang status, given Robinson's background, experience, employment, and most importantly, the remarkable fact that he had just investigated appellant's background and was prepared to hire him as a gang prevention worker in the community.

As with all witnesses, the jury would have been free to assign whatever weight to Robinson's testimony it found appropriate. But under the circumstances it was improper to exclude Robinson's testimony altogether. The trial court's ruling allowed the jury to hear only the prosecution's position, that appellant was an active, violent gang member with a motive to carry out these murder's. The jury, however, was entitled to hear from appellant's expert, who would have provided compelling evidence that appellant had abandoned the gang life and had no motive to be involved in violent gang activity at all.

D. The Trial Court Erroneously Ruled That Robinson Could Not Base His Expert Opinion on Hearsay and Abused Its Discretion by Excluding Robinson's Testimony

The trial court began its analysis by correctly noting that Robinson would be offering his opinion on the basis of three separate sources – appellant's statements, the statements of other gang members, and Robinson's own observations. (18RT 4720-4721.) This was, in fact, precisely how the prosecutor had organized his own argument, noting that Robinson's opinion was premised upon these three sources. (See 18RT 4703.) However, the trial court then *incorrectly* adopted the DDA's erroneous position that Robinson *could not rely* either on what appellant said, or on what others said about him, in forming the opinion that appellant was no longer active in the gang. (See DDA's argument at 18RT 4720 ["the

rules of hearsay dictate that we cannot offer the defendant's statement or other statement [sic] through this other person (Robinson)."].)

While appellant's own statements and the statements of others are unquestionably hearsay, it is well-settled that hearsay is a proper basis for an expert's opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618–619; Evid.Code, § 801, subd. (b) [an expert's opinion may be based on matter "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates".)

Ironically, in the first trial the prosecutor actually made this very point to the court, arguing that police officers could rely on the statements of other officers for their opinion: "Once again, your honor, the case law is very specific that *for the basis of an expert's testimony, hearsay is allowed to come in.* It is not being offered for the truth of the matter so much as for the expert's opinion. That is where the exception does come." (6RT 1756, emphasis added.) The prosecutor was correct.

Hearsay *may form the basis of an expert's opinion*, and both the prosecution and the defense made this argument to the trial court at various times throughout the trial. Nevertheless, somehow the trial court lost its way when it came to ruling on Robinson's testimony. (See 18RT 4710 [trial court stated: "this witness has hearsay information either from your client or from other persons that he has spoken to. And I don't believe that there is an exception to the hearsay rule that would allow him to testify as to that information."]; 18RT 4711 [trial court stated: "I believe that the statement that this witness might testify to concerning what others told him, including your client, would be inadmissible hearsay."];

4722 [trial court stated "because of the hearsay problem" Robinson could only testify as to his personal observations].) The trial court's position with respect to gang experts and what they may rely on for their expert opinion, was contrary to the law.

This Court and others have held that a gang expert may rely on multiple sources, *including hearsay statements of other gang members.* (*People v. Valadez* (2013) 220 Cal.App.4th 16, 29 [California law permits gang experts to rely on hearsay, including "conversations with gang members" to form opinion]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 949 [statements from "citizen informants" and others "from the community" were proper sources for gang expert's opinion]; *People v. Gardeley* (1997)14 Cal.4th 605, 620 [allowing reliance on defendants' statements and other Crips gang members for expert opinion].)

The defense made clear, and the trial court obviously understood, that Robinson's opinion would be based *on all three sources* – appellant's own statements; the statements of friendly and rival gang members in the neighborhood; and lastly, upon Robinson's own observations of appellant – all of which were proper bases for his opinion under the law. In fact, just two days before the trial court ruled that Robinson could not testify regarding what he had been told by gang members, the court heard testimony from the State's gang expert that he would make a determination about whether someone was in a gang "by talking with other gang members." (17RT 4404.)

Nevertheless, by the time the defense sought to present Robinson's expert opinion, the trial court had decided (1) the expert could *not* rely on hearsay for his opinion, and (2) limiting the expert to an opinion based only on observations would result in an

insufficient basis for the expert's opinion. While the latter proposition might arguably be true, the former proposition was legally incorrect. As a matter of law, Robinson could rely both on hearsay and on his personal observations in formulating his opinion.

Robinson's own investigation into appellant's current status in the gang necessarily depended upon what Robinson had learned from his conversations with other gang members. This is exactly the type of hearsay information a gang expert may rely upon when forming an opinion as to whether someone is active in a gang or not. (*People v. Thomas* (2005) 130 Cal. App. 4th 1202,1210 [proper for conversations with other gang members to be the basis of an expert opinion regarding defendant's gang membership].)

As a gang expert, Robinson should have been permitted to testify as to whether, in his expert opinion, appellant had eschewed the gang lifestyle prior to the occurrence of the crimes for which appellant was on trial. As the trial court found, Robinson's proffered testimony was relevant. (18RT 4710-4711.) He was also exceptionally well qualified as an expert on gangs to render an opinion as to whether appellant was still an active gang member. Furthermore, Robinson had a solid basis for his opinion, which consisted of his discussions with, and personal observations of, appellant, as well as interviews he had conducted of numerous gang members from both the Rolling 20's Crips and their rivals, the Insane Crips, all of which he was permitted under the Evidence Code to testify to in support of his opinion, despite the fact that it consisted, in part, of hearsay.

Because the trial court's ruling excluding Robinson's testimony was predicated upon incorrect legal standards, it constituted an abuse of discretion. (*Flannery v. California Highway Patrol* (1998) 61

Cal.App.4th 629, 634 [a court abuses its discretion when it applies incorrect legal standards].)

E. The Exclusion of Robinson's Testimony Was Extremely Prejudicial, Depriving Appellant of His Right to Defend Against a Critical Aspect of the State's Case, and Requires Reversal of Appellant's Conviction and Death Sentence.

The State's case against appellant was very weak. In fact, just one day before trial the prosecution admitted telling the victim's sister that unless an eyewitness came forward tying appellant to the crimes, appellant likely would be "walking out the door" at the end of the trial. (6RT 1764.) Even with witnesses coming forward and changing their original story to implicate appellant, the jury in the first trial was not convinced and the trial resulted in a hung jury. Then a second trial was set, and over time, the witnesses improved their presentation and became more convincing in their identifications, after testifying at the preliminary hearing and two trials. Still, it was critical to the State's case that it be able to convince the jury that appellant had some motive for these otherwise senseless crimes. It was therefore imperative that the jury believe that appellant was an active gang member, who would have killed both victims simply because they were Mexicans and perceived to be members of a rival gang.

The prosecutor understood that establishing this link to the gang was critical to the State's case. At the beginning of the prosecutor's closing argument, he led with this theme, telling the jury that this case was "a gang case; one in which gang motivation, gang retaliation, and gang intimidation permeate [the case]." (19RT 4847.) Establishing that appellant had been in the Rolling 20's gang, while a critical piece of the State's case, was nevertheless a

relatively easy task. Three police officers testified that in 1990, appellant freely admitted his gang affiliation when he spoke to them on the street. (15RT 3935, 3940; 17 RT 4290.) A fourth officer, the State's gang expert Freeman Potter, testified that he had seen appellant in the company of gang members in their Long Beach neighborhood. (17RT 4407.) However, not one of these officers testified, nor could they, that appellant was still *actively* involved in the gang at the time of the offenses. The first three officers had no information at all about appellant's gang status beyond May of 1990. The fourth officer provided no time frame as to when he had observed appellant in the company of gang members, nor did the officer describe any illegal gang activity. He simply agreed that he recognized appellant as someone he "had seen in the field with Rolling 20's." (*Ibid.*) This utter lack of evidence that appellant was presently an active gang member would have been significant had appellant been permitted to put on the credible and highly relevant testimony of Robert Robinson, establishing that appellant was no longer in the gang and was in fact the number one candidate for a *gang prevention job.*

Had appellant been allowed to present the opinion testimony of his own gang expert, someone who had worked with gangs in the area for many years – and someone who law enforcement consulted for his gang expertise – the jury would have learned that appellant had left the gang life and had taken a new path. With that evidence, the jury would have had grounds for reasonable doubt that appellant committed these crimes. Instead, the jury was deprived of the truth. Appellant had Rolling 20's gang tattoos, a permanent physical reminder of his former affiliation. He still lived in the same neighborhood, a fact of life which many cannot escape for practical

and economic reasons. But appellant was trying to turn that around.

Nevertheless, appellant had no way of presenting this truth to the jury. Instead, it was led to believe that appellant was still an active member of the Rolling 20's, and therefore someone with a strong motive to carry out revenge killings against rival gang members. This Court has recognized that evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) There is absolutely no question that, in this case, appellant's alleged gang membership improperly influenced this jury to find appellant guilty.[9]

Deprived of the ability to defend against the charge that he was still a gang member, the jury heard only the prosecution's evidence. The prosecution's argument that appellant could refute his gang membership by taking the stand and testifying (18RT 4704), fails to address the underlying issue – appellant's right to present the most credible and convincing evidence available to his defense. As appellant has pointed out in his opening brief, the jury would have seen appellant's own testimony as self-serving and therefore ineffective. (See AOB 71.) Presenting the testimony of friends, family or other gang members could also have been easily discredited by the prosecution. Robinson, on the other hand, had no apparent reason to lie about his interactions with, or opinion of, appellant. Robinson was a community activist, working with law

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[9]As noted previously in appellant's opening brief, appellant came very close to being acquitted at the first trial because the evidence against him was so weak. However, according to the foreperson, the jurors who did eventually vote for guilt were strongly influenced by "the gang implications." (AOB 72, citing 2CT 404.)

enforcement to quell gang violence. His testimony would have helped to put appellant in the correct light – as someone who had given up the gang life – rather than in the false and devastatingly harmful light created by the prosecution.

The erroneous exclusion of Robinson's testimony not only violated appellant's Sixth and Fourteenth Amendment rights to present his defense, it also deprived him of his Fourteenth Amendment right to due process of law and a fair trial. (*Washington v. Texas* (1967) 388 U.S. 14, 19; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44, 51, fn. 8.) This error further deprived appellant of his right under the Eighth and Fourteenth Amendments to a reliable determination of guilt and penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [applying Eighth Amendment requirement of reliability to guilt determination in capital case].)

Under the *Chapman* standard, the State cannot show beyond a reasonable doubt that the trial court's error was harmless. (*Chapman v. California* (1967) 386 U.S. 18). Even assuming this error was not of constitutional proportions, there is still more than a reasonable probability that appellant would not have been convicted had Robinson been allowed to testify. (*People v. Watson* (1956) 46 Cal.2d 818.) Appellant's convictions and death sentence must be reversed and appellant is entitled to a new trial.

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III.

BECAUSE NO REASONABLE INFERENCE COULD BE DRAWN FROM THE TAPE-RECORDED TELEPHONE CONVERSATION BETWEEN APPELLANT AND HIS BROTHER THAT APPELLANT WAS SEEKING TO SUPPRESS EVIDENCE, INTIMIDATE WITNESSES OR SOLICIT THE PROSECUTOR'S MURDER, THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING IT AND THEREBY VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND A RELIABLE GUILT AND SENTENCING DETERMINATION

A. Introduction

In order to get an accurate sense of why the trial court's admission of the tape-recorded phone conversation was prejudicial error, this Court must listen to the cassette tape that was played for the jury – People's Exhibit 17. Although the tape is unintelligible in portions and very difficult to understand without listening to it several times, listening to both what was said, and the tone in which it was said, makes clear that nothing discussed during that conversation was relevant to prove consciousness of guilt with respect to this case. Nevertheless, by misleading and highly inflammatory argument, the prosecutor was able to successfully manipulate the jury to believe that appellant and his brother, Tony Frazier, were conspiring to conceal evidence, intimidate witnesses, and murder one of the prosecuting attorneys on the case.

The sections of the tape that were emphasized by the prosecutor concerned two entirely distinct topics. The first had to do with appellant's predicament and the evidence presented at his preliminary hearing. The second topic had to do *only* with Tony Frazier's own parole status, and had nothing to do with appellant's case.

With respect to appellant's case, Frazier had not attended the preliminary hearing, and was trying to find out what had happened at that hearing and why appellant remained in custody. From their discussion, it is readily apparent that appellant was at a loss to explain why he was being accused of a murder and an attempted murder. When Frazier asked appellant why he had been detained despite not having been identified by the witnesses at the preliminary hearing, he said, "I don't know." Frazier said the whole thing made no sense, and appellant agreed. Frazier asked appellant a series of questions about the preliminary hearing, including who his accusers were. Frazier wanted to read the transcript. Appellant told Frazier that his attorney was planning to go out and investigate. Appellant emphatically asserted his innocence and told Frazier not to worry. However, Frazier acknowledging that the system is capable of convicting an innocent person, insisted that he was still worried.[10] In an unmistakably sarcastic tone, with a bitter chuckle, appellant said he needed to have the prosecutor "hit." Accordingly, rather than tending to show consciousness of guilt, appellant's statements and his tone reflected feelings of bitterness and frustration at having been falsely accused.

The conversation then shifted to an entirely different topic, namely the terms and conditions of Frazier's parole. Frazier told appellant that he had to go see a "psych" at the parole office as a condition of his parole. Frazier said he had been given pills to take, but he wanted to return them. He said he had given some to "Little Troub," along with two pistols he found in the garage. As a felon on

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[10]Frazier's exact words were, "Man, I'm worried about it man. I know how the folks is."

parole, Frazier would not have been allowed to have firearms in his possession, and appellant warned him not to talk about the guns he had found, because the phone was tapped. As discussed below and in appellant's opening brief, there was no factual basis from which a conclusion could reasonably be drawn that the two pistols Frazier gave away along with some of his pills, had anything to do with the murders and attempted murders in this case. It is absolutely clear, particularly when one *listens* to the tape, that the reference to guns had *only* to do with Frazier's parole conditions.

Although there was nothing incriminating about the conversation as far as appellant was concerned, the prosecution made it the centerpiece of its case, as reflected by the prosecutor's closing arguments in the guilt phase, which are quoted in appellant's opening brief. (AOB 79-86.)[11] However, as the Court will discern from carefully listening to the tape-recording of the conversation, the interpretation urged by the prosecutor was nothing more than a red herring that successfully played to the jurors' fears and prejudices, and distracted them from the weakness of the prosecution's evidence.

Respondent nevertheless maintains that the tape constituted relevant evidence, which was properly admitted by the trial court, arguing that the inferences urged by the prosecutor were reasonable. However, as discussed below, even the trial court itself ultimately rejected that premise, when it found insufficient evidence of an attempt by appellant to suppress evidence to justify giving CALJIC 2.06 (Suppression of Evidence as Evidence of Consciousness of

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[11]The prosecutor also argued in the penalty phase that the conversation was proof of appellant's future dangerousness. (22RT 5508.)

Guilt).

B. Contrary to Respondent's Argument, the Tape-Recorded Phone Conversation Does Not Support a Reasonable Inference That Appellant Was Attempting to Suppress Evidence, and It Therefore Should Have Been Excluded as Irrelevant

1. After Allowing the Prosecutor to Introduce the Tape-recording, the Trial Court Itself Subsequently Concluded Correctly That the Conversation Between Appellant and His Brother Did Not Support an Inference That Appellant was Attempting to Suppress Evidence

Respondent contends that the tape-recorded telephone conversation provided "ample evidence" to support the inference that appellant was attempting to suppress evidence. (RB 73.) The trial court itself ultimately disagreed, but regrettably not until after it had erroneously allowed the prosecution to introduce it into evidence.

Prior to opening statements in the guilt phase, the prosecutor persuaded the trial court to admit the tape by arguing that it was evidence of a conspiracy by appellant to (1) dispose of the murder weapon; (2) murder the prosecutor who handled the preliminary hearing, to stop the prosecution from going forward; and (3) intimidate witnesses to keep them from testifying against him. (14RT 3581-3582.) The prosecutor argued the tape established that appellant was attempting to suppress evidence, thereby showing consciousness of guilt. (*Ibid.*)

However, at the conclusion of the guilt phase, when the prosecutor requested that the court give CALJIC 2.06 (Suppression of

Evidence as Evidence of Consciousness of Guilt),[12] the court refused, stating as follows:

> I don't believe there is sufficient evidence from the statements of Mr. Frazier and from the statements of Mr. Jones, as indicated on the tape, that the defendant was attempting to suppress evidence.

(18RT 4772.)

"A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof." (*People v. Cole* (2005) 33 Cal.4th 1158, 1206.) Whether a particular set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant, is a question of law. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) Thus, before deciding whether to give CALJIC 2.06, the trial court had to determine whether a reasonable trier of fact could find beyond a reasonable doubt that appellant was attempting to suppress evidence. The trial court herein ultimately correctly concluded that the tape did not support a reasonable inference that appellant was trying to suppress evidence, and accordingly refused to instruct the jury that it could consider the

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[12]CALJIC 2.06 reads 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 destroying evidence or by concealing evidence, such an 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.

conversation between appellant and Tony Frazier as evidence as tending to show a consciousness of guilt. However, the trial court, in the first instance, should have granted the defense motion to exclude the tape from evidence on relevance grounds.

2. There Was No Evidence From Which the Jury Could Reasonably Infer That Either One of the Pistols Referred to in the Telephone Conversation Was the Murder Weapon in This Case, or That Appellant Was Planning to Threaten or Otherwise Intimidate Any of the Witnesses or Have the Prosecutor Murdered to Prevent the Case From Being Prosecuted

Frazier told appellant that he had to see a "psych" as a condition of his parole, and that he had been given some pills he did not want to take, which he gave to "Little Troub." Frazier stated: "Yeah I gave him some [pills] and I had found two pistols in the garage here." Respondent argues that it was reasonable for the jury to infer that references to "Little Troub" were references to appellant's co-defendant Melvin Sherman. (RB 73.), However, Melvin Sherman's moniker was"Baby Troub," not "Little Troub" (15RT 3860; 16RT 4175), and the prosecutor *himself admitted on the record* that there was more than one "Troub." (14RT 3581.) More importantly, as Sherman's lawyer pointed out during that hearing, Sherman had been in custody since the date of his arrest on December 9, 1996, three days after the crimes took place (14RT 3569-3570), which meant that he simply could not have been the person to whom Tony Frazier said he gave the two pistols he found in his girlfriend's garage. (See *In re Loresch* (2010) 183 Cal.App. 4th 150, 164 ["Somewhere along the evidentiary spectrum, a rational inference loses its character if one or more of the premises upon which it rests, fails. When this happens, the inference becomes irrational

speculation].)

Furthermore, there was no evidence from which the jury could reasonably infer that either of the two pistols Frazier said he found in the garage was the murder weapon used in this case. As appellant's defense counsel argued, "We have no information what type of pistol it is, whether it is the same type of pistol used in this case. We have absolutely no information." (14RT 3573.) Tony Frazier merely told appellant that he found two pistols in the garage, which he gave to someone named "Little Troub." As defense counsel pointed out, there was absolutely nothing indicating that either of these guns was the murder weapon or that the guns had been placed in Frazier's garage by appellant or anyone else connected with this case. (14RT 3574.) Thus, contrary to respondent's assertion, any inference that Frazier was helping appellant hide or dispose of the murder weapon in this case would not have been based upon any actual evidence, but instead upon unfounded speculation. "Speculative inferences are, of course, irrelevant." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1260.)

Respondent further argues that "from the content of the tape, a jury could reasonably infer that appellant and Frazier were attempting to intimidate witnesses." (RB 74.) After making that assertion, respondent goes on at some length about how gangs intimidate witnesses and make them fearful and reluctant to come forward. (*Ibid.*) These are nothing more than generalizations, and have no tendency in reason to support an inference that *appellant* was seeking to try to intimidate any of the witnesses in *this* case.

Respondent nevertheless claims that "the jury could infer that appellant and Frazier were discussing ways to intimidate witnesses" (*Ibid.*), referring to the following discussion, as transcribed:

KJ: They got me on one murder and an attempt.

T: Now who. How did they get you on this one if they ain't got nobody?[13]

KJ: I don't know cuz. I don't know.

T: Well who are these people? Get the transcripts.

KJ: Yeah, I'm gonna tell my lawyer, man.

T: Okay

KJ: But he said he gonna go out there and investigate. *You know I ain't got, I ain't do this shit, cuz, they ain't got shit.*[14]

(Emphasis added.)

Nothing about this exchange supports a reasonable inference that appellant and his brother were planning to try to intimidate any of these witnesses. Appellant's response when Frazier asked who the witnesses were at the preliminary hearing, was that his *lawyer* was going to go out and investigate because he "didn't do this." (*Ibid.*) (See *People v. Allen* (1976) 65 Cal.App.3d 426, 434 [speculative

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[13]Frazier was referring to the preliminary hearing, during which a witness identified Melvin Sherman as the shooter. (1CTSupp.IV 96-97.)

[14]The transcript prepared for the jury incorrectly transcribed appellant's statement as follows:

KJ: Yeah, I'm fixin to *tell my lawyers* man...*he said he [the lawyer] fixin to go out there and investigate.* You know I ain't got, *I ain't do this cuz*, they ain't go.

(2CT Supp.IV 513.)

inferences derived from a declarant's words cannot be deemed relevant evidence under Evidence Code section 210].) This was simply not a case in which the jury could have reasonably interpreted what appellant was saying as an attempt to suppress evidence. (Compare *People v. Alexander* (2010) 49 Cal.4th 846, 907-908 [statement by defendant to his girlfriend during phone call instructing her to tell co-defendant to "stay strong" could reasonably be interpreted to mean that defendant was trying to keep co-defendant from implicating him as the shooter].)

Respondent also argues that the jury could infer consciousness of guilt from appellant's remark about wanting to "hit" the DA who handled the preliminary hearing. As injudicious as that remark might have been, when one listens carefully to the actual tape played for the jury (Exhibit 17), and hears appellant's sardonic tone and chuckle -- which the transcript given to the jury failed to note -- it is obvious that appellant was not serious about soliciting the D.A.'s murder, but was merely being flippant. Significantly, this is the *only* instance during the entire taped conversation in which appellant chuckles, making it readily apparent that he was not being serious.

The tape reveals that appellant was under significant stress, and was attempting to break the tension by making a sarcastic (albeit inappropriate) joke. As defense counsel pointed out, appellant was blowing off steam. (19RT 5013.) Listening to the tape makes this unmistakably clear.[15]

The instant case is easily distinguishable from the facts of

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[15]It is critical that this Court listen to the actual exhibit played for the jury. The copy that was provided to appellate counsel is of such poor quality that it is completely impossible to hear appellant's brief chuckle immediately following his remark.

People v. Wilson (1992) 3 Cal4th 926, 940, and *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246, the cases cited by respondent as support for the proposition that the jury could infer that appellant seriously sought to kill the prosecutor to prevent her from prosecuting the case. (RB 74.)

In *Wilson*, the defendant told his county jail cellmate that he wanted the latter to help him find a "hit man" to kill a witness. The defendant's cellmate told the district attorney, who had one of his investigators impersonate a hit man. The defendant had two surreptitiously taped telephone conversations with the investigator, during which the defendant told the investigator that he wanted the latter to kill the witness. (3 Cal.4th at pp. 933-934.) This Court held that these two conversations were admissible as evidence of the defendant's consciousness of guilt, and also as evidence of his identity as the killer. (*Id.* at p. 940.)

People v. Pensinger also involved a solicitation of murder for money by the defendant. In that case, the defendant offered another jail inmate $500 to kill a witness. (52 Cal.3d at p. 1246.) This Court held that offer constituted clear evidence of an attempt to suppress evidence and to intimidate a witness, from which the jury could reasonably infer consciousness of guilt. (*Ibid.*)

In contrast to *Wilson* and *Pensinger*, there was *no solicitation* by appellant in the instant case. Moreover, appellant's sarcastic remark about "hitting" the D.A., when viewed in context of what appellant said just prior to making that remark, i.e., *"I ain't do this,"* does not reflect consciousness of guilt. When one listens to the tape-recording of the conversation, it is readily apparent that appellant was asserting his innocence and was bitter that he was still being prosecuted despite not having been identified by the eyewitnesses

who testified at the preliminary hearing. Notably, had the trial court found that was substantial evidence of an attempt to solicit murder from which the jury could reasonably infer consciousness of guilt, it would not have refused to give CALJIC 2.06. Because the conversation had no tendency to "logically, naturally, and by reasonable inference" to establish any material, disputed fact in this case, it was irrelevant, and the trial court erred in failing to exclude it. (*People v. Heard* (2003) 31 Cal.4th 946, 973.)

C. At a Minimum, the Trial Court Should Have Barred Introduction of the Taped Phone Conversation Under Evidence Code Section 352

Respondent claims that the trial court properly rejected the defense's motion to exclude the taped phone conversation under Evidence Code section 352, because it was reasonable to infer that appellant's and Frazier's references to "Troub" were references to Sherman. (RB 75.) Appellant has explained above and in his opening brief why that was not a reasonable inference, and why the other inferences urged by respondent concerning the conversation are also far-fetched and unreasonable. The statements made by appellant and his brother simply had *no* probative value as evidence tending to show consciousness of guilt.

Notably, respondent does not contest appellant's argument that the trial court abused its discretion, under Evidence Code section 352, in allowing the tape to be introduced, because its probative value was outweighed by the probability that its admission was unduly prejudicial and misleading. (AOB 91-93.)[16] A persuasive argument

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[16]Later on in its brief, respondent argues that admission of the evidence "was not so prejudicial as to render appellant's trial

(continued...)

that the probative value of the evidence outweighed the probability of unfair prejudice cannot be made in this case.

"Evidence is substantially more prejudicial than probative if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Jones* (2013) 57 Cal.4th 899, 948.) In this case, there was an enormous risk that admission of the tape would allow the jury to engage in impermissible speculation. Indeed, as the prosecutor's closing argument demonstrates, the jury was actually *encouraged* to engage in such speculation.

The circumstantial evidence presented at trial suggested that the murders this case were gang-related, motivated by gang rivalry. What was far from certain, however, was the identity of the perpetrator or perpetrators of these crimes. What the prosecution lacked in unassailable evidence of appellant's guilt, it made up for with "gang expert" testimony about gang behavior (e.g., intimidating witnesses, disposing of weapons, etc.) which it ascribed to appellant, who some years before had been identified by law enforcement as an active gang member, and who still wore gang tattoos. For example, in arguing to the jury that Tony Frazier's statement regarding the two pistols referred to his disposal of the murder weapon, the prosecutor stated:

> Now, the significance of that, of course, is we learned about what happens when these crimes take place. They do them repeatedly so there are techniques which are employed to avoid detection, to avoid the ability to have them caught and prosecuted. One of them is wearing layered clothing to be able to change their

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[16](...continued)
fundamentally unfair." (RB 79.)

> appearance shortly thereafter. *One of those things is to make sure that a gun goes a different direction, that it's hidden in some other location.*
>
> Of course, we have shell casings here, but a gun is not found. There's warrants executed and that gun is never located. *And that's for a reason.*
>
> What you have, of course, is the defendant, who is in custody – and that tape, I believe is made on January the 12th, some month after the incident – who wants to be sure that wherever it went, that that gun is not located so the efforts have to be made by the people on his behalf outside.

(19RT 4877-4878, emphasis added.)

Admission of the tape-recording thus not only unfairly allowed the prosecution to tie appellant to the missing murder weapon without any substantiation, but it also unfairly allowed it to make up for the absence of evidence that appellant was still an active gang member.[17] Admission of the tape-recording therefore undermined both the fairness of the proceedings *and* the reliability of the outcome.

In the same vein, the prosecution used the tape-recording to encourage the jury to speculate that appellant was planning to intimidate witnesses, further compensating for its lack of evidence regarding appellant's current gang status. The prosecutor argued to the jury as follows:

> Also, *on that tape we have a reference to the very sort of intimidation that we've been talking about here.* The conversation with his brother, Mr. Frazier, is: well, they pointed the other guy out, referring to Maria Jaramillo identifying Melvin Sherman, but they let him go and why did they do that?

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[17]Defense counsel was unfortunately unsuccessful in her effort to persuade the court that this was the prosecutor's true objective in seeking to introduce the tape. (14RT 3573-3574.)

And you have the questioning from Mr. Frazier, essentially saying, well, who are these people? Who are they? Now, there's two ladies and a dude, you know. Well who are they? Get the transcript.

Now, you remember when I asked him questions, it was, nah, nah, I didn't care who they were. I just wanted to know what they had said. That's what I was interested in.

That's not what he's asking. Listen to the tape. Listen to the conversation going back and forth. He wants to know who these people are because they were at that time – or, at least, at the time of the shootings – right there in the neighborhood. And that purpose isn't so he can conduct interviews. It's not so he can do investigation. It's not so he can resolve in this own mind what the evidence is.

It's for a specific purpose. It's to find those people and to let them know that the Rolling 20's know who they are.

(19RT 4878-4879, emphasis added.)

Now, as I said, the first issue is this is a gang case. I'm not waving that flag to cause to you go into a fits of hysteria, but it's an issue because the intimidation affects all aspects of it.

And remember what Tony Frazier was saying when he talks about why he was asking for the transcripts. He said, they will blank it out. He says, who had said something? Who is this person? A lady? Not what did they say, but who said it? Who are they?

Because Tony is out there and Tony can go and Tony can find out and Tony can confront. Two ladies and a dude. But they aren't saying shit. And he goes through all of that. But, remember that's the contest in which that conversation starts.

And then he tells what happened in the prelim. He talks about evidence at the prelim, that they had seen the glove and saw a blast, and they dropped the one murder

and now they got me for the attempt and another murder. Doesn't make any sense.

Okay. The conversation continues. They got him for one murder and an attempt. And then, well, who are these people? Get the transcripts.

Okay. Remember, when I talked to him he said, no, no. I just wanted to know what happened. I just wanted to know what they said. That's not what he's asking. Those are his words. Who are those people? Get the transcripts.

What's the point? Does he want to see if he knows them? Does he want to see if they are a celebrity or something? He knows what neighborhood this happened in. Those are people who are going to be in the neighborhood. He wants to know who these people are for a reason. He does not want those people to come forward. That's why he's asking for the transcripts.

(20RT 5071-5072, emphasis added.)

This Court has held that "evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated." (*People v. Gonzalez* (2011) 54 Cal.4th 254, 289). There was no evidence of any attempt by appellant to intimidate witnesses, and the inference urged by the prosecutor that "on that tape we have a reference to the very sort of intimidation that we've been talking about here" (19RT 4078), was utterly without evidentiary support and completely speculative.

Even more prejudicial was the admission of appellant's remark about having the D.A. "hit." Notwithstanding it lack of seriousness, the comment was guaranteed to inflame the jury, and distract it from the weakness of the prosecution's case for guilt. The trial court's admission of that statement was nothing short of a windfall for the

prosecution, which the prosecutor fully exploited:

> *Finally, of course, the defendant's mindset is truly revealed when he talks about what he needs.* And he refers to himself in the third person, but he says that essentially what he needs is for the District Attorney to be hit, that's what he truly needs.

(19 RT 5079, emphasis added.)

> Referring to himself in the third person, he needs to District Attorney hit. That's who he needs hit. That was when Debra Cole-Hall was the District Attorney on this case.
>
> Why does an innocent man say that? Is he blowing off steam? Listen to him. Listen to his voice there. Is he – is he angry about what's happened. No. *He's talking about what he needs or what would help him out and help his case.* Okay.

(20RT 5072-5073 emphasis added.)[18]

Given the tape's lack of probative value and the substantial risk that its admission would mislead and inflame the jury, the trial court

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[18]In the penalty phase, the prosecutor also cited the comment in arguing for a death sentence:

> I know you saw this before, but I want to touch upon it again because it is something you should consider in making your decision as to the appropriate decision. Future dangerousness. Is it over? Did it end with the murder of Villa and Lopez and the attempted murder of Mr. Hernandez? Where does it go on? *I focus you on the one line of the defendant when he is in county jail, has been arrested and not on the street and doesn't have a gun on him anymore. What is he doing? He is on the phone saying, "we need that D.A. hit.* ¶ Now I am not appealing to you as a district attorney, but the point is it's not over. This is someone who continues to be a violent predator.

(22RT 5808, emphasis added.)

undeniably abused its discretion in denying appellant's motion to exclude the tape from evidence under Evidence Code section 352.

D. Because The Evidence Was Irrelevant, Inflammatory and Highly Prejudicial, Its Admission Violated Appellant's Constitutional Rights to Due Process of Law, a Fair Trial and Reliable Guilt and Penalty Determinations

Respondent argues that admission of the tape did not violate appellant's constitutional rights, because (1) the evidence was relevant, and (2) it was "not so prejudicial as to render defendant's trial fundamentally unfair." (RB 78.) Because respondent's reasons are both incorrect, its argument fails.

Appellant has established above and in his opening brief that the tape-recorded conversation was not relevant to prove any material, disputed fact in this case. Furthermore, the trial court found that it constituted insufficient evidence of an attempt to suppress evidence to merit giving CALJIC 2.06, the consciousness of guilt instruction.

The erroneous admission of irrelevant evidence violates due process if (1) there are no permissible inferences the jury can draw from the evidence, and (2) if the evidence is "'of such quality as necessarily prevents a fair trial.'" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229, quoting *Jamal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) The tape evidence met both of these criteria.

Admission of the tape into evidence allowed the prosecutor to argue that appellant was trying to suppress incriminating evidence, by conspiring with his brother to (1) dispose of the murder weapon, (2) intimidate witnesses, and (3) kill the D.A., and that this showed consciousness of guilt. Because, as the trial court ultimately

concluded, there was no substantial evidence of an effort by appellant to suppress evidence, the inference urged by the prosecutor was impermissible.

The tape, as it was used by the prosecution, also encouraged the jury to view appellant as a ruthless gangster who would conspire to assassinate a public official and hunt down and threaten percipient witnesses in order to avoid prosecution. It is difficult to envision anything more inflammatory, and more destructive to a fair trial.

People v. Albarran, supra, 149 Cal.App.4th 214, is analogous to appellant's case. In that case, the defendant, Albarran, was charged with attempted murder and several other offenses, with gang enhancements. Prior to trial, Albarran moved to exclude the gang evidence,[19] on the grounds it was irrelevant, and that even if relevant, it was more prejudicial than probative under Evidence Code section 352. (*Id.* at p. 217.) The trial court denied the motion, and Albarran was convicted of all charges and gang enhancements. (*Ibid.*)

Albarran then moved for a new trial on the grounds that (1) there was insufficient evidence to support the gang enhancement allegations, and (2) the gang evidence introduced was irrelevant and that its admission was prejudicial error under both state and federal law. The trial court granted the new trial motion with respect to the gang enhancements, finding that there was insufficient evidence to

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[19]This evidence included testimony regarding Albarran's membership in the 13 Kings street gang, his gang tattoos, including one referring to the Mexican Mafia; graffiti attributed to the 13 Kings, including one piece of graffiti that contained a threat to kill police officers; and prior crimes committed by members of the 13 Kings, which included robberies, drive-by shootings, carjacking and felony vandalism. (149 Cal.App.4th at p. 220.) There was also testimony by a police officer that gang members gain respect by committing crimes and intimidating people. (*Id.* at p. 221.)

gang enhancements, finding that there was insufficient evidence to prove the gang allegations, but it denied the motion with respect to the underlying charges. (*Ibid.*) Although the trial court made no finding regarding the relevance issue, the court of appeal assumed the court had accepted the prosecutor's argument that despite dismissal of the gang allegations, the evidence was still relevant as to motive and intent with respect to the underlying charges. The trial court made a finding that admission of the gang evidence was not prejudicial because there was sufficient evidence of appellant's guilt of the underlying charges apart from the gang evidence, so that admission of the gang evidence "would not have affected the verdict one way or another." (*Id.* at pp.225-226.)

The court of appeal disagreed both as to relevance and prejudice, and reversed the entire judgment. The court held as follows:

> [T]he trial court should have granted Albarran a new trial on all charges. Our review of the entire record convinces us that certain extremely prejudicial gang evidence was not relevant to the underlying charges; the People failed to present sufficient evidence these crimes were gang motivated. Furthermore, given the highly inflammatory nature of the gang evidence presented, we cannot say the error in admitting the evidence was harmless.

(149 Cal.App.4th at p. 217.)

In discussing the inflammatory nature of the gang evidence, the court noted that

> California courts have long recognized the potentially prejudicial effect of gang membership. As one California Court of Appeal observed: '[I]t is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from 'Our Little Gang' series. The word 'gang' ... connotes opprobrious implications. ...[T]he word 'gang' takes on a sinister

> meaning when it is associated with activities.' [Citation omitted.]

(*Id.* at p. 223.) The court found that "certain gang evidence admitted [Albarran's Mexican Mafia tattoo; evidence of threats to kill police officers; descriptions of the criminal activities of other gang members] was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt." (*Id.* at p. 228.)

In the instant case, as in *Albarran*, the trial court allowed the prosecutor to introduce highly inflammatory evidence on a theory which the trial court ultimately found the evidence insufficient to prove. In each case, the evidence at issue also played a central role in the prosecution's case.

In *Albarran,* the prosecutor repeatedly referenced the gang evidence in both his opening statement (*Id* at p. 220), and closing argument (*Id.* at p. 222), as proof that the crime was gang motivated. (*Ibid.*) The prosecutor argued that Albarran "is all about being a gang member day in and day out, every day, every night despite efforts of the deputies...He's all about it." (*Id.* at p. 228.)

In the instant case, the prosecutor argued at length that the tape was proof that appellant was trying to suppress evidence of his guilt, and that he was planning to intimidate witnesses and solicit the murder of the Deputy District Attorney – miscreant behavior typical of gang members.

In *Albarran*, the court of appeal found that the gang evidence introduced was "extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues," and that it was therefore "'of such quality as necessarily prevents a fair trial.'"(*Id.* at pp. 230-231.)

claim of the arresting officer that appellant admitted shooting the victim. (*Id.* at p. 230, fn. 16.)

Similarly in appellant's case, admission of the tape "could only have served to cloud" the jury's resolution of the issues, thus deprived appellant of a fair trial. As discussed previously, the prosecution had no murder weapon, no evidence that appellant was still an active gang member, no evidence of motive apart from the testimony of gang detectives that at the time of the murders there was a gang war between the East Side Longos and the Rollling 20's Crips, and a disputed hearsay statement that appellant had been recently beaten up by a Mexican. In addition, the prosecution's eyewitnesses kept changing their stories. (See subsection D., *ante*.)

The tape and the inferences urged therefrom by the prosecutor consequently served to bolster what was otherwise a very weak case. As appellant argued in his opening brief, the prosecutor encouraged the jury to draw inferences from the tape regarding appellant's guilt and bad character that were unsupported by any actual evidence and entirely speculative. This effectively lightened the prosecution's burden of proof, in violation of the Due Process clause, which "protects the accused against conviction except on 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.) It further undermined the reliability of the fact-finding process required by the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 335.)

E. The Error Was Not Harmless Under Either the Federal or State Harmless Error Standard

Respondent contends that "[a]side from the taped conversation, ample evidence supported the jury's verdict," and that therefore any error by the trial court in admitting the tape was harmless. (RB 79-80.) The "ample evidence" to which respondent refers, consists of (1) the testimony of Anna Granillo, the sister of Veronica Munguia and Mario Lopez, that she saw appellant in the alleyway behind the apartment complex prior to the shooting of Mario Lopez and Veronica Munguia; (2) the testimony of Maria Jaramillo that she saw appellant shoot Angel Villa; and (3) the testimony of Nery Hernandez that appellant shot Angel Villa and then Hernandez. However, each one of these witnesses was impeached with prior, materially inconsistent statements.

Anna Granillo told the police on the night of the shooting that she had been in the bedroom and had not seen anything. (15RT 3770.) A year later, a day before the first trial was scheduled to begin, Granillo came up with a different story. She now claimed she had seen appellant and Melvin Sherman in the alleyway behind the apartment complex, as she was walked back and forth from the laundry room. (14RT 3740-3755.) In the first trial, Granillo testified that the reason she had waited a year to come forward with this new story, was because she had started drinking heavily following her brother's murder, and lost her memory. Granillo admitted that she decided to testify as a prosecution witness at the urging of her sister, Veronica, who told her the case was going to trial and her testimony was needed. In the second trial, Granillo denied having had amnesia as a result of heavy drinking. She now claimed she had not come

forward sooner because she did not want to think about the crime. (15RT 3769-3776.) Although Granillo testified that appellant was one of the two men she saw in the alleyway, she admitted that it was dark outside and the lighting was dim, and that she did not get a good look at the men's faces because they were too far away from her for her to see them very well. (15RT 3805, 3814-3816.)

Three days after the shooting of Angel Villa, Maria Jaramillo was shown a six-pack photo lineup, and signed a form stating "it looks like number 5, without the hair on his chin." (16RT 4103-4104.) A month later, at the preliminary hearing, Jaramillo testified that if appellant had hair on his chin on the day of the shooting, he could not have been the shooter. She further testified that she had picked photo number 5 because the man in that photo had more of the height and profile of the shooter, but she was not very sure that the person in the photo was the shooter, because she had seen him from far away, and it all happened very quickly. Jaramillo conceded she had only seen the shooter's profile, and the photo she selected was a full frontal view, not a profile view. (16.RT 4112-4113.) When asked whether she could make an in-court identification, Jaramillo identified Melvin Sherman – not appellant -- as the shooter. (16RT 4101.) Although at trial, Jaramillo identified appellant as the man who came out of the alley and shot Villa, she conceded it was dark outside, and there was no artificial lighting at the mouth of the alley. She also admitted that the whole thing lasted only a few seconds, and that she was looking at the flash when the gun was fired, and not at the shooter. (16RT 4121-4122.)

Nery Hernandez was heavily medicated when the police came to the hospital and showed him a photo lineup. He told the police that the man who shot him kind of looked like the person in photo number

5, but he was not sure. At the preliminary hearing, Hernandez testified that he was still unsure that appellant was the shooter, because the events occurred very rapidly, and it was dark outside, so he did not get a good look at the shooter's face. (16RT 4254-4259.) Hernandez also testified that his headlights were off as he was backing out of his driveway. (16RT 4252-4253, 4274.) Hernandez's preliminary hearing testimony conflicted with his trial testimony , in which he insisted he had seen the shooter's face and that he was certain appellant was the man who shot him. (16RT 4253, 4262, 4266.)

Both Jaramillo and Hernandez acknowledged that they had received money from the District Attorney's Office, Jaramillo, to pay moving expenses (16RT 4126), and Hernandez, to pay his hospital bills. (16RT 4282.) Hernandez also admitted having spoken repeatedly with the investigating detective since the preliminary hearing. (16RT 4272.)

Because each eyewitness's account of what he or she saw changed dramatically over time, and because the events happened so quickly and the lighting conditions were so poor, there were compelling reasons for the jury to doubt the credibility of these witnesses's testimony and the reliability of their respective identifications of appellant.

Respondent also maintains that "[a]ppellant had a "strong motive to commit the shootings" (RB 80), but in reality there was scant evidence of such motive. The only evidence that the shooting of Mario Lopez and Veronica Munguia was gang-related, was the testimony of Detective Victor Thrash that at the time in question the East Side Longos and the Rolling 20's Crips were at war with each other (16RT 4234), and that Mario Lopez and other people in his

apartment that day were members of the Longos gang. (14RT 3720.) The last time appellant had been identified as an active member of the Rolling 20's gang was May 1990, more than six and a half years prior to this incident (15RT 3939-3940), and there was no evidence presented establishing that he was *still* an *active* member of the gang.

Respondent argues that an additional motive for the shootings was the fact that appellant had "recently been physically beaten by an Hispanic gang member." (RB 80.) Respondent has misstated the evidence. Detective Victor Thrash testified that appellant's friend Leslie Rainey told Thrash that appellant was angry because he had recently been beaten up by a "Mexican." (16RT 4176.) There was no mention of an "Hispanic gang member." In any event, Rainey disputed that testimony, and denied ever having made such a statement. Rainey testified that he was arrested and interrogated by Detectives Thrash and Conant, and that during that interrogation, which was conducted over a 12 hour period, one of the detectives told Rainey that appellant claimed to have told Rainey about a fight with some Mexicans. Rainey insisted that appellant had never said anything of the kind to him. (15RT 3969-3970.)

Finally, respondent argues that appellant had a motive to murder Angel Villa and Nery Hernandez because they had witnessed him committing crimes. First, there was *no* evidence that Villa had witnessed any crime – respondent has again misstated the evidence. The motive for shooting Villa remains a mystery. Second, although Nery was shot because he was a witness to the Villa shooting, the evidence establishing appellant's identity as the shooter, for the reasons stated above, was far from robust.

Had the prosecution had a stronger case against appellant, the first trial would not have resulted in a hung jury. Indeed, the first jury

was initially deadlocked 10-2 in favor of acquittal on four counts and 11-1 for acquittal on the remaining count, but several jurors changed their vote to guilty, despite acknowledging the weakness of the evidence, due to the "gang implications." (2CT 404.)

The most significant difference between the first trial and the retrial, was that the prosecution was allowed to introduce the tape-recorded phone conversation into evidence in the retrial and cleverly weave it into its case to plug the holes and tie up the loose strings. Therefore, admission of the tape into evidence was not harmless either as federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24, or state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836.

Under *Chapman*, respondent must prove beyond a reasonable doubt that the error was harmless. (*Id.* at p. 24.) To meet this burden, respondent cannot simply show that there was sufficient evidence on which appellant could have been convicted without the tape-recorded phone conversation. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 87.) Put another way, the Court must look to "the basis on which the jury actually rested its verdict. [Citation.] "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

The tape-recorded conversation played an extremely prominent role in the prosecution's case. In urging the jury to convict appellant, the prosecutor effectively portrayed the conversation as a metaphorical smoking gun. Under the circumstances, there is simply

no way that respondent can prove beyond a reasonable doubt that "the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Ibid.*) Because the prosecutor also cited the tape as evidence of appellant's future dangerous, justifying a death sentence, the same is true with respect to the jury's penalty verdict.

The error was also not harmless under the standard set forth in *People v. Watson,* for evidentiary errors under the California Evidence Code. The inquiry under that standard is whether it is reasonably probable appellant would have obtained a more favorable result in the absence of the error. (*People v. Watson, supra*, 46 Cal.2d 818.) The fact that the prosecution could not obtain a conviction in the first trial without the tape is compelling evidence that appellant would have obtained a more favorable result in the retrial had the tape not been admitted into evidence.

For all of the reasons stated above and in appellant's opening brief, this Court must find that admission of the tape was prejudicial error, and reverse appellant's conviction and death sentence.

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IV.

THE TRIAL COURT ERRONEOUSLY GRANTED THE PROSECUTION'S CHALLENGE FOR CAUSE OF JUROR 3389 ON THE GROUNDS THAT THE JUROR "HAS A DEFINITE BIAS IN FAVOR OF LIFE WITHOUT PAROLE," AND "WOULD NOT FAIRLY CONSIDER BOTH OPTIONS"

A. Introduction

The trial court excused Juror 3389 for cause on the grounds that the juror was biased in favor of life without the possibility of parole (hereinafter "LWOP"), and would not *fairly* consider both sentencing options if allowed to serve on the jury. (13RT 3246.)[20] Appellant argued in his opening brief that the trial court's stated reasons for excusing the juror did not constitute legal "cause" for excusal, as defined by the United States Supreme Court. A juror may be excused for cause based on his views regarding the death penalty, *only* if such views would "prevent or substantially impair the performance of his duties as a juror in accordance with his

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[20]The trial court's entire ruling was as follows:

> I am going to grant the motion as it relates to Mr. 3389. It appears from his answers that he has a definite *bias in favor of the (sic) life without parole* and that the only situation he could foresee himself, the only one he gave as an example – even when I asked him for additional situations where it might occur – the only one that came to mind for him is a situation where someone was already serving a life sentence and had committed further murders while in custody in serving that life sentence. I believe that based upon his expression of his strong religious beliefs that he would not *fairly* consider both options in this case if given the opportunity to do so.

(*Ibid.*)

instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) As appellant discussed at length in his opening brief, the fact that a juror has a preference in favor of one penalty or the other does not disqualify that juror from serving.[21] This Court recently reiterated this principle in *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1041 [161 Cal.Reporter 3d 1, 50]:

> That a prospective juror might weigh the aggravating and mitigating evidence in light of his or her death penalty views is not necessarily a ground for exclusion. Opinions about the death penalty may disqualify a penalty juror only if they would prevent the juror from engaging in the weighing process and deliberating the issue of penalty.

Respondent does not dispute, or even address, appellant's contention that the trial court's *stated* reason for excusing Juror 3389 – i.e., that he was biased in favor of LWOP and would not *fairly* consider both options -- was legally improper. Instead, respondent asserts that "substantial evidence supported the trial court's finding that Juror 3389 (sic) views on the death penalty would 'prevent or substantially impair' his performance." The trial court never made that finding, and its ruling cannot legitimately be construed to be the functional equivalent. However, even if the trial court had applied the correct legal standard, and made a finding that "Juror 3389's views on the death penalty would prevent or substantially impair his performance," such finding would not have been supported by substantial evidence.

A respondent concedes at the outset of its argument (RB 86), Juror 3389's statements regarding the death penalty were not equivocal or ambiguous. Furthermore, the trial court did not cite Juror 3389's demeanor during voir dire as a basis for its ruling.

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[21]See AOB 120-125.

Accordingly, no deference is owed to the trial court's ruling in this case, and it cannot be upheld on appeal if it is not supported by substantial evidence. (*People v. McKinsie* (2012) 5 Cal.4th 1302, 1328 ["When a juror has not made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life in prison without the possibility of parole, the court's ruling will be upheld if supported by substantial evidence"].)

Because Juror 3389 clearly indicated that he would be willing to impose the death penalty based on a showing of future dangerousness, substantial evidence does not establish that his dislike of the death penalty would prevent or impair him from performing his duties as a juror.

B. Juror 3389 Made Clear That He Would Be Willing to Impose the Death Penalty in a Case Involving a Risk of Future Dangerousness

Juror 3389's unequivocal, unambiguous position regarding the death penalty was that despite his preference for LWOP, he would be willing and able to impose the death penalty in a case where the defendant is shown to pose a future threat to others, even if incarcerated. Indeed, Juror 3389 stated during voir dire that it would be "an easy decision" for him to vote for the death penalty "where [the defendant's] existence is hazardous to some segment of society." (13RT 3222.) This was precisely the prosecution's argument in the penalty phase – that if sentenced to LWOP, appellant would continue to be a threat to others. In urging the jury to return a death verdict, the prosecutor argued:

> I know you saw this before, but I want to touch upon it again because it is something you should consider in making your decision as to the appropriate decision. *Future dangerousness.* Is it over? Did it end with the murder of Villa and Lopez and the attempted murder of

> Mr. Hernandez? Where does it go on? *I focus you on the one line of the defendant when he is in county jail, has been arrested and not on the street and doesn't have a gun on him anymore. What is he doing? He is on the phone saying, "we need that D.A. hit."* ¶ Now I am not appealing to you as a district attorney, but the point is it's not over. *This is someone who continues to be a violent predator.*

(22RT 5808, emphasis added.)[22]

The United States Supreme Court has recognized that future dangerousness is one of the factors a jury may consider in determining the appropriate sentence in a capital case:

> [W]here the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase. The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing appropriate punishment.

(*Simmons v. South Carolina* (1994) 512 U.S. 154, 163.)

This Court has also upheld the prosecution's right to argue that a death sentence is warranted due to evidence of the defendant's future dangerousness:

> "[P]rosecutorial argument regarding the defendant's future dangerousness is permissible when based on evidence of the defendant's conduct rather than expert opinion." (*People v. Ervin* (2000) 22 Cal.4th 48, 99, 91 Cal.Rptr.2d 623, 990 P.2d 506 [prosecutor's argument, based on the defendant's record, that he would present a discipline problem in prison because he would have

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[22]The prosecutor announced his intention, prior to the commencement of voir dire on retrial, to introduce evidence of a taped phone conversation initiated by appellant from the county jail during which appellant talked about wanting to have the D.A. killed. (10RT 2469.)

"nothing to lose," was not improper].)

(*People v. Thomas* (2012) 53 Cal.4th 771, 822.)

Because Juror 3389 stated, unequivocally, that he would be willing and able to impose the death penalty if the evidence indicated that appellant could pose a threat to others even if incarcerated, his views on the death penalty would not have prevented him from performing, or substantially impaired his ability to perform, his duties as a juror in the present case.

C. Respondent Has Overstated Juror 3389's Opposition to the Death Penalty and Has Misrepresented His Stated Position as to Whether He Would Be Willing and Able to Consider the Death Penalty as a Sentencing Option

Respondent claims that Juror 3389, as a Catholic, was strongly opposed to the death penalty. (RB 86.) However, in his juror questionnaire, Juror 3389 stated that he was "moderately against" the death penalty . (16CT Supp.II 4418.) He also agreed that California should have the death penalty. (16CT Supp.II 4421.) He further stated that he would not automatically vote for life without the possibility of parole, regardless of the evidence. (*Ibid.*) When asked during voir dire about his views, Juror 3389 stated, "My inclination is to try to avoid the death penalty, *inclination but not an absolute.*" (13RT 3222, emphasis added.)

While Juror 3389 wrote in his jury questionnaire that his views about capital punishment were shaped by Catholic teachings (16CT Supp.II 4419), respondent's assertions that Juror 3389 (1) expressed strong religious beliefs against the death penalty he could not set aside (RB 86, 88), and (2)"could not consider imposing the death penalty as a reasonable possibility" (RB 87), neither accurately reflect

the juror's questionnaire responses or his statements during voir dire. Juror 3389 made clear that he could vote for the death penalty in a case in which he felt that it was necessary to protect the public.

In response to Question 67 in the jury questionnaire – "What is the view, if any, of your religious organization concerning the death penalty?" – Juror 3389, wrote:

> The death penalty should only be imposed when life in prison without possibility of parole cannot be "absolutely" implemented to protect society.

(16CT Supp.II 4420.) In response to the next question – "Do you feel obligated or persuaded to accept that view?" – Juror 3389, wrote "yes," and explained that, "It protects society from repeated evil acts." (*Ibid.*)

At the time Juror 3389 filled out the jury questionnaire, he was of the belief that someone sentenced to life without possibility of parole might someday be released from prison. (13RT 3221.) However, even after the court refuted this assumption, Juror 3389 told the court he could still vote for a death sentence if the evidence indicated the defendant would remain dangerous to others despite being incarcerated. (13RT 3222-3223.)

Respondent incorrectly asserts that "[d]uring voir dire, Juror No. 3389 stated that, absent a situation where an incarcerated person continued to commit additional murders while in prison, he was inclined to 'always' impose a sentence of life without parole." (RB 87.) The precise question to which Juror 3389 responded affirmatively was that he could return a death verdict in a "situation where a person is in prison and *is still at risk*." (13RT 3223.) Although Juror 3389 offered a hypothetical example involving the killing of prison guards, his point was that he would be willing and able to

impose a death sentence on an individual whose continued "existence is hazardous to some segment of society." (13RT 3222.)

In justifying his decision to excuse Juror 3389 for cause, the trial court noted that Juror 3389 could not come up with another hypothetical example of a set of facts under which he might vote for the death penalty. (13RT 3246.) However, the court ignored the prosecutor's subsequent colloquy with Juror 3389, during which Juror 3389 clarified that he would vote for the death penalty in a situation where life imprisonment would not prevent the defendant from committing further acts of violence. (13RT 3223.)

Juror 3389's jury questionnaire responses and his comments during voir dire clearly establish that while he disfavored the death penalty, he nevertheless believed it would be appropriate – and he would be willing to impose it – in a case where there was a risk that a dangerous person would be either released from prison or would continue to pose a threat to public safety even if incarcerated. It was thus simply wrong for the trial court and respondent to conclude that the only set of facts under which Juror 3389 could vote for the death penalty would be one in which the defendant had previously committed murder while incarcerated.

Under the circumstances, respondent's reliance on *People* v. *Bradford*, (1997) 15 Cal.4th 1229, 1320, and "cases cited therein" (RB 89) is misplaced.[23] *Bradford*, and the cases cited therein, all involved a juror or jurors who initially indicated that they would automatically choose LWOP, but when pushed, hypothesized that they might

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[23]The cases to which respondent is referring are (*People v. Cummings* (1993) 4 Cal.4th 1233, 1280-128); (*People v. Payton* (1992) 3 Cal.4th 1050, 1063), and (*People v. Hill* (1995) 3 Cal.4th 959, 1003)

theoretically be able to consider a death sentence in an extreme case, such as one involving mass murder, or in a case involving specific circumstances inapplicable to the case being tried.

In *People v. Bradford, supra*, one of the two jurors excluded for cause stated she could bring herself voting for death perhaps if a child were involved. (15 Cal.4th at pp. 1319-1320.) The other juror initially stated that he could only conceive of imposing the death penalty if it would bring the victim back to life. When pushed by the court and counsel to identify circumstances in which he could render a death verdict, he "suggested he could do so in the case of a 'death commandant,' 'grinding out victims by the thousands on a monthly basis,' or where a hired killer performed premeditated mass murder on school children." (*Id.* at p. 1320.) This Court upheld the trial court's exclusion of the two jurors, noting that:

> Although both jurors indicated they could impose the death penalty in specified, particularly extreme cases, their hypothetical examples presented more egregious facts than those involved in the present case...Their examples were not analogous to the circumstances of the murders at issue in the proceedings before them.

(*Ibid.*)

The instant case is materially distinguishable from *Bradford*, because Juror 3389 stated that it would be "an easy decision" for him to vote for the death penalty under the precise circumstances urged by the prosecution as the reason for sentencing appellant to death: appellant's demonstrated potential for committing future acts of violence. Neither *Bradford*, nor the cases cited by the Court therein (*People v. Cummings, supra*, 4 Cal.4th 1233. at pp. 1280-128; *People v. Payton, supra*, 3 Cal.4th 1050, at p. 1063, and *People v. Hill, supra*, 3 Cal.4th 959, at p.1003) involved a prospective juror who

stated that it would an "easy decision" to vote for a death sentence under circumstances being argued by the prosecution as a reason to sentence the defendant to death.[24]

D. The Record Does Not Establish That Juror 3389 Was Unwilling to Temporarily Set Aside His Beliefs and Follow the Law

Respondent argues that Juror 3389 "did not clearly state that he was willing to temporarily set aside his beliefs in deference to the rule of law." (RB 87.) In *Lockhart v. McCree* (1986) 476 U.S. 162, 176, the United States Supreme Court stated:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

As a preliminary matter, Juror 3389 was *never asked* – either in the jury questionnaire or during voir dire -- whether he could follow the court's instructions. Because the burden of proof in challenging a juror for anti-death penalty views rests with the prosecution (*People v. Watkins* (2012) 55 Cal.4th 999, 1012), it was up to the prosecutor to establish that Juror 3389's feelings about the death penalty would

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[24]In *People v. (Mark) Bradford* (1997) 14 Cal.4th 1005, 1049-1050, (not cited by respondent) this Court upheld the trial court's exclusion for cause of a prospective juror who said he would not consider a death sentence unless there was evidence establishing the defendant's propensity to either kill someone in prison, or escape from prison and kill again. However, in that case, unlike the present one, the prosecution was not raising the issue of future dangerousness. In addition, the trial court found the excused juror's demeanor during voir dire (his legs were shaking and he appeared very nervous) indicated he had very strong anti-death penalty views that he was unable to fully articulate. In the instant case, the trial court did not cite Juror 3389's demeanor as a factor in its decision to excuse the juror for cause.

prevent or impair the performance of his duties, as defined by the court's instructions and the juror's oath. Accordingly, any failure on the part of Juror 3389 to explicitly state that his opposition to the death penalty would not prevent him from following the court's instructions, was not evidence that such opposition would interfere with the performance of his duties. It was simply the result of his never having been asked whether or not he could do that.

Nevertheless, despite the fact that Juror 3389 was never asked that question, he *did* clearly and unequivocally confirm that notwithstanding his opposition to the death penalty, he would be willing to impose it in a "situation where the person is in prison and still at risk." (13RT 3223.)

Respondent points to the fact that on his jury questionnaire, Juror 3389 circled "strongly disagree" when asked whether someone who commits multiple murder should get the death penalty (16CT Supp. II 4421), as evidence that Juror 3389 would not "defer to the rule of law." (RB 88.) However, under California law, jurors are permitted to assign lesser or greater weight to aggravating and mitigating factors as a matter of individual judgment. (CALJIC 8.88.) Therefore, the fact that a juror does not believe multiple murder justifies a death sentence, but instead believes that future dangerous does, does not constitute cause for excusal under *Witt v. Wainwright*, *supra*, and its progeny. As observed by a former justice of this Court, "One who favors the death penalty in some cases but not in others is considered a supporter of the death penalty." (*People v. Sanders* (1990) 51 Cal.3d 471, 546, dissenting opn. J. Broussard.)

E. Juror 3389 Did Not Give Conflicting Answers When Questioned by Defense Counsel, So the Trial Court's Determination of Juror 3389's State of Mind Is Not Binding on This Court

Respondent argues that "[t]o the extent Juror No. 3389 gave conflicting answers when questioned by trial counsel, the trial court resolved those differences adversely to appellant by granting the challenge, and its determination as to Juror 3389's state of mind are (sic) binding." (RB 88.)

Juror 3389's responses to defense counsel's questions in no way, shape or form conflicted with anything he had stated previously. The following are defense counsel's questions and Juror 3389's responses:

Ms. Robinson:	If you sat in the penalty phase and felt the facts and evidence presented warranted a death verdict, could you render such a verdict?
Juror No. 3389:	In other words, if it fit my criteria, yes.
Ms Robinson:	If you believe based upon the facts and the circumstances, could you come back with a death verdict?
Juror No. 3389:	I think so, yes.

(13RT 3224.)

Juror 3389's responses to defense counsel's questions were entirely consistent with what he had said before, which was that he could vote for a death verdict if the evidence established that appellant would pose a continuing threat if given a sentence of life without the possibility of parole. It is obvious from the record that future dangerousness was what Juror 3389 meant by, "if it fits my criteria, yes."

Accordingly there was no ambiguity regarding Juror 3389's state of mind for the trial court to resolve, and therefore its findings are not entitled to any deference and are not binding on this Court. (*People v. McKinsie, supra,* 5 Cal.4th at p. 1328.)

F. Conclusion

The trial court in this case abused its discretion when it excused Juror 3389 for cause. Not only did the court apply the wrong legal standard in making its ruling, but even under the correct legal standard, there was no substantial evidence that Juror 3389's views regarding the death penalty would "prevent or substantially impair his performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 433.)

Thus for all of the reasons set forth above and in the AOB, this Court must reverse appellant's death verdict. (*People v. Riccardi* (2012) 54 Cal.4th 758, 783 [under United States Supreme Court precedent, erroneous excusal of prospective juror for cause based on juror's views regarding death penalty automatically compels reversal of penalty verdict].)

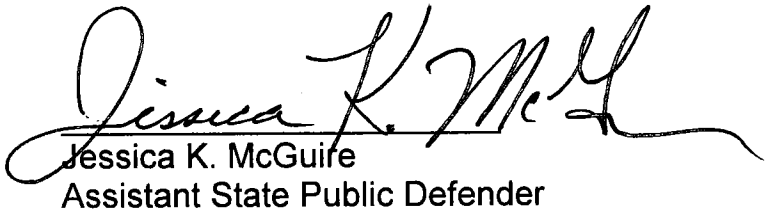
CONCLUSION

For all of the foregoing reasons and those stated in appellant's opening brief, appellant requests that this Court reverse his conviction, strike the special circumstances and set aside his sentence of death

Dated: November 14, 2013

Respectfully submitted,

Michael J. Hersek
State Public Defender



Jessica K. McGuire
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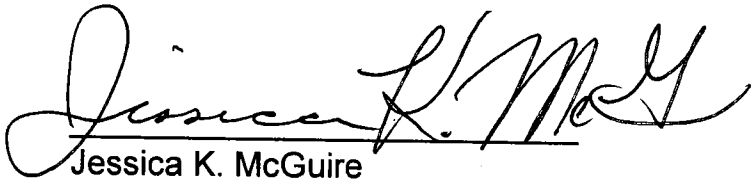
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2)

I, Jessica K. McGuire, am the Deputy State Public Defender assigned to represent appellant Kiongozl Jones in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 26,090 words in length excluding the tables and this certificate.

Dated: November14, 2013



Jessica K. McGuire
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DECLARATION OF SERVICE BY MAIL

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Case Number: **Supreme Court No. S075725**
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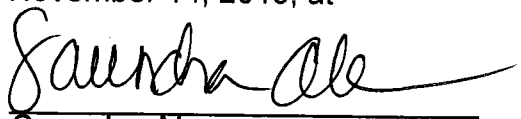
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 14, 2013, at Sacramento, California.



Saundra Alvarez