In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

FLOYD LAVENDER, et al.,

Defendant and Appellant.

Case No. S209975

Fourth Appellate District Division One, Case Nos. D057655, D057686
Imperial County Superior Court, Case No. JCF21567
The Honorable Donal B. Donnelly, Judge

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ISSUE PRESENTED

Where a reviewing court is presented with conflicting affidavits that create material, disputed issues of fact regarding the nature and extent of jury misconduct, should it remand the matter to the trial court for a limited hearing [*People v. Hedgecock* (1990) 51 Cal.3d 395 (*Hedgecock*)], so that the record may be fully developed before it determines whether the presumption of prejudice has been rebutted?

INTRODUCTION

Appellants Floyd Lavender and William James Gaines terrorized Kristen Martin, Mike Hughes, Thayne Tolces, and 14-year-old Courtney Bowser, for nine hours, using a hammer, nails, a chisel, and hair clippers in the process. They also took or carried a handcuffed Bowser from the scene and later drowned her in an irrigation canal.

After their convictions for murder, kidnapping, and torture, appellants filed a motion for a new trial, based in part on allegations of juror misconduct. In support of their motion, appellants attached affidavits from three jurors and a defense investigator, which alleged that several jurors had discussed at length the fact that appellants had failed to testify, and had concluded they were guilty for that reason. In opposition to the motion, the prosecution provided affidavits from four jurors, including two of the same jurors who had also provided affidavits to the defense. Those affidavits indicated that only one juror had briefly mentioned appellants' failure to testify, and that this juror was quickly admonished by several other jurors, including the foreperson, not to consider that fact.

The trial court denied appellants' motion, and sentenced them both to state prison. Appellants appealed the judgment. Division One of the Fourth District Court of Appeal reversed and remanded the matter for a new trial, finding that the prosecution's affidavits had failed to rebut the

presumption of prejudice arising from the misconduct alleged in the affidavits presented by the defense.

The Court of Appeal's modified opinion failed to squarely address an issue that is central to the resolution of this case: What exactly did the parties' affidavits prove, given their contradictory nature? Instead, it begged that question by concluding the defense affidavits established that the jurors committed prejudicial misconduct. But this is a factual question that cannot be resolved on a cold appellate record. Since the trial court is in the best position to resolve the credibility disputes and make the necessary factual findings concerning the nature of the misconduct here, the Court of Appeal erred by reversing the judgment and granting appellants a new trial without first remanding the matter for an evidentiary hearing under *Hedgecock.*

FACTUAL AND PROCEDURAL BACKGROUND

On August 14, 2003, or the following day, Kristen Martin, Mike Hughes, Thayne Tolces and 14-year-old Courtney Bowser, gathered at the apartment of Angela Vereen. They spent the better part of the next four days playing video games and smoking methamphetamine. (4 GCT 953; 6 LRT 617-622; 8 LRT 981-982; 9 LRT 1143-1145, 1168; 11 LRT 1572.) At some point after her visitors had left, Vereen noticed that two blank "traveler's checks" she had left on her desk in a yellow envelope were missing. (5 LRT 327-330.) They had been entrusted to her by appellant Gaines, and she immediately called him to report the suspected theft. (5 LRT 334.) Appellants arrived at Vereen's apartment, and spent the next nine hours torturing Martin, Hughes, Tolces, and Bowser. (6 LRT 649; 8 LRT 986-987; 1027, 1098-1100.)

Appellants heated up spoons, knives, and forks with a lighter, and they used them to burn Bowser's breasts and Martin's forehead. They also

stuck the tines of the fork in Bowser's legs. (6 LRT 636-637, 702; 8 LRT 999-1002; 9 LRT 1149-1151, 1181, 1203-1204, 1207, 1263.) Appellant Lavender took Martin and Bowser into the bathroom and handcuffed them together, suspending their arms from the shower rod in the bathroom. (9 LRT 1151-1152.) Lavender took a pair of scissors and cut Martin's shirt from the bottom up, cutting through her bra and exposing her breasts. (9 LRT 1152-1153.) Lavender did the same with Bowser, and then pulled down her pants as well. While rubbing the scissors along their bodies, he told the girls that if they did not reveal the location of the checks, he was "going to put the scissors up [them]." (9 LRT 1152-1153.) Either Gaines or Lavender threatened the girls at some point that they would take them out to the desert and "make [them] dig [their] own hole." (9 LRT 1259-1260.)

Hughes and Tolces were taken to the living room, where appellant Gaines hit Hughes either in the forehead or his face with the butt of his gun. (5 LRT 342, 383; 8 LRT 997, 1091-1092.) Gaines also threw a knife at Tolces. (8 LRT 998.) Next, appellant Gaines either placed Hughes on the floor, or knocked him to the floor by striking him in the head with either a hammer or a chisel. Martin initially feared that Hughes was dead. Appellant Gaines began to tap the end of the chisel on a portion of Hughes's ear. Gaines then used the hammer to pound the flat ends of some nails into Hughes's head. (6 LRT 648-649; 8 LRT 997-998; 9 LRT 1154-1155, 1209-1211.)

Hughes's trauma was enough to prompt a distraught Bowser to confess that she had taken the checks. (6 LRT 651-652.) After that point Lavender and Gaines, along with Vereen, took turns slapping Bowser, punching her, and pulling her hair. As they did, they kept saying, "You're going to die, bitch, you're going to die." (6 LRT 652-653.) Next, either Gaines or Lavender began to shave Bowser's head with some clippers, and at some point had Tolces do so as well. (6 LRT 654-656, 711; 8 LRT 1003-

1004, 1054-1055, 1095-1096; 9 LRT 1156, 1185-1186, 1197-1198.) Near daybreak, appellants wrapped a trench coat around the still sobbing Bowser, and took her handcuffed from the apartment. (7 LRT 809-810; 8 LRT 1003-1004, 1051-1052; 9 LRT 1156-1157.)

Vereen ran into appellant Gaines later the next morning. Referring to Bowser, appellant Gaines told Vereen that, "The girl is in a canal with a bag over her head barely breathing." (5 LRT 348-349, 387.)

On August 20, 2003, Bowser's body was discovered in an irrigation ditch leading from the Pansy Canal, but it was not identified until sometime in February 2006. (11 LRT 1456-1460, 1525, 1571; 13 LRT 1938.) The forensic pathologist who performed the autopsy testified that the condition of Bowser's body suggested she was still alive while she was placed in the water, that she had struggled while being held under, and that she had died of drowning. (10 LRT 1336-1338, 1342, 1347.)

On June 27, 2008, the Imperial County District Attorney filed an information alleging both appellants committed willful, deliberate, and premeditated murder (Pen. Code, §§ 187, subd. (a) and 189; count 1); kidnapping (Pen. Code, § 207, subd. (a); count 2); torture (Pen. Code, § 206; counts 3-5); and false imprisonment (Pen. Code, § 236; counts 6-9). (1 GCT 38-42.)

On May 4, 2010, the jury convicted both appellants of all counts. (3 GCT 688-696; 2 LCT 393-401; 15 LRT 2229-2236.) On May 28, 2010, the court below granted appellants' unopposed motion to dismiss counts 6-9 on grounds that they were time-barred. (3 GCT 739; 2 LCT 435; 15 LRT 2250-2251.)

On June 30, 2010, appellants filed their motion for a new trial which was based in part on allegations of juror misconduct, and supported by declarations from Juror No. 9, Juror No. 4, and Juror No. 10. (3 GCT 849; 4 GCT 851, 853.) In its opposition, the prosecution submitted "clarifying"

affidavits from Juror No. 9 and Juror No. 4, as well as additional affidavits from Juror No. 12 and Juror No. 5. (4 GCT 899, 901, 903, 905.) Appellants also submitted a declaration from a defense investigator, challenging the statements made by Juror No. 9 and Juror No. 4 in their clarifying affidavits. (4 GCT 941-942.)

During the hearing on the motion, the trial court ruled the following portions of the declarations submitted by appellants were admissible: from the declaration of Juror No. 9, her statement that, "Several jurors also discussed the fact that the defendants did not testify in this case" (16 LRT 2327); from the declaration of Juror No. 4, his statement that, "The fact that the defendants did not testify was discussed at length during the deliberations" (16 LRT 2327-2328); and from the declaration of Juror No. 10, his statement that, "There was no testimony from the defendants and we discussed this fact during deliberations" (16 LRT 2328).

The court below also ruled the following portions of the declarations submitted by the prosecution were admissible: from the clarifying declaration of Juror No. 9, her statement that, "The only discussion that occurred during deliberations regarding the defendants not testifying is when one of the jurors mentioned it. The foreperson immediately admonished that juror that we could not consider that issue. Several other jurors then also repeated that it was an issue that we could not consider" (16 LRT 2331); from the declaration of Juror No. 12, his statement that, "The only discussion that occurred during deliberations regarding the defendants not testifying is when one of the jurors mentioned it. I immediately admonished that juror that we could not consider that issue. I specifically recall that [Juror No. 11], also stated that we were not to consider that issue and must follow the instructions" (16 LRT 2331-2332); from the clarifying declaration of Juror No. 4, his statement that, "The only discussion that occurred during deliberations regarding the defendants not testifying is

when a juror mentioned it. The foreperson immediately told the juror that we could not consider that issue." (16 LRT 2333.)

The trial court ruled that the declaration of the defense investigator was inadmissible in its entirety. (16 LRT 2333-2334.)

The trial court found that misconduct had occurred, as one or more jurors had mentioned the fact that appellants had not testified, but that the discussion was brief and the foreperson had immediately admonished the juror or jurors that they were not to consider that fact. (16 LRT 2335-2336.) Accordingly, the trial court found that the prosecution had rebutted the presumption of prejudice by making a showing that "no actual prejudice occurred that affected the defendants' right to a fair trial." (16 LRT 2335-2336.) The trial court also found that appellants had not made the requisite showing to obtain a hearing under *Hedgecock*, because there were no "clearly defined and specific disputes on material issues relating to misconduct," and it "would likely result in the Court or counsel improperly inquiring into subjective thought processes of the jury." (16 LRT 2336-2337.) The trial court then denied appellants' motions and sentenced them to a term of 25 years to life for their violation of count 1; a consecutive term of 5 years for their violation of count 2; and 3 terms of life with the possibility of parole for their violations of counts 3-5, to run concurrently to each other and consecutively to their sentence for count 1. (4 GCT 925-926, 973-976; 2 LCT 455-456, 506-509; 16 LRT 2375-2378.)

Appellants appealed the judgment. In an opinion authored by Justice McDonald, the Court of Appeal unanimously reversed, and remanded the matter for a new trial. (*Lavender I*, Slip Opn. at 37.) The Court of Appeal found the trial court erred by excluding the statements Juror No. 4 made in his original declaration; namely, that the jury's discussions regarding appellants' refusal to take the witness stand "played a large part in our decision," and that "[w]e discussed the fact that if the [defendants] were

innocent then they should've testified." (*Lavender I*, Slip Opn. at 25.) The Court of Appeal also found the trial court erred when it excluded the statements from Juror No. 10's declaration that the jury "openly talked about why they did not testify and that this fact made them appear guilty to us" and that "[t]he jurors discussed that the defendants should have provided more witnesses, including themselves, to testify on their behalf." (*Lavender I*, Slip Opn. at 26.)

The Court of Appeal also held that many of the statements made by the defense investigator were admissible. These included the following statements regarding the clarifying affidavit submitted by Juror No. 4: "this is . . . not what [Juror No. 4] told me. [Juror No. 4] told me that the defendants not testifying was discussed for some period of time and was more than a mere mentioning of that fact. He also told me that the jury discussed that if they were really innocent they would have testified. He never said that [the foreperson] or any other juror admonished them to stop talking about that or that they could not consider this in their deliberations," and the following statements regarding the clarifying affidavit submitted by Juror No. 9: "This is not what she told me when I first interviewed her. [Juror No. 9] told me that several jurors discussed the fact that the defendants did not testify. She did say that at some later point in time that a juror said that they should not discuss that. She never told me that the foreperson immediately put a stop to the discussion." (*Lavender I*, Slip Opn. at 27-28, fn. 27.)

The Court of Appeal then found the jurors' declarations established that the jury discussed appellants' failure to testify, and "the adverse inference to be drawn from that fact." (*Lavender I*, Slip Opn. at 28.)

The Court of Appeal held, "as in *Cissna* [*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116 (*Cissna*)], the entire case turned on the credibility of witnesses whose versions were at best internally inconsistent in many

particulars. Under the facts of this case, we cannot conclude the jury's discussion of defendants' failure to testify, which 'presumptively establish[ed] prejudicial jury misconduct' (*People v. Perez* (1992) 4 Cal.App.4th 893, 908-909), did not warrant a new trial because we cannot conclude " ' "upon examining the entire record, that there is no substantial likelihood that [defendants] suffered actual harm [from the misconduct]." ' (*In re Carpenter*[(1995)]9 Cal.4th [634,] 654[(*Carpenter*)].)" (*Lavender I*, Slip Opn. at 30-31.)

The Court of Appeal further held, "Here, unlike the situations in *Hord*, [*People v. Hord* (1993) 15 Cal.App.4th 711 (*Hord*)], *Leonard* [*People v. Leonard* (2007) 40 Cal.4th 1370 (*Leonard*)] and *Loker* [*People v. Loker* (2008) 44 Cal.4th 691 (*Loker*)], the discussion about defendants' failure to testify was not limited to expressions of regret or curiosity, but instead was expressly linked to the adverse inference of guilt to be drawn from the failure to testify." (*Lavender I*, Slip Opn. at 33.) In a footnote, the Court of Appeal added, "Although the foreman here told the jury not to consider the *fact* of the defendant's failure to testify, as occurred in *Loker* and *Hord* (*Loker*, *supra*, 44 Cal.4th at p. 748; *Hord*, *supra*, 15 Cal.App.4th at p. 728), neither *Loker* nor *Hord* involved a jury that *also* discussed the inference of guilt it would draw from that fact, and therefore neither case supports the notion that a jury foreman's admonition can *cure* the taint created by such discussions." (*Lavender I*, Slip Opn. at 33, fn. 29, emphasis in the original.)

On July 24, 2012, the People filed a Petition for Rehearing, arguing the case should be remanded to the trial court so that it could hold a limited hearing in light of the newly admitted evidence, be afforded the opportunity to receive testimony from the jurors, and resolve the factual conflicts in the first instance. On July 27, 2012, the Court of Appeal denied the petition. Justice Nares was of the opinion that it should be granted.

On August 21, 2012, respondent filed its first Petition for Review. On October 24, 2012, this Court unanimously granted respondent's petition, and transferred the matter to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1462-1471 (*Bryant*); *People v. Von Villas* (1992) 11 Cal.App.4th 175, 251-261 (*Von Villas*); and *People v. Perez* (1992) 4 Cal.App.4th 893, 905-909 (*Perez*). All three of the cited opinions concluded a remand for an evidentiary hearing was the appropriate remedy.

On March 6, 2013, the Court of Appeal issued its modified opinion and held, "We have examined *Perez*, as well as its progeny *Bryant* and *Von Villas*, and conclude those cases are both distinguishable and involve questionable legal reasoning that should not be perpetuated, and therefore our original disposition should remain unchanged." (*Lavender II*, Slip Opn. at 4.) The Court of Appeal added, "After reconsideration, we remain convinced the misconduct by this jury in discussing the adverse inference to be drawn from defendants' failure to testify was presumptively prejudicial and, because the evidentiary basis for the guilty verdict appeared diaphanous and was in many respects in disarray, the record in this case is inadequate to rebut that presumption." (*Lavender II*, Slip Opn. at 4.) The Court of Appeal reversed, and set the matter for retrial after concluding that the evidence was sufficient to support appellants' convictions for all offenses. (*Lavender II*, Slip Opn. at 50-52.)

On April 15, 2013, respondent filed its second Petition for Review, which this Court unanimously granted on June 12, 2013.

ARGUMENT

I. IN LIGHT OF THE AFFIDAVITS' INCONSISTENCIES, THE PROPER REMEDY IN THIS CASE IS A REMAND FOR AN EVIDENTIARY HEARING, NOT A NEW TRIAL

In its second opinion, the Court of Appeal concluded that, notwithstanding this Court's order for reconsideration, it would adhere to its original decision, reverse the convictions, and remand the cause for a new trial "because the admissible evidence demonstrated that misconduct occurred and our independent review of the entire record convinces us the presumption of prejudice from the misconduct has not been rebutted." (*Lavender II*, Slip Opn. at 48.)

In so holding, the Court of Appeal erred, because it acted as the trier of fact, chose to credit the account of the misconduct that was contained in the defense affidavits, and then made its determination that appellants suffered actual harm without giving the court below the opportunity to receive additional evidence and testimony, assess the credibility of the declarants, resolve the contradictions in their accounts of what took place during deliberations, and make the crucial factual findings in the first instance. Given the unresolved material, disputed issues of fact in this case, a remand for an evidentiary hearing under *Hedgecock*, and not a new trial, is the appropriate remedy.

A. Case Law On Motions For A New Trial Based On Juror Misconduct

A criminal defendant has a right to have the charges against him determined by an unbiased and impartial jury. (U.S. Const., 6th & 14th Amends.; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) The Fifth Amendment also provides that "no person 'shall be compelled in any case to be a witness against himself,' " and it is a violation of that constitutional principle if a jury draws any inference of guilt from a defendant's decision

not to take the stand in a criminal trial. (*Leonard, supra*, 40 Cal.4th at p. 1424.) Accordingly, where a juror violates the trial court's instructions not to discuss a defendant's failure to testify, that juror commits misconduct. (*Loker, supra*, 44 Cal.4th at p. 749.)

When a party seeks a new trial based upon jury misconduct, the trial court undertakes a three-step inquiry. "First, the court must determine whether the evidence presented for its consideration is admissible." (*Hord, supra*, 15 Cal.App.4th at p. 724, citing Evidence Code section 1150, subdivision (a).) "Once the court finds the evidence is admissible, it must then consider whether the facts establish misconduct." (*People v. Duran* (1997) 50 Cal.App.4th 103, 113, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 398 (*Stankewitz*); *Perez, supra*, 4 Cal.App.4th at p. 906, citing *Krouse v. Graham* (1977) 19 Cal.3d 59, 79-82 (*Krouse*).) Finally, if it finds that misconduct has occurred, the trial court "must determine whether the misconduct was prejudicial." (*Perez, supra*, 4 Cal.App.4th at p. 906.)

A trial court has broad discretion to hold an evidentiary hearing in order to determine the truth or falsity of allegations of jury misconduct, to resolve any factual disputes raised by a claim of juror misconduct, and to those ends, to permit the parties to call jurors to testify at such a hearing. (*People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Dykes* (2009) 46 Cal.4th 731, 809.) However, a defendant is not entitled to an evidentiary hearing as a matter of right. (*People v. Avila, supra*, 38 Cal.4th at p. 604.)

> The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.

(*Hedgecock, supra*, 51 Cal.3d at p. 419.)

In determining whether a defendant has demonstrated a strong possibility that prejudicial misconduct has occurred, and thus established his entitlement to an evidentiary hearing, a trial court may consider declarations that are submitted by both the prosecution and the defense. "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) However, jurors' unsworn statements, and hearsay declarations, are inadmissible and may not be proffered in support of a claim of jury misconduct. (See, e.g., *People v. Dykes*, *supra*, 46 Cal.4th at pp. 810-811.) Additionally, all proffered declarations containing any statement made by a juror must conform with the requirements for admissibility as set forth in Code of Civil Procedure section 2015.5. (*Bryant*, *supra*, 191 Cal.App.4th at pp. 1468-1470.) Further, "No evidence is admissible to show the effect of such statement . . . upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).)

Under Evidence Code section 1150, jurors may "testify to 'overt acts' – that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' – but may not testify to 'the subjective reasoning processes of the individual juror . . . .' " (*Stankewitz*, *supra*, 40 Cal.3d at p. 398, quoting *People v. Hutchinson* (1969) 71 Cal.2d 342, 346.) While statements made within the jury room are admissible in certain instances, they must be received into evidence with caution, since "Statements have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors – e.g., what the juror making the statement meant and what the juror hearing it understood." *(Stankewitz*, *supra*, 40 Cal.3d at p. 398; see also *In re*

Hamilton (1999) 20 Cal.4th 273, 294 (*Hamilton*) ["evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict"].) They are also more apt to be misused by counsel as part of an improper effort to open the jury's deliberative processes to scrutiny. *(In re Stankewitz, supra,* 40 Cal.3d at p. 398.)

This Court has held, however, that "no such misuse is threatened when . . . the very making of the statement sought to be admitted would itself constitute misconduct." (*Ibid.*) For example, evidence that a deliberating jury has violated the trial court's instruction not to discuss a defendant's failure to testify is admissible under Evidence Code section 1150 (*People v. Leonard, supra*, 40 Cal.4th at p. 1425), because it constitutes one of those "rare circumstances [where] a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible." (*Hedgecock, supra*, 51 Cal.3d at p. 419.)

Such misconduct gives rise to a presumption of prejudice, which may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's determination, after its examination of the entire record, that there is no substantial likelihood of juror bias, or of actual harm to the complaining party resulting from the misconduct. (*Carpenter, supra*, 9 Cal.4th at p. 657.) However, before any assessment of prejudice can be made, and before a reviewing court may determine whether the presumption of prejudice has been rebutted, it is essential that a trial court first determine the nature of the misconduct giving rise to that presumption. "Although prejudice is presumed once misconduct has been established, the initial burden is on defendant to prove the misconduct. We will not presume greater misconduct than the evidence shows." (*Ibid.*, citation omitted; see also *id.* at p. 656 ["This is correct once bias is established, but the exact nature of the misconduct is highly relevant to the

initial determination of bias, which is based on all the surrounding circumstances"].)

A trial court's ruling whether to hold an evidentiary hearing to determine the truth or falsity of juror misconduct allegations is reviewed for abuse of discretion. (*People v. Staten* (2000) 24 Cal.4th 434, 466.) A trial court's denial of a new trial motion based upon allegations of juror misconduct is reviewed independently. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262.)

B. The Nature Of The Misconduct In This Case, And The Court of Appeal's Determination that the Presumption of Prejudice Was Unrebutted

After adverting to "the delicate and fine line separating admissible evidence of objective facts occurring in the jury room and inadmissible evidence of subjective reasoning processes of jurors" (*Lavender II*, Slip Opn. at 22-23 [citing *Cissna*, *supra*, 182 Cal.App.4th at p. 1116]), the Court of Appeal found the following four statements admissible, based on the proposition that since they were spoken, they were objectively verifiable and capable of corroboration: Juror No. 4's statements that appellants' refusal to testify "played a large part in our decision," and that "[w]e discussed the fact that if the [defendants] were innocent then they should've testified;" as well as Juror No. 10's statements that the jury "openly talked about why they did not testify and that this fact made them appear guilty to us" and that "[t]he jurors discussed that the defendants should have provided more witnesses, including themselves, to testify on their behalf." (*Lavender II*, Slip Opn. at 25-26.) Those statements formed the basis for the Court of Appeal's conclusion that appellants' jurors had engaged in prejudicial misconduct, and its ruling that a new trial was therefore warranted. However, the inherent ambiguities of those statements counsel a remand for an evidentiary hearing, and not a new trial, in this case.

This Court confronted similar circumstances in *Krouse*. There, the trial court received four declarations from jurors, which alleged that "several jurors commented" on their belief that "plaintiffs' counsel would be paid one-third of the total award," that the jury "considered" this belief in its award of monetary damages to the plaintiffs, and that the award was "determined" by adding $30,000 for legal fees on top of the amount the jury had otherwise deemed appropriate. (*Id.* at pp. 79-80.) The plaintiffs moved to strike the declarations on grounds that "they contained inadmissible evidence and involved the 'mental processes' of the jurors." (*Id.* at p. 80.) This Court disagreed. With respect to the affidavits' admissibility, this Court observed that "if the jurors in the present case actually discussed the subject of attorneys' fees and specifically agreed to increase the verdicts to include such fees, such discussion and agreement would appear to constitute matters objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of section 1150." (*Id.* at pp. 80-81.)

This Court then found the declarations "inconclusive," because they "could be construed as conduct reflecting only the mental processes of the jurors." (*Krouse*, *supra*, 19 Cal.3d at p. 59.) This Court explained, "An assertion that a juror privately 'considered' a particular matter in arriving at his verdict, would seem to concern a juror's mental processes" and statements which merely verbalized those mental processes would be inadmissible under Evidence Code section 1150. This Court continued, "It is not clear from the record whether the jury's treatment of attorneys' fees constituted 'overt acts, objectively ascertainable' and thus admissible, or rather may more properly be described as evidence of the jury's 'subjective reasoning processes' and thus excludable[.]" (*Krouse*, *supra*, 19 Cal.3d at p. 81.)

This Court recognized that a remand was the appropriate remedy given the ambiguous nature of the declarations before it. (*Krouse*, *supra*, 19 Cal.3d at p. 81.) This Court observed that although the declarations were inconclusive, they concurred in alleging that the verdict was improperly inflated by $30,000. This Court found that allegation alone a "serious matter" and concluded that the "declarations, taken together, raise an issue of sufficient moment that, in fairness, the declarations should have been admitted and considered by the court in its ruling upon defendant's motion for a new trial." (*Id.* at pp. 81-82.) This Court then ruled, "Rather than set aside the [ ] verdict, thereby necessitating a new trial, however, it is appropriate simply to vacate the order denying new trial and to direct the trial court to admit the declarations and, weighing them in conjunction with all other relevant matters, to reconsider the motion." (*Id.* at p. 82.)

As in *Krouse*, those portions of the juror declarations that the Court of Appeal found admissible walk the same fine line, and share the same ambiguity. It is equally unclear whether the statements as set forth in the defense declarations constitute "overt acts," which are "objectively ascertainable" and thus admissible as evidence of an explicit agreement by the jurors to disregard their instructions, or whether they merely verbalize the jurors' subjective mental processes, and thus are not to be considered by the trial court in ruling on appellants' new trial motion. Further, the declarations in the instant case concur only in the respect that appellants' decision not to testify was at least mentioned by one or more jurors. While this, too, is "serious matter," since it constitutes misconduct, the declarations are otherwise inconclusive with respect to the nature and extent of that misconduct – specifically, if there was a discussion how long it lasted, whether the foreman admonished the juror or jurors in question, whether there was an explicit link between any remarks concerning appellants' refusal to take the stand and the prohibited inference of their

guilt, and whether the jurors agreed that they would follow the court's instructions or disregard them.

Further militating in favor of a remand in this case are the additional ambiguities which result from the fact that Juror No. 4 and Juror No. 9 submitted contradictory declarations to both the defense and the prosecution. Those ambiguities are appropriately resolved by the trial court, which will be in a position to procure the testimony of the jurors, evaluate their credibility, and determine what exactly took place during deliberations. Indeed, it is difficult to imagine how that process could be undertaken in any other manner. Once that determination has been made, the trial court will be able to weigh those portions of the declarations which truly constitute "overt acts" in conjunction with all other relevant matters, and then reconsider the new trial motion. (*Krouse, supra,* 19 Cal.3d at p. 82.)

Where no hearing has been held, assessing prejudice based only upon the evidence provided by conflicting declarations is a perilous undertaking, because a declaration which merely alleges " ' "deliberative error" in the jury's collective mental process – confusion, misunderstanding, and misinterpretation of the law,' " particularly regarding 'the way in which the jury interpreted and applied the instructions,' " is inadmissible. (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 476.) Further, there is always a possibility that jurors' statements in that context might be misconstrued or misrecorded by investigators who prepare affidavits for them. (See, e.g., *Loker, supra*, 44 Cal.4th at p. 746.) Indeed, there are indications that may have occurred in at least two instances here. Juror No. 9 declared that, "When I signed the declaration that was brought to me by [the defense investigator] and mentioned several jurors discussing the defendants not testifying, I was referring to the fact that several jurors verbally agreed with the foreperson when he said we could not consider the fact that the

defendants did not testify." (4 GCT 899.) Juror No. 4 also declared, "I did believe that the defendants should have brought forth more evidence and witnesses in their case. When I told this to [the defense investigator], I was not referring to the defendants themselves testifying." (4 GCT 901.)

In this case, those portions of the defense affidavits which the Court of Appeal deemed admissible indicated that appellants' failure to testify was discussed at length by several jurors, their decisions not to take the stand played a large part in the jurors' verdicts, and the jurors concluded they were guilty for that reason. By contrast, the prosecution's affidavits indicated that only one juror briefly mentioned that appellants did not testify, and several other jurors, including the foreperson, immediately admonished the juror that that fact was not to be considered during deliberations.

As previously discussed, though it is misconduct for a juror to comment on a defendant's failure to testify (*Leonard, supra*, 40 Cal.4th at p. 1425; *Loker, supra,* 44 Cal.4th at p. 749), it is not prejudicial if the jury has declined to draw any adverse inferences from that fact. (*Leonard, supra*, 40 Cal.4th at pp. 1424-1425; *Loker, supra*, 44 Cal.4th at p. 749.) This is exactly the scenario that the prosecution's declarations described. Though the defense declarations presented a different account of what happened in the jury room, they merely placed the nature of the misconduct that occurred here in dispute. (See *Carpenter, supra*, 9 Cal.4th at p. 657) ["Although prejudice is presumed once misconduct has been established, the initial burden is on defendant to prove the misconduct. We will not presume greater misconduct than the evidence shows"] (citation omitted); see also *Hamilton, supra*, 20 Cal.4th at p. 295 ["To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible

standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"].)

In the face of the disputed, material issues of fact in this case concerning the nature and extent of the misconduct that occurred, the Court of Appeal should have remanded the matter for a limited evidentiary hearing before it determined whether the presumption of prejudice had been rebutted, especially in light of the fact that two of the declarations the defense submitted in support of its motion were from the *same jurors* who provided clarifying declarations in support of the prosecution's opposition to the motion. This proposition is underscored by the many cases in which a hearing was held, and the jurors who allegedly committed misconduct were questioned, before that analysis was undertaken. (See, e.g. *People v. Clark* (2011) 52 Cal.4th 856, 971 ("We have long recognized that, except when bias is apparent from the record, the trial judge is in the best position to assess the juror's state of mind during questioning"); *People v. Bennett* (2009) 45 Cal.4th 577, 625-626; *People v. Carter* (2005) 36 Cal.4th 1114, 1205-1206; *People v. Nesler* (1997) 16 Cal.4th 561, 570-574, 583 ("We look to the entire record to resolve this issue, keeping in mind that the trial court has found the relevant historical facts and resolved the conflicting evidence, but that the question of prejudice is for our independent determination"); *People v. Majors* (1998) 18 Cal.4th 385, 417-430; *People v. Honeycutt* (1977) 20 Cal.3d 150, 154-158; *Carpenter*, *supra*, 9 Cal.4th at p. 659 ("Because there is now a full factual record regarding the misconduct with all conflicts in the evidence resolved and with the relevant historical facts found, little would be gained by a remand").)

Though in other cases reviewing courts have reached the question of prejudice without the benefit of a hearing, they involved circumstances where the declarations did not create any material, disputed issues of fact regarding the nature of the alleged misconduct, or where the parties agreed

it would not be necessary to take the jurors' testimony. (See *Stankewitz, supra*, 40 Cal.3d at pp. 400-402; see also *People v. Hardy* (1992) 2 Cal.4th 86, 174 ("Because no material factual dispute was presented to the trial court it did not abuse its discretion in declining to hold a hearing to question [Juror] Lipman"); *Leonard, supra*, 40 Cal.4th at p. 1424; *Loker, supra*, 44 Cal.4th at p. 746 ("The parties agreed that there was no need to take live testimony from the jurors, and that the court could decide the motion based on the declarations"); *People v. Danks* (2004) 32 Cal.4th 269, 304-313; *People v. Lewis* (2001) 26 Cal.4th 334, 387-391; Cf. *Carpenter, supra*, 9 Cal.4th at p. 646 [where evidentiary hearing held but matter remanded so that prejudice could be assessed in light of the record on direct appeal] ("The Attorney General does not challenge, and we accept, the superior court's findings of historical fact, which resolved a credibility dispute"); *Hord, supra,* 15 Cal.App.4th at p. 723 ("As stated by the trial court, there was no material conflict that the statements were made. The trial court accepted as true that the two improper topics were mentioned during deliberations and that some of the jurors heard the statements. The trial court also found the foreperson admonished the jury not to consider these matters").)

Viewed in their totality, the affidavits in this case are consistent in only one regard – that a single juror mentioned the fact that appellants had not testified.[1] (4 GCT 899, 901, 903.) The declarations in this case were otherwise contradictory and thus presented several material, disputed issues of fact with respect to the nature of the misconduct that occurred: whether more than one juror mentioned appellants' failure to testify, and if so, how

[1] In his affidavit Juror No. 5 declared, "I do not recall any mention by any juror regarding the fact that the defendants did not testify." (4 GCT 905.)

many jurors discussed it; how long the discussions lasted and how extensively the topic was discussed; and whether the foreman admonished that juror or those jurors and how quickly he did so. Most important, the declarations created an additional material, disputed issue of fact, and the crucial one in this case – whether the juror or jurors who mentioned appellants' failure to testify drew the prohibited inference at all, by expressly linking appellants' silence to the question of their guilt or innocence, and therefore expressed their intention to disregard the trial court's instructions.

The Court of Appeal cited several cases in support of the proposition that its "original disposition followed well-established precedent." (*Lavender II*, Slip Opn. at 38-39.) However, far from establishing that reversal is the remedy appellants should receive, those cases demonstrate that an evidentiary hearing is necessary under the circumstances presented here. (See, e.g., *Cissna*, *supra*, 182 Cal.App.4th at p. 1118 ("Here, there were no conflicts in the descriptions of juror misconduct that were resolved by the trial court"); *People v. Castro* (1986) 184 Cal.App.3d 849, 852-853 [no declaration countering description of improper juror experiment contained in juror's declaration was submitted]; *People v. Brown* (1976) 61 Cal.App.3d 476, 479 ("Juror Winters' declaration therefore stands uncontradicted on the record"); *Stankewitz*, *supra*, 40 Cal.3d at pp. 400-402 [clarifying declarations subsequently submitted by two jurors were not inconsistent with their original declarations; thus the showing of misconduct made in their original declarations was never countered]; *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 510-511 [counterdeclarations constituted "imperfect denials" of the misconduct described in the moving declarations]; *Smoketree-Lake Murray Ltd. V. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1745-1749 [no indication that other juror declarations contradicted the misconduct in

declaration submitted by juror describing her improper experiment and demonstration to other jurors during deliberations]; *Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 365 ("We do not, however, find a complete and categorical denial of all of the charges").)[2]

C. The Court of Appeal's Discussion of *Perez*, *Von Villas*, and *Bryant*

The Court of Appeal's opinion also distinguished the three decisions cited by this Court in its remand order, *Perez*, *Von Villas*, and *Bryant*, by asserting that the facts of the instant case are different, since in its view the defense met its burden by submitting affidavits that established the jury had committed prejudicial misconduct. (*Lavender II*, Slip Opn. at 20-21, fn. 22, 39-48.) In doing so, the Court of Appeal begged the central questions presented here. In the course of its analysis the Court of Appeal also rejected its own precedent in *Perez*. Finally, the Court of Appeal's opinion sidestepped the broader proposition advanced by those three cases – that there are instances where motions for a new trial based on jury misconduct cannot be resolved without holding an evidentiary hearing, especially under circumstances where the record requires further development, credibility determinations must be made, and material factual conflicts must be resolved. This is such a case.

In *Perez*, the Court of Appeal considered a case where defense counsel represented he had been told by a juror that the panel had based its guilty verdict on the fact that the defendant had not testified. No affidavits were submitted attesting to that fact. The trial court assumed, "for the sake of argument," that all 12 jurors would say that a discussion regarding the

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[2] The Court of Appeal also cited this Court's opinion in *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, in support of its disposition. However, that case is inapposite because it involved misconduct on the part of the city attorney, and not the jury. (*Id.* at p. 871.)

defendant's failure to testify at trial took place during deliberations. The trial court then denied the defendant's new trial motion. In vacating the trial court's order, the Court of Appeal held:

> Our conclusion the court prejudicially erred in denying the new trial motion requires that we vacate the judgment and remand for further proceedings. On remand we wish to emphasize the trial court should not assume 12 jurors actually discussed [defendant]'s failure to testify.

(*Perez, supra,* 4 Cal.App.4th at p. 909.)

In this case, the Court of Appeal found that the remedy of a remand for an evidentiary hearing as offered in *Perez* was unsupported by applicable legal precedent: "Indeed, absent some pertinent law that makes new trial motions based on jury misconduct *different* from other matters that trial courts must decide, we are unable to understand *why* a trial court would be precluded from ruling on a new trial motion based on jury misconduct established by presumed or stipulated facts, considering the numerous *other* proceedings in which such a procedure seems permissible." (*Lavender II*, Slip Opn. at 41, emphasis in original.) The Court of Appeal also found the remedy afforded the parties by its opinion in *Perez* was dictated by a key factual difference: "In *Perez*, the court ordered the new trial motion restarted anew because it doubted the court could assume the evidentiary predicate without proper declarations from jurors, and remanded to place the burden back on the defendant, which the court's error had relieved the defense of; here, in contrast, the defense has *already* met its burden because it *did* file declarations from jurors establishing the evidentiary predicate to the motion." (*Lavender II*, Slip Opn. at 41, emphasis in original.)

In *Von Villas*, defense counsel and a defense investigator interviewed two jurors, Ms. Cornick and Ms. Brown, who purportedly revealed that during deliberations jurors knew that the defendant had been previously

convicted of committing a jewelry store robbery as well as a murder, and had falsely denied their awareness of that fact when they were polled by the court prior to the guilt phase. When defense counsel drafted a declaration for Juror Cornick, based on his investigator's notes from their conversation, Juror Cornick denied that she had told the defense investigator any of the things contained in the unsigned declaration. (*Von Villas, supra,* 11 Cal.App.4th at pp. 251-252.) Both jurors were present at the hearing on the new trial motion, but since the prosecutor had threatened to bring perjury charges against them, they invoked their Fifth Amendment privilege against self-incrimination and declined to testify. The prosecutor and defense counsel entered into a stipulation that the unsigned Cornick declaration would be admitted as part of an offer of proof concerning what the defense investigator would testify he had been told by Cornick. (*Id.* at pp. 252-253.) The defense investigator was also permitted to testify regarding the contents of his conversation with Juror Brown as a second offer of proof. (*Id.* at p. 253.) The prosecutor "produced no evidence to either disprove the allegation of jury misconduct or to prove that if there was misconduct, it caused no prejudice to [defendant]." (*Id.* at p. 253.) In denying the new trial motion, the trial judge ruled:

> I have not had any evidence that the knowledge that the jurors had that [defendant] had been involved in the robbery effected the finding of their guilt . . . . I simply don't have that evidence that what transpired in the jury room or in the conversation between [Juror] Kitchen and Miss Brown effected the outcome of the case. That seems to be the very important missing link . . . . So I do have insufficient evidence to find that the defense has met the burden that there was absolute juror misconduct that would prejudice the defendant.

(*Von Villas, supra,* 11 Cal.App.4th at p. 253.)

The court in *Von Villas* reversed and remanded so that a rehearing on the motion could be held. It found that the record reflected "a series of

errors on all sides which brought about an untenable situation for the trial judge who, in turn, committed error by applying an incorrect legal analysis to the jury misconduct issue." (*Id.* at p. 257.) The court in *Von Villas* noted that if the trial judge believed that misconduct had occurred, as evidenced by her observation that the jurors did possess the prohibited knowledge of the defendant's prior crimes, then "the prosecution would be required to rebut the presumption of prejudice in order to avoid an adverse ruling on the motion for new trial." (*Ibid.*) The court in *Von Villas* then held:

> Thus there is no question that because of these multiple errors, there is a distinct possibility, if not a probability, that serious juror misconduct occurred. Of interest, however, is the fact that the trial judge never once was afforded the opportunity to test the credibility of Ms. Cornick and Ms. Brown. As counsel for [defendant] indicated, Ms. Cornick denied telling [the defense investigator] any of the things contained in the unsigned declaration. The concern then, is whether [defendant]'s judgment of conviction should be reversed in toto on this record, or whether the judgment should be vacated and the matter remanded to the trial judge with instructions to allow examination of the jurors themselves as to what really occurred during deliberations that might have constituted juror misconduct.
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> We are convinced that the trial judge must be allowed the opportunity to at least test the credibility of Jurors Cornick and Brown. If the trial judge is convinced that what they allegedly told the [ ] defense team actually occurred, especially the information contained in Juror Cornick's unsigned declaration, and that [defendant] was prejudiced thereby, then a new trial must be afforded [defendant].

(*Von Villas, supra*, 11 Cal.App.4th at p. 258.)

In its opinion, the Court of Appeal also took issue with the remedy offered by the majority in *Von Villas*; namely, remanding the matter for a hearing so that live testimony could be taken from the jurors in instances where they had already provided evidence of misconduct in the declarations

they had submitted. In that context, the Court of Appeal quoted the concurring and dissenting justice in *Von Villas*, who opined, "Conceding that Von Villas proved *once* that his trial was unfair, the majority opinion now – three years later – requires him to prove it again." (*Lavender II*, Slip Opn. at 45, quoting *Von Villas*, *supra*, 11 Cal.App.4th at pp. 261-262 [concurring and dissenting opinion of Woods, J.] (emphasis in original).) The Court of Appeal noted, "We agree with Justice Woods that mandating a hearing at which live testimony from jurors is solicited whenever any potential evidentiary conflicts exist, and barring the use of other evidentiary submissions to resolve motions for new trials premised on jury misconduct, is contrary to established precedent." (*Lavender II*, Slip Opn. at 45.)

In *Bryant*, defense counsel proffered an unsworn statement by one juror, who purportedly told him that another juror had used his iPhone during deliberations to access and share what seemed to be a dictionary definition of reasonable doubt. (*Bryant, supra,* 191 Cal.App.4th at p. 1464.) In response, the prosecution submitted unsworn statements from all 12 jurors, which provided conflicting details with respect to whether anyone had used the internet, how much of the definition was read, whether the foreperson admonished that juror to stop reading and to use the court's definition, and whether the alternative definition affected their deliberations. (*Id.* at pp. 1464-1465.)

The court in *Bryant* held, "While parties may, in general, waive evidentiary objections to documents, we hold it is not permissible to treat unsworn statements of 12 jurors as though they had been made under penalty of perjury in order to attack a jury verdict for misconduct." (*Bryant, supra,* 191 Cal.App.4th at p. 1470.) The court in *Bryant* also held, "As in *Perez* . . . it was error to reach the merits of the jury misconduct issue without the sworn affidavits required by law. Because the parties waived any objection to the unsworn statements at the suggestion of the trial court,

the appropriate remedy is to return the matter to the trial court for a full and complete hearing with competent evidence." (*Id.* at p. 1471.) In reaching its disposition, the court also noted, "The issues of misconduct asserted in this case are serious and if proven by sworn evidence, give rise to a presumption of prejudice. . . . It is difficult to imagine how the presumption of prejudice could be rebutted in the absence of evidence as to what definition of reasonable doubt was accessed by the jury during deliberations." (*Bryant* at p. 1471.)

In its analysis, the Court of Appeal noted that the court in *Bryant* had observed, "[t]he issues of misconduct asserted in this case are serious *and if proven by sworn evidence*, give rise to a presumption of prejudice," but decided that "[b]ecause the parties waived any objection to the unsworn statements at the suggestion of the trial court, the appropriate remedy is to return the matter to the trial court for a full and complete hearing with competent evidence." The Court of Appeal then distinguished the instant case by finding that "As in *Bryant*, the issues of misconduct asserted below were serious, but here (unlike *Bryant*) the misconduct *was* 'proven by sworn evidence, giv[ing] rise to a presumption of prejudice.' " (*Lavender II*, Slip Opn. at 48, emphasis in original.)

The lessons of *Perez*, *Von Villas*, and *Bryant* are clear: an evidentiary hearing is necessary when the nature of the misconduct cannot be determined. (*Perez, supra,* 4 Cal.App.4th at p. 909 ["On remand we wish to emphasize the trial court should not assume 12 jurors actually discussed [defendant]'s failure to testify"]; *Von Villas*, *supra*, 11 Cal.App.4th at p. 258 ["The concern then, is whether [defendant]'s judgment of conviction should be reversed in toto on this record, or whether the judgment should be vacated and the matter remanded to the trial judge with instructions to allow examination of the jurors themselves as to what really occurred during deliberations that might have constituted juror misconduct"];

Bryant, supra, 191 Cal.App.4th at p. 1471["It is difficult to imagine how the presumption of prejudice could be rebutted in the absence of evidence as to what definition of reasonable doubt was accessed by the jury during deliberations"].) The underlying determinations of credibility are for the trial court, or the finder of fact, to make, and not for an appellate court. In finding that appellants had established their entitlement to a new trial, the Court of Appeal necessarily determined that the defense declarations were accurate and credible, while the prosecution's declarations were not. Its conclusions were both speculative and unwarranted, given the declarations' contradictory nature and the undeveloped state of the record before it.

In this case misconduct occurred, but its nature and scope are unclear. Those determinations must be made in the first instance. (*Carpenter*, *supra*, 9 Cal.4th at p. 657 ["We will not presume greater misconduct than the evidence shows"].) Given the conflicting accounts presented by the juror declarations regarding the nature and extent of the misconduct, including contradictory declarations submitted by Juror No. 4 and Juror No. 9 to both the defense and the prosecution, the trial court should be afforded the opportunity to test the credibility of the declarants at an evidentiary hearing, where the jurors in question may testify and be cross-examined by counsel. If the trial court determines that the prosecution has failed to rebut the presumption of prejudice, and that both appellants suffered actual harm, then they will be afforded a new trial. Since the nature and extent of the misconduct cannot be determined with recourse to the declarations alone, and those issues are central to the disposition of this case, material, disputed issues of fact remain to be resolved, and they can only be resolved by remanding the matter for an evidentiary hearing.

D. Since The Trial Court Is In The Best Position To Assess The Credibility Of The Jurors And Make The Necessary Factual Findings In The First Instance, An Evidentiary Hearing Is A More Reliable Means Of Determining Whether Prejudicial Misconduct Has Occurred

Under Penal Code section 1260, an appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." This provision allows the court to avoid unnecessary retrials when a less drastic remedy will resolve the issue posed on appeal. (*People v. Moore* (2006) 39 Cal.4th 168, 176.) "[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury," the appellate court may remand the matter for a separate post-judgment hearing before the trial court. (*Id.* at pp. 176-177 [remand to hold a Penal Code section 1538.5 hearing in light of new Fourth Amendment law]; *People v. Braxton* (2004) 34 Cal.4th 798, 819 (*Braxton*) [remand to hold hearing on motion for new trial]; *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104 (*Johnson*) [remand for evidentiary hearing to determine whether prosecutor properly exercised peremptory challenges against three prospective African-American jurors in accordance with *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (*Batson*)]; *People v. Williams* (1999) 21 Cal.4th 335, 341, 345 [remand for an evidentiary hearing to decide unresolved factual issues regarding the statute of limitations]; *People v. Lynch* (2010) 182 Cal.App.4th 1262, 1271-1275 [same]; *People v. Minor* (1980) 104 Cal.App.3d 194, 199 [remand to hold a *Marsden* hearing, where the trial court may "take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made"].)

This is no less true under federal law. Due process requires that if the trial judge becomes aware of possible juror bias, the trial judge should "determine the circumstance, the impact thereof on the juror, and whether or not it was prejudicial." (*Remmer v. United States* (1954) 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 [remand for evidentiary hearing under circumstances where unnamed individual had allegedly told jury foreman "that he could profit by bringing in a verdict favorable to the petitioner"] ("We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless").) The United States Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." (*Smith v. Phillips*, *supra*, 455 U.S. at p. 215.) This is so because the resolution of allegations concerning juror bias "depends heavily on the trial court's appraisal of witness credibility and demeanor." (*Thompson v. Keohane* (1995) 516 U.S. 99, 111, 116 S.Ct. 457, 133 L.Ed.2d 383.)

In *Perez*, the Court of Appeal determined that remand for an evidentiary hearing was appropriate, notwithstanding the defendant's assertions that it would be impractical:

> Although we appreciate a substantial period of time has expired since the jury in this case was discharged and obtaining declarations from some or all of the jurors may be difficult or impossible, we do not believe the court's earlier error relieving defense counsel of this burden should result in any other procedure than that required by law.

(*Perez*, *supra*, 4 Cal.App.4th at p. 909.) In its opinion, the Court of Appeal rejected that very remedy, based on its belief that the holding of *Perez* should not "be extended to require the defense to reinvent the wheel, particularly considering the lengthy passage of time that has elapsed since the original, properly supported motion was filed." (*Lavender II*, Slip Opn.

at 41-42.) In a lengthy footnote, the Court of Appeal explained why a different result was mandated in this case:

> [T]he fact that years have passed could well harm defendants by eroding the reliability of any evidence (whether from the fading memories as to the precise dynamics of the deliberations, or the coloring of memories from posttrial publicity, or simply the inability to reassemble the entire jury to conduct the inquiry) that might be gleaned from ordering a *Hedgecock* hearing, as now proposed by the People.

(*Lavender II*, Slip Opn. at 43, fn. 32.)

In *Hedgecock*, this Court rebuffed the defendant's complaints that holding an evidentiary hearing years afterward would prejudice him:

> We reject defendant's contention, made at oral argument, that because of the difficulty in relocating the jurors for a possible evidentiary hearing several years after the completion of the trial, we should direct the trial court to grant his motion for new trial. At this point, the claim that the parties may be unable to locate the jurors is entirely speculative and premature. In any event, defendant has presented no persuasive authority that he would be entitled to such relief.

(*Hedgecock, supra*, 51 Cal.3d at p. 421, fn. 11.) This Court also discussed the many reasons why it was desirable for a trial court to have the discretion to hold an evidentiary hearing:

> There are substantial advantages to a rule recognizing the trial court's discretion to order an evidentiary hearing at which jurors may testify. Most important, when compared to the use of affidavits, a hearing at which witnesses testify and are subject to cross-examination is a more reliable means of determining whether misconduct occurred.

(*Hedgecock, supra*, 51 Cal.3d at p. 417.)

Finally, this Court observed, " 'A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his

answers in light of the particular circumstances of the case.' " (*Ibid.*, quoting *Smith v. Phillips*, *supra*, 455 U.S. at p. 222.)

This Court reaffirmed those same principles more recently in *Johnson*, *supra*, 38 Cal.4th at p. 1096. There, it became clear following the Supreme Court's holding in *Johnson v. California* (2005) 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129, that the trial court had applied an erroneous standard when it determined that the defendant had failed to establish a prima facie case under *Batson*. (*Johnson*, *supra*, 38 Cal.4th at pp. 1098-1101.) In concluding that remand was the appropriate remedy, this Court observed, "The federal courts generally remand for further hearings in this situation," and that a remand was the remedy the high court had provided in *Batson* itself. (*Id.* at p. 1099.)

The defendant in *Johnson* argued that a limited remand was impractical for several reasons. First, the defendant contended that since the prospective jurors had been dismissed, they could not "be examined further." (*Johnson*, *supra*, 38 Cal.4th at p. 1101.) After first noting, "This would generally be the case with a limited remand," this Court observed that, "The federal courts have apparently not found this to be a problem." (*Ibid.*) Nor would it be a problem in the context of this case. Under the holding of *Hedgecock*, a trial court may "permit the parties to call jurors to testify at such a hearing." (*Hedgecock*, *supra*, 51 Cal.3d at p. 419.) Indeed, jurors may be compelled to testify at the hearing by subpoena. (*Id.* at p. 420; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 163; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 387.)

Next, the defendant argued that too much time had passed, since voir dire had concluded between seven and eight years beforehand, memories may have faded during the intervening time, "and it would be too difficult for the trial court to attempt to undertake steps two and three at this late date." (*Johnson*, *supra*, 38 Cal.4th at p. 1101.) Though this Court

acknowledged, "This circumstance is indeed a concern," it also observed that "a comparable amount of time has elapsed in some of the cases that the federal courts have remanded for a hearing." (*Ibid.*, citing *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110 fn. 14 [remand ordered after intervening period of nearly eight years, "even though the state represented to the district court that the prosecutor no longer remember[ed] why he utilized his peremptory challenges and could not locate the jury selection notes"]; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083 [intervening period of five years after state appellate court decision and a longer time after trial]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073 [remand ordered about seven years after trial].)

Here, appellants were convicted in May 2010, and the Court of Appeal filed its most recent opinion in March 2013. A remand for an evidentiary hearing in this matter would fall well within the timeframe adopted by this Court. As this Court observed in *Johnson*, "the court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection." (*Johnson*, *supra*, 38 Cal.4th at p. 1102.) Similarly here, the jurors' recollection of what transpired during deliberations will be aided by their review of the declarations themselves. There is no evidence in this case that a remand will be infeasible for any reason. (See, e.g., *Braxton*, *supra*, 34 Cal.4th at p. 819 ["Defendant here has not argued, much less presented evidence, that the passage of time has resulted in a dimming of memories, destruction of relevant documents, unavailability of material witnesses, or any other circumstance that would now preclude a fair hearing on the jury misconduct claim that the trial court refused to entertain"]; see also *Johnson*, *supra*, 38 Cal.4th at p. 1102 ["If, as is the case, federal courts routinely hold a hearing under these circumstances to attempt to determine

whether there was a federal constitutional violation, we see no reason for California courts not even to try to make this determination"].)

Additionally, the defendant in *Johnson* maintained that since the trial judge in that case had been elevated to the Court of Appeal, on remand the matter would have to be heard by a different judge. (*Johnson*, *supra*, 38 Cal.4th at p. 1102.) This Court found, "This circumstance does not make a limited remand impossible," and noted, "Every time a hearing is held in federal district court on habeas corpus review of a state case the hearing will be before someone other than the state court trial judge." (*Ibid.*) Even in the event that the original trial judge is unavailable on remand in this case, it will not deprive appellants of a fair hearing on remand. Here, since the trial court made its original rulings based solely upon the declarations that are now a part of the court file, any judge will be capable of taking the necessary testimony from the declarants, and assessing the witnesses' demeanor and credibility in the course of making the necessary factual findings.

Finally, the defendant in *Johnson* urged that "the prosecutor waived his right to state his reasons for exercising the peremptory challenges by failing to do so at trial." (*Johnson*, *supra*, 38 Cal.4th at p. 1102.) The defendant further noted that after the trial court found the defendant had failed to establish a prima facie case, it gave the prosecutor the opportunity to develop the record further, and the prosecutor declined the trial court's invitation. (*Ibid.*) This Court noted, "We attach no legal significance to this circumstance." This Court explained that since the trial court found no prima facie case, the prosecutor was not required to state any reasons for the peremptory challenges he had made. This Court also observed, "That he did not do so at that time should not deprive him of the opportunity to do so on remand now that we know the trial court erred in failing to find a prima facie case." (*Ibid.*)

After ordering a remand, this Court concluded:

> If the [trial] court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment.

(*Johnson*, *supra*, 38 Cal.4th at p. 1104.)

A remand for an evidentiary hearing is also the remedy that this case requires. At that hearing, the prosecutor will have a fair opportunity to rebut the presumption of prejudice, either through examining the jurors or by marshaling other evidence, to establish that any mention or discussion of appellants' decision not to testify was brief, that the foreman quickly admonished the juror or jurors who broached that topic, and that those jurors agreed they would follow the trial court's admonition not to allow the fact that appellants did not testify to influence their verdicts. "If the prosecutor cannot carry this burden to the trial court's satisfaction," or if, "due to the passage of time or other reasons" the trial court is unable to make a reliable determination, then a retrial will be necessary. (*Johnson*, *supra*, 38 Cal.4th at p. 1103; *Braxton*, *supra*, 34 Cal.4th at p. 819.)

E. This Court Should Decline To Conclude That Respondent Is Judicially Estopped From Arguing That An Evidentiary Hearing Is The Appropriate Disposition In This Case

In another footnote to its opinion, the Court of Appeal remarked, "The defendants also argue the remedy now urged by the People – to order a *Hedgecock* hearing and then to revisit the new trial motion after the hearing – should be foreclosed under principles of judicial estoppel, because the prosecution below successfully *opposed* the defense request for a *Hedgecock* hearing, and the People's brief in the original appeal argued the *Hedgecock* hearing was properly denied by the trial court below."

(*Lavender II*, Slip Opn. at 42-43, fn. 32, emphasis in original; see also *Lavender II*, Slip Opn. at 3-4, fn. 3, 39.) The Court of Appeal found it was "unnecessary definitively to apply judicial estoppel here," notwithstanding its conclusion that "the elements appear facially present in this case[.]" (*Lavender II*, Slip Opn. at 42-43, fn. 32.) This Court should also decline to hold that respondent is judicially estopped from requesting a remand for an evidentiary hearing.

The doctrine of judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 987 (*Aguilar*), quoting *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.) " 'Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.]' " (*Ibid.*, quoting *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735, fn. omitted.)

After argument, the trial court first denied the new trial motion by finding that the prosecution had rebutted the presumption of prejudice. (16 LRT 2336.) It then ruled that the defense had "failed to make a sufficient showing that a *Hedgecock* hearing should be held to elicit testimony from jurors," that no "clearly defined and specific disputes on material issues relating to misconduct" appeared, and that "any such hearing would likely result in the Court or counsel improperly inquiring into subjective thought processes of the jury." (16 LRT 2337.)

Since the trial court ruled in the prosecutor's favor on the new trial motion, there was no reason for her to argue that in the event the trial court's ruling was adverse to her, it should then hold a hearing instead of granting appellants' new trial motion. (Cf. *Johnson*, *supra*, 38 Cal.4th at p. 1102.) Moreover, in ruling that portions of the declarations which had previously been excluded were now admissible, the Court of Appeal's intervening opinion effected a dramatic change in the evidentiary landscape that was before the trial court and the parties below. Of course, neither the trial court nor the parties had the benefit of the Court of Appeal's ruling, and so they were denied the opportunity to litigate the issues fully and to develop a complete record below during the course of further hearings. (Cf. *People v. Williams*, *supra*, 21 Cal.4th at p. 338; *People v. Lynch*, *supra*, 182 Cal.App.4th 1262, 1271-1275.)

Further, since appellants argued that the trial court had erred by not holding a *Hedgecock* hearing (GAOB 36; LAOB 42), there was no reason for respondent to argue in its initial briefing that the Court of Appeal should remand the matter for an evidentiary hearing before ordering a new trial. After the Court of Appeal found admissible several portions of the defense affidavits that the trial court had originally excluded from evidence, and held, based on its examination of the now contradictory affidavits that a new trial should be granted, it was not inconsistent in the slightest, let alone "totally inconsistent," for respondent to argue at that stage that appellants had established their entitlement to an evidentiary hearing and that a conditional reversal was the remedy that the Court of Appeal should have provided them instead. (*Aguilar, supra,* 32 Cal.4th at p. 987.)

"Judicial estoppel is intended to protect the integrity of the judicial process by preventing litigants from playing 'fast and loose' with the courts. It should, therefore, be invoked only in egregious cases and is usually limited to cases where a party misrepresents or conceals material

facts." (7 Cal. Procedure, (5th ed.), Witkin, Judgment, § 339, p. 946.) Similarly, before this court finds a party is collaterally estopped, it considers whether application of the doctrine will serve the public policies underpinning it; namely, the preservation of the integrity of the judicial system, the promotion of judicial economy, and the protection of the parties from vexatious litigation. (See, e.g., *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343.) However, as this Court held in *Lucido*, " 'the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality.' " (*Ibid.*, quoting *Ashe v. Swenson* (1970) 397 U.S. 436, 444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469.)

This Court should apply the same analysis here. In advancing their arguments, the People did not seek to play fast and loose with the Court of Appeal; rather, they sought to have a hearing held at which the necessary factual findings and credibility determinations may be made, and those material, disputed issues of fact may be resolved, before the question of prejudice was reached. The change in the People's position was responsive to the change in the character of the record effected by the Court of Appeal's evidentiary rulings. Accordingly, this Court should decline to hold that respondent is judicially estopped from asserting its argument, which is based upon this Court's well-established precedents.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court of Appeal's judgment be reversed and the matter be remanded for a *Hedgecock* hearing.

Dated: September 5, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 12,147 words.

Dated: September 5, 2013

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Floyd Lavender, et al.**
No.: **S209975**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 6, 2013, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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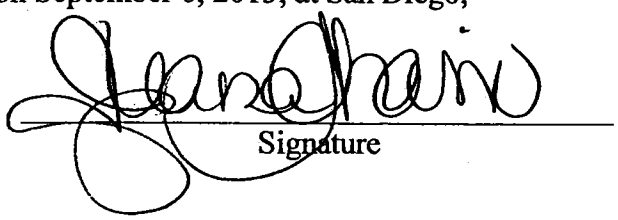
and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on September 6, 2013 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 6, 2013, at San Diego, California.

Ileana Chavarin
Declarant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