IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No.
	)	S209975
Plaintiff and Respondent,	)	
	)	Court of Appeal Nos.
v.	)	D057655/57686
	)	
FLOYD LAVENDER and MICHAEL GAINES,	)	Superior Court Nos.
	)	JCF21566
Defendants and Appellants.	)	JCF21567
	)	

Appeal From the Superior Court of Imperial County
Honorable Donal B. Donnelly, Judge

ANSWER BRIEF ON THE MERITS OF APPELLANT FLOYD LAVENDER

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STATEMENT OF THE CASE[1]

An information filed on June 7, 2008, charged appellants with one count of murder (Pen. Code, § 187, subd. (a)), one count of kidnapping (Pen. Code, § 207, subd. (a)), three counts of torture (Pen. Code, § 206), and three counts of false imprisonment (Pen. Code, § 236). (1 CTL 32-35.) Appellants pled not guilty to the charges. (1 CTL 31.) Jury trial of the matter began on March 23, 2010 (1 CTL 75), and concluded on May 4, 2010 (2 CTL 381).

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[1] Two appeals have been joined in this case, and there are two separate records. For purposes of clarity, references to the record in appellant Lavender's appeal [D057655] will be designated "CTL" and "RTL." References to the record in appellant's Gaines' appeal [D057686] will be designated "CTG" and "RTG."

The jury returned guilty verdicts on all of the charges, and fixed the degree of the murder at first. (2 CTL 393-401; 3 CTG 677-685.)

On May 12, 2010, appellant Lavender filed a motion to set aside the verdicts on the false imprisonment counts on the grounds that the charges were barred by the statute of limitations. (2 CTL 423.) The unopposed motion, joined by appellant Gaines, was heard and granted on May 28, 2010. The verdicts as to counts 6, 7, 8, and 9 were set aside as to both defendants. (2 CTL 435; 15 RTL 2250.) Appellant Gaines filed a motion for new trial for *Griffin*[2] error and juror misconduct on June 18, 2010. (CTG 818.) Appellant Lavender joined the motion. (2 CTL 449.) The motion was heard and denied on June 30, 2010. (2 CTL 455; 16 RTL 2287-2339.)

After the motion for new trial was denied, the trial court sentenced appellant Lavender to an indeterminate term of 25 to life on the murder charge plus a determinate term of 5 years on the kidnapping charge. Concurrent life terms were imposed on the 3 torture charges. (2 CTL 456, 506-509; 16 RTL 23-43-2377.) Appellant Gaines received an identical term. (4 CTG 925-926.) Both appellants filed timely notices of appeal. (4 CTG 977; 2 CTL 505.)

The issues raised on appeal are summarized in the Court of Appeal Opinion as follows:

> On appeal, defendants argue the evidence was insufficient to support the convictions, and there were other errors, including the claim the jury engaged in prejudicial misconduct because the jurors discussed during deliberations the adverse inference to be drawn from fact the defendants did not testify on their own behalf, and it was therefore error to deny their new trial motion based on juror misconduct. They also assert (1) the pretrial identification procedures were unduly suggestive and therefore tainted the in-court identifications; (2) the court

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[2] *Griffin v. California* (1965) 380 U.S. 609.

> erroneously instructed the jury under CALCRIM No. 315 that a witness's level of confidence in his or her identification is a factor to be weighed when assessing the accuracy of that identification; (3) the court erroneously admitted expert testimony that relied on hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36 and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; (4) the prosecutor engaged in acts of misconduct during closing argument, including adverting to defendants' failure to testify; and (5) because of the weakness of the evidence, these errors and misconduct warrant a finding there was cumulative error rendering defendants' trial fundamentally unfair.

(Slip Opinion filed 3/6/13, at p. 2 [hereafter "*Lavender II*"].) In an opinion filed July 10, 2012, the Court of Appeal concluded that, "although there was sufficient evidence from which *a* jury could have found defendants guilty," the misconduct by *this* jury in discussing the adverse inference to be drawn from the defendants' failure to testify required reversal of the judgment. Because it ordered a new trial based on jury misconduct, the Court of Appeal did not address the other claimed errors. (*Lavender II*, Slip Opn. at p. 3.) Respondent filed a petition for rehearing arguing for the first time that the proper remedy in connection with the jury misconduct issue would be to remand the case to the trial court for an evidentiary hearing rather than order a new trial. (*Ibid.*) The Court of Appeal denied the petition for rehearing, and the People filed a petition for review with this court.

This court granted respondent's petition and directed the Court of Appeal to vacate its decision and reconsider the matter in light of *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1462-1471, *People v. Von Villas* (1992) 11 Cal.App.4th 175, 251-261, and *People v. Perez* (1992) 4 Cal.App.4th 893, 905-909. After reconsidering the matter in light of these cases, the Court of Appeal concluded as follows:

> 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. We reverse the judgment and remand the matter for a new trial.

(*Lavender II*, Slip Opn. at p. 4.) Respondent filed a second petition for review which was granted by this court on June 12, 2013.

STATEMENT OF THE FACTS

PROSECUTION EVIDENCE

Around 3:00 a.m. on August 20, 2003, Alfrego Mayoral discovered the body of a young female in the Pansy Canal in Imperial County. (11 RTL 1457-1458, 1525.) Mayoral had checked the canal around 8:30 the night before, and had not seen the body at that time. (11 RTL 1463-1464.) An autopsy was performed the following day by Dr. Darryl Garber who listed the cause of death as drowning based upon the fact that the body was found in water, the hands and feet showed signs of wrinkling, and the presence of hemorrhage in the middle ear. (10 RTL 1336-1338.) He estimated that the body would have been in the water a day or two at the time it was found. (10 RTL 1342.) Dr. Garber opined that the victim's death was the result of homicide based upon his observation of bruises, and possibly abrasions, on the body. (10 RTL 1347.) Toxicology reports later revealed the presence of hydroxybutyric acid "GHB" known as a date rape drug in the body. (10 RTL 1388.)

Authorities were unable to identify the body, and had no suspects, for approximately two and a half years. (11 RTL 1477.) The coroner ultimately identified the victim as Courtney Bowser. (10 RTL 1336; 11 RTL 1477.)

Subsequent investigation suggested that Bowser was last seen leaving the apartment of Angela Vareen with appellants Gaines and Lavender after a night long incident involving Vareen, Michael Hughes, Thayne Tolces, Kristen Martin, Bowser and appellants Gaines and Lavender. Hughes, Vareen, Tolces, and Martin all gave statements to police and testified at trial regarding the incident. Because their stories were inconsistent with each other in significant ways, the record is summarized separately as to each witness.

Angela Gibot Vareen

In August of 2003, Angela Vareen lived in Palm Desert in the Desert Oasis Apartment complex. (5 RTL 322.) At the time she was addicted to methamphetamine, and was using on a daily basis. (5 RTL 322-323.) She also worked with law enforcement in two counties as an informant. (5 RTL 351, 390-391, 480.) Appellants Gaines and Lavender lived in an apartment downstairs from Vareen. (5 RTL 323.) She bought marijuana and cocaine from Gaines and sold methamphetamine to him. (5 RTL 324-325.)

Although Vareen did not know Gaines well, in August he asked her to hold some checks for him. He did not tell her anything about the checks or why he wanted her to hold them for him. She looked at the checks after he gave them to her, and discovered that they were traveler's checks with no amount written on them. Vareen put the checks the desk in her bedroom, and kept them for a few days before she noticed they were missing. (5 RTL 327-328 417.)

Before the checks disappeared, a group of people including Bowser, Hughes, Tolces and Martin had been in Vareen's apartment. (5 RTL 330-333.) When she discovered the checks were missing, Vareen telephoned Gaines and asked him if he had picked them up. He informed her he had not picked up the checks, and told her he was on his way over to her apartment.

(5 RTL 333-334.) Shortly thereafter Gaines and Lavender arrived, and were angry about the missing checks. Gaines told Vareen they had to find the checks because someone was coming from Los Angeles to get them. (5 RTL 334.) Vareen testified at trial: "All I remember is they told me that I had to find the checks because there was somebody, some high-powered figure coming down from LA and if we didn't all get the checks that we all would have been 'capped' is the word." (5 RTL 335.) Both Gaines and Lavender had 9 mm handguns, and they had brought Hughes, Tolces, Bowser and Martin to the apartment with them. (5 RTL 335-336, 339.)

Lavender took Vareen, Martin, and Bowser into Vareen's bedroom, while Gaines stayed in the livingroom with Tolces and Hughes. (5 RTL 339.) Once in the bedroom, Vareen and Lavender yelled at Bowser, repeatedly demanding to know where the checks were. (5 RTL 340-341.) Bowser denied any knowledge of the checks or their whereabouts. (5 RTL 342.) At one point Vareen's son came out of his bedroom into the hallway and asked Vareen what was going on. After telling him to go back in his room, Vareen went into the livingroom. While she was there she saw Gaines hit Hughes in the head with the butt of his gun.[3] (5 RTL 342.) Vareen went back to the bedroom where the questioning of Bowser continued. Eventually Bowser said that she and Tolces had taken the checks and had traded them to someone named Renn[4] for drugs. (5 RTL 347.) Lavender went back to the livingroom, and told Gaines what Bowser had said. Bowser told them she would take

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[3] On cross-examination Vareen said Gaines hit Hughes in the head with the gun shortly after they all entered the apartment. (5 RTL 383.)

[4] Vareen testified that Renn was Bowser's boyfriend, and that some time after the incident he lived for a while at Vareen's apartment. (5 RTL 353.)

them to the checks, and they all left Vareen's apartment. Vareen locked the door after them and never saw Bowser again. (5 RTL 348.)

The next day Vareen saw Gaines as she was walking her son to the bus, and asked him if he had gotten the checks back. He said he had not, and told her that Bowser was in a canal with a bag over her head barely breathing. Vareen did not believe him. (5 RTL 349.) She did not report the incident to police. (5 RTL 350.)

Vareen was eventually contacted by police and interviewed on more than one occasion. During these interviews she made statements which were inconsistent with her testimony at trial. For example, she testified that she had held the checks for Gaines for a period of two days, but stated during an interview that she had held them for a month and a half.[5] (5 RTL 409, 449.) At various time she said there were two checks and then that there were six or seven checks. (5 RTL 463.) At one time she said she found one of the checks ripped in half on the windshield of her car with the words "Sorry Cujo" written on it. Cujo was Hughes' nickname. (5 RTL 509-512.) On one occasion she told police that both Martin and Bowser were missing, and that Renn Shores had done something with them. (5 RTL 412, 451-453.) She also told officers that Hughes had been killed, and that she was being blamed for his murder. (5 RTL 418.) During one of her interviews she said that the last time she saw Bowser she was walking a bike with Tolces and Hughes. (5 RTL 436, 508-509.) She told officers that Josh Thibedeaux was going to kill Gaines and Lavender. (5 RTL 457-458.) Vareen was shown a photo of appellant Lavender's father, and she identified him as the man who had been

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[5] She also said that a box of her checks was stolen when the other checks were stolen. (5 RTL 454.)

with Gaines at her apartment during the incident. (5 RTL 395-396.) Although she testified that Gaines hit Hughes in the head with the gun, she told officers at one time that Gaines hit Tolces in the head with the gun. (5 RTL 464-465.)

Michael Hughes

In August of 2003 Michael Hughes was living in the Desert Oasis Apartment complex with his mother. He was 18 years old at the time, and a regular user of methamphetamine. (6 RTL 602-602.) Hughes had just been released from juvenile hall where he had been confined until his 18th birthday on August 2nd for forging checks on his mother's account. (6 RTL 604, 606.) Also released from juvenile hall in August of 2003 were Hughes' friends Thayne Tolces and Kristen Mark. Tolces was released at midnight on August 5th and Martin was released within a few days of Hughes and Tolces. (6 RTL 608-610.)

When Martin was released, she went to Hughes' apartment, and from there they went to Vareen's apartment. (6RTL 617-619.) Bowser and Tolces were there when they arrived and the four of them spent the evening and the next several days with Vareen, doing drugs, talking, and playing video games with Vareen's son. (6 RTL 618-619.) Hughes left Vareen's and went back to his apartment to sleep after getting into an argument with Martin who had been unaware of his relationship with Bowser. (6 RTL 621-622.)

Tolces also went back to Hughes apartment, and overhead a message left on Hughes' answering machine when Vareen called the apartment in a rage the next morning. Tolces woke Hughes in a panic telling him he needed to listen to the message because something crazy was going on. Hughes replayed the message and heard Vareen saying they were all going to die, they were dead men walking, and that in about a minute and 50 seconds his

apartment was going to be blown up. She said there were two crazy people coming after him and he had no idea who he was messing with. She was accusing him of taking checks from her. (6 RTL 623-624.) Hughes had no idea what Vareen was talking about and he called her back. She repeated her accusation about the missing checks, and told Hughes they were all going to die in about 30 seconds if they didn't leave the apartment and if they didn't give the checks back. (6 RTL 624-625.) When Hughes got off the phone with Vareen, he told Tolces they had to get out of the apartment. Tolces wanted to brush his teeth, but Hughes told him they needed to leave immediately. Hughes left without Tolces, and went to a nearby apartment complex where he sat for a period of time in a common grass area. (6 RTL 624-625.) Hughes waited two hours then went to a friend's house and used the phone to call his apartment. When no one answered, he walked back to the Desert Oasis complex and saw that the door to his apartment was standing open. (6 RTL 625-626.) Tolces and Martin were there, and they told him that nothing had happened while he was gone. Tolces and Hughes went to Hughes' room and waited for his mother to get home from work around 7:00 p.m. (6 RTL 626-627.) Martin left the apartment. (6 RTL 629.)

When nothing had happened by the time his mother returned to the apartment, Hughes began to think the situation was not too serious and that maybe Vareen was just trying to scare him. (6 RTL 626-627.) Around 9:00 there was a loud banging on the window, and Hughes looked outside and saw a black male with long hair holding a gun. Hughes had never seen the man before, and did not know who he was at the time. He later identified him as Gaines. (6 RTL 628-629.) Gaines told Hughes to get Tolces and come downstairs. He referred to Tolces by name, and threaten to kill everyone in the apartment including Hughes' mother if Hughes did not comply. (6 RTL

628-629.) Tolces and Hughes went outside, and Gaines ordered them to come downstairs. When Hughes told him they were not coming down because he was out of control, Gaines ran up the stairs and escorted them down and into a black Ford Ranger. (6 RTL 630.) He drove them to Vareen's apartment. On the way he kept the gun in his lap. He yelled at them to shut up and threatened to hit them with the gun when they attempted to ask him what was going on. (6 RTL 6311.)

When they arrived at Vareen's apartment, Vareen and Martin were there along with a few other people Hughes did not know. Gaines pushed Hughes and Tolces into the apartment and Vareen began questioning them angrily about the missing checks. She grabbed Hughes, swore at him, and began hitting, kicking and punching him. (6 RTL 633.) Hughes began crying, and they escorted him and Tolces into Vareen's bedroom where Martin was with a man Vareen referred to as "Floyd." Tolces and Hughes were put on the bed next to Martin, and Gaines asked each of them where the checks were. (6 RTL 635-636.) They all denied knowing anything about the checks. As Gaines continued to demand answers, Floyd heated up the bottom of a spoon with a lighter. Gaines asked Martin if she had taken the checks and when she said no, they burned her on the forehead with the heated spoon. (6 RTL 637.)

Sometime during the night it was decided that Hughes would go with Vareen to get Bowser. (6 RTL 638-639.) They went to several apartments before locating Bowser with Renn Shores. (6 RTL 639-641.) When they returned to Vareen's with Bowser, they went back in Vareen's bedroom where the others were. The questioning regarding the checks resumed, and Vareen slapped the girls and grabbed Hughes by the ear demanding answers. When they continued to deny knowledge of the checks, the girls were burned with

the spoon. During the interrogation, the girls were screaming. (6 RTL 641-642.) Eventually Tolces and Hughes were removed from the bedroom and taken into the livingroom. (6 RTL 643.)

As the night progressed, Hughes heard additional screams from the girls in the bedroom, and at one point Gaines hit Hughes in the head with the gun. (6 RTL 644-645.) Hughes was bleeding from the blow and Gaines threatened him with further injury. He said he was going to stab him, told him he would feel the pain, and said: "When I put the knife in you, you better not take that knife out boy. You better not take it out." He also put the gun to Hughes' head, cocked it, and pulled the trigger, but the gun did not fire. (6 RTL 645.)

At one point they told Tolces and Hughes they were going to take them to the desert and bury them alive, and began walking them down the stairs. Tolces and Hughes screamed for help, and when they were ½ way down the stairs Vareen yelled for them to shut them up and bring them back into the apartment. (6 RTL 646.) At that point they were taken back inside and the torment continued. One of the men put Hughes on the floor and placed a chisel against his ear and hit it with a hammer. Hughes described an additional assault as follows: "And then they ended up putting nails into my head and they were hitting nails into my head with a hammer but not the sharp side, the flat side was on my head. And they were hitting the sharp part with the hammer and the nails were going, like hitting my head." He said the nails did not actually go into his head. (6 RT 648-649.) By this time Bowser and Martin had been brought into the livingroom. As Gaines was about to hit Hughes with another nail, Boswer admitted having taken the checks. She said one of the checks was still in the room, and that she had given the other to one of Tolces' friends known as "Dopey." (6 RTL 650-652.)

After Bowser admitted taking the checks, Vareen slapped her and pulled her hair. Vareen, Gaines and Floyd all told her she was going to die. (6 RTL 653.) They made Tolces shave Bowser's head with clippers. The clippers were not working properly and pulled the hair out rather than shaving it.[6] (6 RTL 654-655.) Bowser was then placed in a suit bag and carried out of the apartment by Gaines and Floyd who said they were going to put her in a big snake cage. (6 RTL 654-656.)

Vareen told the others they could leave, but said they would be killed if they told anyone about what had happened. Tolces and Hughes wrapped Martin, who was naked, in a towel, and the three went back to Hughes' apartment. (6 RTL 656-657.) According to Hughes, Martin had burns all over her, and he did not take her inside his apartment because he did not want his mother to know what had happened to them. (6RTL 658.) Despite Vareen's warning, Hughes later told numerous people about the incident. He did not immediately report it to police. (6 RTL 660-661.)

When Hughes was ultimately interviewed by investigators he made statements which were inconsistent with his testimony at trial. For example he told investigators that two men had come to his apartment to get him and Tolces while at trial he testified that it was only one man. (7 RTL 766-767.) He also told investigators that there were five or six people in Vareen's apartment when he and Tolces were taken there against their will. He said there were some "gangster chicks" in Vareen's apartment during the incident, and said that when one of the guys would do something to Hughes these girls would hug and kiss the guys. (7 RTL 772-774.) Hughes told investigators

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[6] When Bowser's body was discovered, her head had not been shaved, she had a full head of hair, and there was no indication of any damage to her scalp. (12 RTL 1691-1693.)

that these girls left with the suspects. (7 RTL 776.) He described serious injuries including numerous burns to both Martin and Bowser all over their faces and chests, and said that they had candle wax on them. He said both girls had areas of torn skin. (7 RTL 778-779.) He also told investigators that he was covered in blood as a result of his injuries. (7 RTL 811.)

While he testified at trial that he and Vareen went to look for Bowser sometime during the night, he told officers this occurred during the early afternoon around 2:00 p.m. When confronted with this discrepancy in his story on cross-examination, Hughes stated: "Man, I don't know. Something is not right now. Something is not right. There was a time and point where I did go with Angela and I did go look for Tory." (7 RTL 787.) He then continued: "I know — I know what I know. I do. I just got my story mixed up. That's all it is I know what happened man." (7 RTL 788.) With regard to how Bowser got in Vareen's car, Hughes told wildly different stories ranging from she went voluntarily, to Vareen grabbed her by the hair, dragged her out of the apartment, and threw her down the stairs. (7 RTL 793-794.)

He also told investigators that when he, Tolces and Martin left Vareen's apartment there were police vehicles outside including FBI vans and Jeeps. He said they were everywhere and guarding the gates. (7 RTL 877-879.)

Thayne Tolces

At the time he testified Tolces was incarcerated in a California prison serving a sentence of 11 years and 8 months for felony hit and run with great bodily injury, providing a controlled substance to a minor, and unlawful sex with a minor. (8 RTL 972-973.) In August of 2003 Tolces also lived in the Desert Oasis Apartment complex. (8 RTL 974.) He met Vareen at the complex pool, and went to her apartment where he met Gaines. There they

discussed two travelers checks Gaines had given Vareen that were blank and they were trying to figure out how to stamp an amount on them. Tolces said that he had a friend who might be able to help. (8 RTL 975-978.) This meeting took place two weeks after Tolces's birthday on August 5th. (8 RT 974, 981.)

The night Martin was released from juvenile hall she went with Hughes, Tolces, and Bowser to Vareen's apartment. They stayed at the apartment that night smoking drugs provided by Vareen, and the next day Tolces and Hughes went back to Hughes' apartment to shower and change. The girls stayed at Vareen's. (8 RTL 982-983.)

When Hughes and Tolces went back to Vareen's that afternoon around 3:00, they knocked on the door but no one answered. (8 RTL 984.) Tolces and Hughes walked back down the stairs and looked in a window where they saw Vareen and one of the girls. Vareen was angry and said: "You guys fucked up. You guys, where are the checks at?" She accused them of taking the checks and told them Gaines was on his way over. Hughes left and went back to his apartment while Tolces stayed to talk to Gaines and explain that they had not taken the checks. (8 RTL 984.)

Gaines arrived within 15 minutes, and Tolces attempted to explain to him that they had nothing to do with the missing checks. They went up to Vareen's apartment where Vareen was waiting with Martin. Bowser was not there at the time. (8 RTL 986-987.) Gaines called Lavender and he came over to the apartment. (8 RTL 987-988.) After Lavender arrived, Gaines made another phone call, then left the apartment for a few minutes. When he returned with a 9 mm handgun he and Tolces went to look for Bowser. (8 RTL 991-992.) They went to a couple of different apartments before they found her, and then took her back to Vareen's apartment. (8 RTL 990-991.)

Gaines and Tolces then went to Hughes' apartment and brought him back to Vareen's. On the way to Hughes' apartment, Gaines told Tolces that he was going to die that night. He told him he would be digging his own grave, and told him the checks needed to turn up. (8 RTL 993-994.)

When they were all back in Vareen's apartment, Gaines stayed with Hughes and Tolces in the livingroom while Vareen and Lavender took Martin and Bowser into the bathroom. (8 RTL 996.) Over a period of about 8 hours Gaines repeatedly asked Hughes were the checks were, and Hughes consistently denied knowing anything about them. About 5 hours into the interrogation, Gaines hit Hughes in the face with the gun. Later he put Hughes on the floor face down and began tapping a chisel with a hammer on the back of his head. Hughes was screaming for his life and crying. (8 RTL 997-998.) At one point Gaines threw a knife at Tolces, but he primarily focused his attention on Hughes. Vareen went back and forth between the bathroom and the livingroom asking everyone where the checks were. During this time she slapped or hit Hughes. (8 RTL 998.) Tolces could hear the girls screaming in the bathroom throughout the night. (8 RTL 1002.)

Towards morning the girls were brought into the livingroom. Bowser had no shirt on, and Martin was wearing a shirt and boxer shorts. Tolces could see the girls had been burned. They both had "big open wounds." Martin had been burned on her face and maybe her chest, and Bowser had been burned on her chest. (8 RTL 999-1002.) Bowser had admitted taking the checks, and they put her in a chair and told Tolces to shave her head with a pair of clippers. He shaved about ¼ of her hair off before they told him to stop. Gaines and Lavender then wrapped Bowser in a trench coat and walked her out of the apartment. (8 RTL 1003.) Tolces, Hughes and Martin went back to Hughes' apartment. Hughes banged on the door and his mother, who

was getting ready for work, let them in. (8 RTL 1004.) Martin took a shower and called someone to come pick her up. Tolces never saw her again. (8 RTL 1005.)

Kristen Martin

Martin became friends with Hughes while they were detained in juvenile hall. (9 RTL 1142.) She also met Tolces there. (9 RTL 1142.) When she was released, Martin called Hughes and arranged to meet him at his apartment. (9 RTL 1143.) Tolces was with Hughes when Martin arrived, and the three of them walked over to Vareen's apartment where they met Bowser and Vareen. The group spent the night together playing video games and doing drugs. (9 RTL 1145-1146.) In the morning they walked back to Hughes' apartment. An hour or two later Hughes received a phone call, and told Martin and Tolces they needed to go back to Vareen's apartment. (9 RTL 1146-1147.) Martin, Tolces and Hughes walked back to Vareen's. When they arrived Vareen was enraged. She accused them of taking some traveler's checks worth $250,000. She was holding a full wine bottle in her hand and waiving it around as she screamed at them accusing them of taking the checks and demanding to know where they were. Vareen hit Martin in the head with the wine bottle and knocked her out. (9 RTL 1148-1149.)

When Martin regained consciousness, she was in the bedroom with Tolces, Hughes, Vareen and two black men she did not know. One of the men had longer hair and one was heavier set. They had spoons, knives and forks and were rubbing hot objects on Bowser's body. The man with the longer hair hit Martin in the forehead with a heated spoon leaving a red mark and small blister. (9 RTL 1149-1150.) At this point Hughes and Tolces were taken into the livingroom by the man with the longer hair while the heavy set

man took Martin and Bowser into the bathroom and handcuffed them together over the shower curtain rod. (9 RTL 1151.)

The man with Bowser and Martin tried to get the girls to turn on each other saying: "If you didn't take the checks, then obviously she did; make her tell me." He cut Martin's shirt and bra with a pair of scissors, then did the same to Bowser before pulling Bowser's pants down. He rubbed the scissors on the girls bodies and demanded that they tell him where the checks were, while the girls pleaded for their lives. (9 RTL 1152-1153.) However, when the man saw the tattoo Martin had on her back, his attitude toward her changed. He complimented her on the tattoo and told her it was a symbol for where he was from — Orange County. (9 RTL 1153.) Martin asked to used the restroom and the man unhandcuffed her. After Martin used the restroom, the man took the girls into the livingroom. (9 RTL 1154.) While they were in the livingroom Martin saw Hughes being hit with a hammer and chisel by the man with the longer hair. (9 RTL 1154.) There was no blood on Hughes. (9 RTL 1210.) At another time Hughes was hit twice and fell to the floor. Martin was told to sit next to him; she did, and fell asleep on the floor. (9 RTL 1155.)

When Martin awoke, she heard people talking about Bowser having admitted something. Bowser was sitting on a kitchen stool and Hughes was told to cut her hair with a pair of clippers. Martin watched as Hughes shaved Bowser's hair off with the clippers. (9 RTL 1156.) After her hair was shaved the men wrapped Bowser in a trench coat and walked her out the door. (9 RTL 1157.) Vareen told Tolces, Hughes and Martin they could leave, and they went back to Hughes' apartment. (9 RTL 1157.) After sleeping for a bit at Hughes' apartment, Martin called a friend for a ride and left. (9 RTL 1158.)

Although she never saw Bowser, Tolces or Hughes again after that night, she did run in to Vareen at another apartment complex about a year later. Vareen was with a group of younger Hispanic males and, when she saw Martin she yelled: "There's that little bitch." The group of males began chasing Martin as she ran to her friend's car. Shots were fired at Martin, but she was not hit. (9 RTL 1159.)

As with the other witnesses, Martin was interviewed by investigators and made statements which were inconsistent with her testimony at trial. For example she told investigators that, in addition to being burned, Boswer was stuck in the legs with forks. (9 RTL 1204-1207.) She also told officers that the men were holding sawed-off shotguns during the incident. (9 RTL 1175-1176.)

DEFENSE EVIDENCE

In addition to thoroughly impeaching all prosecution witnesses, the defense played a recording of a police interview with Joshua Thibedeaux, who was part of the Bowser, Tolces, Martin, Hughes circle of friends, where he claimed to have been present during the incident even though all other witnesses confirmed that he was, in fact, not present. (12 RTL 1778; 1 CTL 224.) The defense also presented expert testimony on the cause of death issue. Forensic pathologist Harry Bonnel reviewed documentation on the case, and testified that with respect to Bowser's body he found no evidence of stab wounds that might have been inflicted by a fork, no evidence of burns, and no evidence the victim's head had been shaved. (12 RTL 1691-1693.) Bonnell did not see convincing evidence that the victim's death was the result of homicide. He opined that GHB could have been a contributing factor in her death whether she had ingested it accidentally or intentionally. (12 RTL 1716, 1731.)

AUTHORITIES AND ARGUMENT

I.

RESPONDENT'S REQUEST FOR A BELATED EVIDENTIARY HEARING SHOULD BE REJECTED BECAUSE THE EVIDENCE PRESENTED TO THE TRIAL COURT ESTABLISHED PREJUDICIAL JUROR MISCONDUCT, AND A REMAND FOR AN EVIDENTIARY HEARING WOULD SERVE NO LEGITIMATE PURPOSE.

A. General Principles of Law Regarding Juror Misconduct

A motion for new trial may be made on the grounds of juror misconduct. (Pen. Code, § 1181, subd. 3.) "Prejudicial jury misconduct constitutes grounds for a new trial." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.) In general, jurors commit misconduct when they directly violate the oaths, duties, and admonitions imposed on them. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) To challenge the validity of a verdict based on juror misconduct, a defendant may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses. (*People v. Danks* (2004) 32 Cal.4th 269, 302.) Under Evidence Code section 1150, subdivision (a): "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Juror misconduct is established when an overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors. (*In re Hamilton, supra*, 20 Cal.4th at p. 294.)

In deciding whether to grant a new trial based on juror misconduct, "a trial court undertakes a three-part inquiry." (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 475.) "First, the court must determine whether the evidence presented for its consideration is admissible. . . . [¶] Once the court finds the evidence is admissible, it must then consider whether the facts establish misconduct. . . . The trial court may conduct an evidentiary hearing to determine the truth of the allegations set out in the declarations [filed in support of the motion]. . . . [¶] Finally, if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial." (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-1 13.)

Generally, "'juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted." [Citations.]'" (*People v. Majors* (1998) 18 Cal.4th 385, 417 [quoting *In re Hitchings* (1993) 6 Cal.4th 97, 118].) This presumption is provided as an evidentiary aid to the defendant because of the statutory bar against evidence of a juror's subjective thought processes and the reliability of external circumstances to show underlying bias. (*In re Hamilton, supra*, 20 Cal.4th at p. 295; *In re Carpenter* (1995) 9 Cal.4th 634, 651-652, 657.) Consequently, once misconduct is established, "[i]t is settled that 'unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial.'" (*People v. Pierce* (1979) 24 Cal.3d 199, 207.) "[A] conviction cannot stand if even a single juror has been improperly influenced." (*Id.* at p. 208.)

"The presumption of prejudice 'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. ...'" (*People v. Miranda* (1987) 44 Cal.3d 57, 117.) "Whether a defendant has been prejudiced ...

depends upon 'whether the jury's impartiality has been adversely affected, whether the prosecution's burden of proof has been lightened and whether any asserted defense has been contradicted.'" (*Ibid.*)

On appeal from a ruling denying a new trial motion based on juror misconduct, appellate courts defer to the trial court's factual findings if supported by substantial evidence, and exercise independent judgment on the issue of whether prejudice arose from the misconduct. (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1117; *People v. Nesler* (1997) 16 Cal.4th 561, 582 & fn. 5; see *People v. Ault* (2004) 33 Cal.4th 1250, 1263-1264.) As the court explained in *Cissna*:

> Although we defer to factual findings supported by substantial evidence, the legal import of the facts accepted by the trial court on the issue of prejudice is subject to our de novo evaluation. Accordingly, we independently review whether the record shows the presumption of prejudice was rebutted because there is no substantial likelihood of juror bias.

(182 Cal.App.4th at p. 1117; see also *People v. Leonard* (2007) 40 Cal.4th 1370; *People v. Nesler*, *supra*, 16 Cal.4th at p. 582 & fn. 5; *People v. Ault*, *supra*, 33 Cal.4th at pp. 1263-1264.) Courts have stressed the particular need for independent review of the trial court's reasons for denying a new trial motion in juror bias cases. This is because the reviewing court must protect the complaining party's right to a fully impartial jury as an "'"inseparable and inalienable part" of the [fundamental] right to jury trial [(U.S. Const., amend. VI; Cal. Const., art. I, § 16)]. [Citations.]'" (*People v. Ault*, *supra*, 33 Cal.4th at p. 1262.)

B. Proceedings Below

Prior to sentencing, co-appellant Gaines filed a motion for new trial based, in part, on juror misconduct. (CTG 818.) In this regard it was argued

that the jury committed misconduct when it discussed the defendants' failure to testify ***and*** adverse inferences to be drawn from this fact. (CTG 819-824.) Appellant Lavender joined the motion. (2 CTL 449.)

In support of the motion, the defense submitted declarations from three jurors. The declaration from Juror No. 9 read as follows:

> I have personal knowledge of all facts contained in this declaration and can testify to these facts if called as a witness.
>
> I was Juror No. 9 in the case of People v. Michael Gaines and Floyd Lavender. I thought it was a fair trial and that we considered the instructions.
>
> During the deliberations some of the jurors including me considered our own experiences regarding remembering things from a long time ago.
>
> Several jurors also discussed the fact that the defendants did not testify in this case. However, I did not consider what the other jurors said and discussed about the defendants not testifying in the case in reaching my decision in the case.
>
> I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing statements are true and correct.

(CTG 849.) The declaration of Juror No. 4 read as follows:

> 1. I have personal knowledge of all facts stated herein and if called upon can competently testify to the same.
>
> 2. I was Juror No. 4 in the case of the People v. Michael Gaines and Floyd Lavender and participated in the deliberations of the case.
>
> 3. The jurors did not discuss any of their past experiences during the deliberations. We did our best to follow the instructions and I believe we did so.

As far as the testimony, we understood that all of the witnesses were drug users and that included the Defendants.

The fact that there was more testimony on the part of the prosecution carried a lot of weight as far as our decision. Additionally, the fact that the defendants did not testify was discussed at length during the deliberations, and also played a large part in our decision. We discussed the fact that if the defendants were innocent then they should've testified.

I believe that we did a good job in deciding this case.

I declare under penalty of perjury that the foregoing is true and correct pursuant to the laws of the State of California.

(4 CTG 851.) The declaration of Juror No. 10 read as follows:

I have personal knowledge of all facts contained in this declaration and can testify to these facts if called as a witness.

I was Juror No. 10 in the case of People v. Michael Gaines and Floyd Lavender.

We asked for copies of the indictments to review, it weighed a lot on the jurors.

There was no testimony from the defendants and we discussed this fact during the deliberations and openly talked about why they did not testify and that this fact made them appear guilty to us.

There was not enough testimony from defendants' witnesses. The jurors discussed that the defendants should have provided more witnesses, including themselves, to testify on their behalf.

When the mother of one of the defendants got on the stand, we thought, well here comes the evidence on the other side. But no, there wasn't anything like they continued to be employed and that they were good people. Nothing like that was said.

Attorney Sullivan kept saying why didn't the prosecution do this or that like checking some records. Well, why didn't the defendants

check into it? They didn't, we thought because it wasn't true what the defense Attorney, Sullivan, was saying.

Put all of this together and we thought they were guilty and voted that way.

In the end, we all felt we had done a good job in finding them guilty.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing statements are true and correct.

(4 CTG 853.)

The prosecution filed points and authorities in opposition to the motion for new trial and submitted declarations from two of the jurors who had provided declarations submitted by the defense — Juror No. 9 and Juror No. 4 — and a declaration by Juror No. 12, the jury foreperson. (4 CTG 892-903.) The declaration of Juror No. 9 read as follows:

1. I have personal knowledge of all facts stated herein and if called upon can competently testify to the same.

2. I was Juror No. 9 in the cases [sic] of People v. Michael Gaines and Floyd Lavender and participated in deliberations of that case.

3. 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.

4. When I signed the declaration that was brought to me by Mr. Cordova 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.

5. I never mentioned the fact that the defendants did not testify during deliberations.

(4 CTG 899, 940.) Juror No. 4's declaration read as follows:

1. I have personal knowledge of all facts stated herein and if called upon can competently testify to the same.

2. I was Juror No. 4 in the cases [sic] of People v. Michael Gaines and Floyd Lavender and participated in deliberations of that case.

3. 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 and there was no further mention. I do not recall any other discussion regarding the defendants not testifying.

4. I did believe that the defendants should have brought forth more evidence and witnesses in their case. When I told this to Mr. Cordova, I was not referring to he defendants themselves testifying.

5. I never mentioned the fact that the defendants did not testify during the deliberations.

(4 CTG 901, 939.) The declaration of Juror No. 12 read as follows:

1. I have personal knowledge of all facts stated herein and if called upon can competently testify to the same.

2. I was Juror No. 12 in the cases [sic] of People v. Michael Gaines and Floyd Lavender and participated in deliberations of that case. I was the foreperson of the jury.

3. 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 were not to 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.

4. That was the one and only reference to the defendants not testifying that occurred during deliberations.

5. After we had signed the verdict forms and were waiting in the jury room, we did discuss that the defense should have brought forth more evidence.

(4 CTG 903, 938.)

The matter was heard on the date set for sentencing. At that time the defense objected to the declarations submitted by the prosecution on the grounds that they were inadmissible in that they had not been executed under penalty of perjury. (16 RTL 2297-2298, 2300.) The trial court recognized that the declarations submitted by the prosecution were defective and indicated it would grant a two day continuance of the hearing in order to give the prosecution time to obtain properly executed declarations. (16 RTL 2315-2316.) The court further indicated that either party would be permitted to submit additional declarations during that period of time noting: "The bottom line is that I need all of the admissible evidence that I can get before me in order to make the right decision on this matter." (16 RTL 2319.) The prosecutor then indicated that, during the hearing, she had succeeded in obtaining the signatures of two of the three jurors on properly prepared declarations, and that she would have the third within minutes so that there would be no need to continue the hearing. (16 RTL 2319.) Moments later the prosecution presented declarations from all three jurors executed under penalty of perjury. (16 RTL 2320.) In rebuttal to the declarations offered by the prosecution, the defense tendered a declaration from a defense investigator relating conversations he had with jurors. (16 RTL 2308-2310; 4 CTG 941-942.) The trial court refused to consider the declaration finding that it contained only hearsay. (16 RTL 2310.) When the court asked if either the

defense or the prosecution was requesting a continuance of the hearing, both sides indicated that they were not requesting a continuance. (16 RTL 2321.)

The possibility of an evidentiary hearing was also discussed. The prosecution objected to such a hearing noting:

> Ms. Trapnell: . . . Now, as to a *Hedgecock* hearing, those are very disfavored. This causes a chilling effect on jurors. It's a fishing expedition, which is exactly what the defense wants. They want to put everybody up here and try to find something. [¶] And, as I stated to the court, this was not an issue we were going to get into, but these jurors are already feeling extremely harassed by the numerous phone calls for interviews. This is not something that the court favors, for us to bring jurors in to impeach their verdicts. And I don't believe a showing has been made sufficient to do that in this case. The People would object to any type of hearing and would ask that the court overrule the motion.

(16 RTL 2301-2302.) Defense counsel inquired whether a "*Hedgecock*" hearing would be helpful to resolve conflicts in the declarations regarding the length of the discussions relating to the defendants' failure to testify. (16 RTL 2321-2322.) However, defense counsel noted: "Granted, I think the defense knows very well that *Hedgecock* hearings don't go the defense way. Jurors, when confronted with facts that they have committed misconduct, are going to do everything within their power to say whatever needs to be said to ensure that their verdict is going to be upheld." (16 RTL 2323.) The prosecution then objected again stating: "The People would oppose any *Hedgecock* hearing and ask the court to deny the motion for new trial." (16 RTL 2324.) The trial court ultimately ruled that no *Hedgecock* hearing would be held:

> All right. The court will further find that the defense has failed to make a sufficient showing that a *Hedgecock* hearing should be held to elicit testimony from jurors. [¶] Furthermore, there does not appear to be before the court clearly defined and specific disputes on material issues relating to misconduct. [¶]

> Thirdly, any such hearing would likely result in the court or counsel improperly inquiring into subjective thought processes of the jury. So I'll exercise my discretion, in both matter of law and matter of fact in the case, not to order any evidentiary hearing under *People v. Hedgecock.*

(16 RTL 2336-2337.)

With regard to the substance of the motion for new trial, the court ruled that only certain portions of the declarations submitted by the parties were admissible in light of Evidence Code section 1150. As summarized by the Court of Appeal the trial court admitted the following portions of the declarations submitted by the defense:

> (1) Juror No. 9's statement in her original declaration that "[s]everal jurors also discussed the fact that the Defendants did not testify in this case" was admitted. The court excluded the balance of her original declaration as reflecting thought processes of the jury.
>
> (2) Juror No. 4's statement in his original declaration that "the fact that the defendants did not testify was discussed at length during the deliberations" was admitted. The court excluded his statements that these discussions "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 reflecting thought processes of the jury.
>
> (3) Juror No. 10's statement in his declaration that "[t]here was no testimony from the defendants and we discussed this fact during the deliberations" was admitted. The court excluded the balance of the declaration, including the statements that the jury "openly talked about why they did not testify and that this fact made them appear guilty to us" and the statement that "[t]he jurors discussed that the defendants should have provided more witnesses, including themselves, to testify on their behalf" as reflecting thought processes of the jury.

(Slip Opinion filed 3/6/13 at p. 23 [ruling 16 RTL 2327-2330].) With regard to the declarations submitted by the prosecution, the trial court ruled as follows:

> (1) Juror No. 9's statement in her clarifying declaration that "[t]he 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" was admitted. The court excluded the balance of her original declaration as reflecting thought processes of the jury, or as irrelevant or hearsay.
>
> (2) Juror No. 4's statement in his clarifying declaration that "[t]he 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" was admitted.
>
> (3) Juror No. 12's statement that "[t]he 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" was admitted. The court excluded the balance of Juror No. 12's declaration.

(*Lavender II*, Slip Opn. at pp. 23-24 [ruling 16 RTL 2331-2333].)

In ruling on the motion for new trial the trial court found juror misconduct: "Based upon the state of the evidence before the court, I'll find that jury misconduct did occur. At least one — if not more than one — juror mentioned that the defendants did not testify during the deliberations process." (16 RTL 2335.) However, the court denied the motion finding as follows:

> However, based upon all of the evidence before the court, I'll find that this presumption of prejudice has been rebutted by a

showing that no actual prejudice occurred that affected the defendants' right to a fair trial.

Specifically, I'll note that one issue of misconduct is whether it adversely affected the jury's impartiality, lightened any burden of proof or removed a defense in the case.

I'll further note that the case law appears to require more than a brief and transitory violation of the court's instructions. I specifically find that the admonition by the foreperson as stated to the jury cured the misconduct. And the defense at this point has — forgive me, the prosecution has met its burden to rebut the showing of misconduct and has demonstrated that no actual prejudice occurred.

(16 RTL 2335-2336.)

The Court of Appeal determined that the trial court had incorrectly ruled on the admissibility of certain key portions of the declarations submitted by the defense. Specifically, the court found:

> Although the court admitted Juror No. 4's statement (in his original declaration) that "the fact that the defendants did not testify was discussed at length during the deliberations," it excluded his statements that these discussions "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." The latter statement clearly represented "statements that are objectively ascertainable by sight, hearing, or the other senses" [citation], and should have been admitted. The former statement, while arguably describing the "subjective reasoning processes" of the jury, is at least equally capable of an interpretation that described the quantitative level at which the failure to testify was involved in the jury's discussions, and therefore was admissible as objectively ascertainable conduct.
>
> Although the court admitted Juror No. 10's statement that "[t]here was no testimony from the defendants and we discussed this fact during the deliberations," it excluded the balance of the declaration. While most of the balance of Juror No. 10's

> statement was inadmissible, the court excluded two statements (e.g. 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") that clearly represented "statements that are objectively ascertainable by sight, hearing, or the other senses" [citation], and should have been admitted.

(*Lavender II*, Slip Opn. at pp. 29-30.) The court also determined that the trial court improperly excluded portions of the declaration by the defense investigator relating prior statements by Juror No. 4 and Juror No. 9 which were inconsistent with the declarations by the jurors submitted by the prosecution with regard to the number of jurors involved in the improper discussions, the length of the discussions, and whether the discussions were immediately halted by the jury foreperson. (*Lavender II*, Slip Opn. at p. 31.)

Based upon the admissible evidence before the trial court, and after conducting a careful review of the record — including the evidence presented at trial — the Court of Appeal concluded that the presumption of prejudice had not been rebutted by the prosecution and that appellants were entitled to a new trial. (*Lavender II*, Slip Opn. at pp. 32-48.)

C. ***The Court of Appeal Properly Determined that, Because the Jurors Discussed Appellants' Failure to Testify and the Adverse Inferences to Be Drawn from this Fact, the Evidence Before the Trial Court Established Prejudicial Jury Misconduct.***

The Fifth Amendment to the federal Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." "The right not to testify would be vitiated if the jury could draw adverse inferences from a defendant's failure to testify. Thus, the Fifth Amendment entitles a criminal defendant, upon request, to an instruction that will 'minimize the danger that the jury will give evidentiary weight to a

defendant's failure to testify.'" (*People v. Leonard, supra*, 40 Cal.4th at pp. 1425-1426 [quoting *Carter v. Kentucky* (1981) 450 U.S. 288, 305].) "[T]he failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege." (*Griffin v. California* (1965) 380 U.S. 609, 614.)

In accordance with these principles, the trial court instructed the jury pursuant to CALCRIM No. 355 that: "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way." (2 CTL 332.) Despite this cautionary instruction, according to uncontroverted juror affidavits presented by the defense in support of the motion for new trial, the jury discussed the defendants' failure to testify and the adverse inferences to be drawn from this fact during its deliberations. The parties agreed, and the trial court found, that this activity constituted juror misconduct. (16 RTL 2335.) The sole dispute was whether the presumption of prejudice arising from the misconduct had been rebutted by the prosecution.

"[B]y violating the trial court's instruction not to discuss defendant's failure to testify, the jury committed misconduct. [Citations.] This misconduct gives rise to a presumption of prejudice, which 'may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.'" (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.)

In the present case the Court of Appeal undertook a careful review of the factors affecting a determination of prejudice, and concluded that the presumption of prejudice had not been rebutted. (See *Lavender II*, Slip Opn. at pp. 32-38.) In this regard the court stated: "We conclude that, because the evidentiary landscape here was devoid of forensic certainties and therefore turned entirely on close and substantial credibility assessments of the veracity of prosecution witnesses whose testimony was at best in disarray, and a 'defendant is entitled to have all 12 jurors make this [credibility] evaluation without considering whether the defendant took the stand to deny the accusations [and] [t]he defendant's silence should not be a factor adding to any inferences that the victim is telling the truth' [citation], the presumption of prejudice from the misconduct has not been rebutted." (*Lavender II*, Slip Opn. at p. 38.)

Respondent argues: "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." (Respondent's Opening Brief on the Merits at p. 28.) However, this is not the case. The Court of Appeal's evaluation of the issue was based upon uncontroverted portions of the declarations submitted by the defense establishing that one or more jurors had discussed the defendants' failure to testify and the adverse inferences to be drawn from this fact. In concluding that the presumption of prejudice had not been rebutted, the court assumed the truth of the declarations submitted by the prosecution.

The fact that the jurors had discussed adverse inferences to be drawn from the defendants' failure to testify was a significant factor in the Court of Appeal's decision:

> Here, unlike the situations in *Hord*, *Leonard* and *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. In *Hord's* words, when such comments arise in the jury room, "the chance of prejudice increases . . . [because] the comments go beyond mere curiosity and lean more toward a juror's drawing inappropriate inferences from areas which are off limits. Such comments are more likely to influence that juror and other jurors." [Citation.]

(*Lavender II*, Slip Opn. at p. 38 [footnote omitted].) This fact was set forth in the declarations submitted by the defense, and was not contradicted by the declarations submitted by the prosecution.

Juror No. 4's declaration submitted by the defense stated: "[T]he fact that the defendants did not testify was discussed at length during the deliberations and also played a large part in our decision. We discussed the fact that if the defendants were innocent then they should've testified." (CTG 851.) Juror No. 10's declaration stated: "There was no testimony from the defendants and we discussed this fact during the deliberations and openly talked about why they did not testify and that this fact made them appear guilty to us." (CTG 853.) Although the prosecution submitted a clarifying declaration from Juror No. 4, minimizing the number of jurors involved in the discussions of prohibited topics and the length of the discussions, the declaration did not contradict the juror's original statement that the jurors: "discussed the fact that if the defendants were innocent then they should've testified." The prosecution did not present a declaration from Juror No. 10. There simply was no conflict in the evidence as to whether the jurors discussed adverse inferences to be drawn from the defendants' failure to testify.

In reaching its conclusion that the presumption of prejudice was not rebutted, the Court of Appeal also assumed that the declarations submitted by the prosecution were true. For example the court assumed that the jury foreperson reminded the offending jurors that they were not to consider the defendants' failure to testify. (See *Lavender II*, Slip Opn. at p. 35 ["Even assuming the foreman's declaration was credited . . ."], p. 37, fn. 31 ["Although the foreman here told the jury not to consider the *fact* of the defendant's failure to testify . . .."].)

Contrary to respondent's position, the Court of Appeal's conclusion did not require, and was not based upon, a resolution of disputed facts. Rather, the Court of Appeal's conclusion was based on the severity of the misconduct — the discussion of adverse inferences to be drawn from the defendants' failure to testify — and the overall all weaknesses in the prosecution's case against appellants. The disputed facts referred to by respondent were not material to the Court of Appeal's resolution of the issue.

D. A Remand for an Evidentiary Hearing Would Serve No Legitimate Purpose in this Case.

Respondent argues that an evidentiary hearing is necessary in order to resolve factual disputes. However, the only factual disputes mentioned by respondent are immaterial to resolution of the question of whether prejudicial jury misconduct occurred. Respondent argues:

> 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. [4 GCT 899, 901, 903 [cite to declarations provided by prosecution] 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 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.

(Respondent's Opening Brief on the Merits at pp. 20-21.) However, none of claimed factual disputes related to ***material*** issues of fact.

The question of how many jurors discussed the defendants' failure to testify is immaterial since it is well settled that "[a] defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citation.]" (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578.)

Additionally, whether and how quickly the offending juror or jurors were admonished by the foreperson was also immaterial. As the Court of Appeal noted: "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* . . . 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. Indeed, when a jury chooses to place that inference on the table *notwithstanding the court's express prior instruction* not to consider the same inference, we have difficulty understanding why the foreman's *repetition* of that instruction would have any curative effect on a jury that has already

evinced a willingness to disregard the court's instructions." (*Lavender II*, Slip Opn. at p. 37, fn. 31 [emphasis in original].) Moreover, respondent cannot hope to prove that the foreman's admonition did anything other than stop the discussion. The defendants' failure to testify may still have affected the decision of at least one of the jurors. The extent to which any of the jurors relied upon the foreman's admonition rather than the prohibited matter cannot be determined at an evidentiary hearing in light of the prohibition of inquiry into the thought processes of jurors contained in Evidence Code section 1150.

Similarly, with regard to the final issue of fact referenced by respondent — "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" — this is an issue not subject to proof at an evidentiary hearing in light of the prohibition of inquiry into the thought processes of jurors. (See *In re Carpenter*, *supra*, 9 Cal.4th at pp. 651-652.) The only proper inquiry would be whether the jurors ***discussed*** negative inferences to be drawn from the defendants' failure to testify. On this point there was no conflict in the declarations. The defense presented declarations indicating that adverse inferences were discussed, and the prosecution did not present any declarations expressly contradicting the defense declarations on this point.

Respondent also argues that following statements contained in the juror declarations are ambiguous:

> 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."

(Respondent's Opening Brief on the Merits at p. 14.) According to respondent, "the inherent ambiguities of those statements counsel a remand for an evidentiary hearing, and not a new trial, in this case." (*Ibid.*) On this point respondent contends that the statements are similar to those before in the court in *Krouse v. Graham* (1977) 19 Cal.3d 59. However, *Krouse* is inapposite. While in the present case the declarations were clearly describing statements made by the jurors during deliberations, in *Krouse* it was unclear whether the declarations were describing what the jurors said or what the jurors thought. In this regard the court observed:

> [I]f 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. [Citation.]
>
> The declarations in question are inconclusive, however, and could be construed as conduct reflecting only the mental processes of the declarant jurors, for they assert that certain unnamed jurors "commented" on the subject of attorneys' fees, and that the jurors "considered" the matter in determining the "final compromise award." 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 declarations regarding them, accordingly, would be inadmissible under section 1150. 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 . . . .

(19 Cal.3d at pp. 80-81.) Unlike *Krouse*, in the present case the juror declarations clearly indicated that they were describing statements made

during deliberations. The Court of Appeal properly determined, as a matter of law, that the portions of the declarations referred to by respondent were, therefore, admissible under Evidence Code section 1150. (See *Lavender II*, Slip Opinion at pp. 29-30.)

Respondent also argues that: "Further militating in favor of a remand in this case are the additional ambiguities which resulted from the fact that Juror No. 4 and Juror No. 9 submitted contradictory declarations to both the defense and the prosecution." (Respondent's Brief on the Merits at p. 17.) However, whatever contradictions exist in the declarations were apparent at the time the new trial motion was heard. In fact counsel for appellant Gaines expressly inquired of the trial court whether an evidentiary hearing was necessary in light of the "conflicts within the declarations, both within the declarations submitted by the same jurors and amongst the jurors, which may or may not resolve in a *Hedgecock* hearing." (16 RTL 2322-2323.) When asked by the court for comment, the prosecution opposed an evidentiary hearing. (16 RTL 2324.) Respondent now argues that an evidentiary hearing is required in order to give the prosecutor "a fair opportunity to rebut the presumption of prejudice . . . ." (Respondent's Brief on the Merits at p. 35.) The prosecutor, however, was already afforded this "fair" opportunity. The issue respondent seeks to address in a belated evidentiary hearing 3+ years after the fact ***is the same issue*** that was before the trial court originally.

Respondent relies extensively on cases such as *People v. Johnson* (2006) 38 Cal.4th 1096, dealing with jury selection error where the issue is whether the prosecutor improperly exercised peremptory challenges based upon group bias. (See Respondent's Opening Brief on the Merits at pp. 32-35.) In such cases the trial court engages in a multi-step analysis summarized by the court in *Johnson* as follows:

> In its opinion in this case, the high court explained the three-step procedure that applies when a defendant objects at trial that the prosecution exercised its peremptory challenges discriminatorily. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" [Citation] Here, because the trial court found that defendant had not made out a prima facie case, it did not move on to steps two and three. We now know that the trial court erred in this respect.

(38 Cal.4th at p. 1099.) The court ultimately remanded for a hearing to give the prosecutor the opportunity offer permissible race-neutral justifications for the challenges. The question to be addressed on remand, therefore, had never been addressed in the trial court. Such is not the case here.

At the time the pleadings and supporting declarations were filed, all matters bearing on the question of whether prejudicial jury misconduct had occurred were at issue. At that time the prosecutor had no way of knowing how the court would rule on any of the issues involved in the motion for new trial. It must be assumed that she presented all relevant information at that time, particularly in light of the fact that she never indicated she needed more time to respond. In fact the prosecutor even rejected the trial court's offer to continue the matter for two days to permit the parties to present additional declarations to resolve any material factual disputes, and opposed a proposed evidentiary hearing. Because the prosecution was afforded every opportunity to present evidence relating to the question of prejudice at the time the motion was heard, there is no equitable basis for granting respondent's request for a

belated evidentiary hearing. On the other hand, granting an evidentiary hearing at this stage of the proceedings would be unfair to appellants.

As noted by the Court of Appeal: "Although it is unnecessary definitively to apply judicial estoppel here, the elements appear facially present in this case, and the fact that years have passed could well harm defendants by eroding the reliability of any evidence (whether from the fading of memories as to the precise dynamics of the deliberations, or the coloring of memories from post trial 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 pp. 42-43, fn 32.) One additional and significant factor putting appellant Lavender at a distinct disadvantage is that, as reflected in State Bar Records available online,[7] appellant Lavender's trial attorney Mark Sullivan (Bar No. 62948 [1 CTL 97]) is now deceased. Consequently, appellant Lavender would necessarily be represented at any such hearing by an attorney unfamiliar with the case.

Because there are no material issues of fact to be resolved, and in light of the fact that respondent was afforded every opportunity to present any and all relevant evidence at the time of the original hearing, respondent's request for a belated evidentiary hearing should be denied.

JOINDER OF ARGUMENTS ADVANCED BY CO-APPELLANT

Pursuant to rule 8.200(a)(5) of the California Rules of Court, appellant adopts and joins in the arguments advanced by co-appellant Michael Gaines in his answer brief on the merits.

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[7] http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch

CONCLUSION

In light of the foregoing discussion, appellant respectfully requests that the judgment of the trial court be reversed, and that the matter be remanded for a new trial.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Kimberly J. Grove, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 12,721 words, excluding the tables, this certificate. This document was prepared in WordPerfect, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 23, 2013, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over 18 years of age, employed in the county of Westmoreland, Pennsylvania, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 425, Ligonier, Pennsylvania. I served Appellant's Answer Brief on the Merits by placing a copy in an envelope for the addressee named hereafter, addressed as follows:

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Each envelope was then sealed and with postage thereon fully prepaid deposited in the United States mail by me at Ligonier, Pennsylvania, on September 24, 2013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 24, 2013, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove