SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. Holmes, McClain and LORENZO NEWBORN ~~et al~~, Defendants and Appellants.	S058734 Los Angeles County Superior Court No. BA092268

APPELLANT NEWBORN'S REPLY BRIEF

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

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DEATH PENALTY

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Appellant replies to respondent's contentions as follows. For continuity, appellant addresses respondent's arguments in the same order as the arguments were presented in Appellant Newborn's Opening Brief.

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I. APPELLANT WAS DEPRIVED OF DUE PROCESS, EQUAL PROTECTION, AND A REPRESENTATIVE JURY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERROR IN REFUSING TO REMEDY THE PROSECUTOR'S IMPROPER EXERCISE OF PEREMPTORY CHALLENGES BASED ON RACE AND SEX.

The Batson-Wheeler issue is addressed in Respondent's Brief ("RB") at pp. 129-144.

A. The Totality of Relevant Facts Before the Trial Court Amply Established a Prima Facie Case.

1. The inference of discrimination supported by all relevant statistics and numerical measures.

The defense made a Batson-Wheeler motion immediately after the prosecutor struck Juror #94, who was the sixth Black female the prosecution had struck, see 13 RT 907-908, and who was the prosecutor's 12th peremptory strike overall. At the time of the Batson-Wheeler motion, a total of nine Black females had been qualified for service and seated in the jury box, and the prosecutor had struck six of them, a 67 percent elimination rate.[1] The record

[1] Appellant uses the term "elimination rate" to mean the number of prosecutorial strikes against Black females in comparison with the total number of Black females called to the jury box at the time of the strike. This statistic is a direct measure of the diminution of representation of the particular category of prospective jurors. The higher the elimination percentage, the more indicative of purposeful discrimination. Many courts make this calculation in

reflects that the defense had not struck any Black female jurors, and there were three Black female jurors remaining in the jury box following the prosecutor's sixth strike against Juror #94 and the defense objection. See Appendix A to Appellant's Opening Brief, p. 4. As argued in the Opening Brief, that elimination rate by itself satisfies the standard of Johnson v. California (2005) 545 U.S. 162, 168, i.e., a "showing that the totality of relevant facts gives rise to an inference of discriminatory purpose."

Respondent contends that "Appellant Newborn erroneously asserts that the strike ratio is 67 percent (or six out of nine prospective jurors)," and explains, "[i]t appears that Appellant Newborn has counted prospective Juror #53 as an African-American woman who was challenged, but did not include her in the total number of African-American women called to sit in the box." RB 133, fn. 38. Respondent is incorrect. At the time that the prosecutor struck Juror #94 and triggered the Batson-Wheeler motion, there had been nine Black females called to the jury box (# 9, #34, #37, #48, #53, #63, #88, #94, and #98),

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reviewing Batson challenges, but there is no uniformly employed term for it in the case law or commentary. As an evidentiary rule of thumb, the higher the elimination rate, the stronger the inference of discriminatory purpose.

Appellant used the term "strike rate" to refer to this statistic in the AOB, but will no longer do so because the term "strike rate" has evolved a different meaning in certain federal cases. See fn. 3, infra.

and the prosecutor had struck six of them (#9, #37, #48, #53, #88, and #94), a 67 percent elimination rate.

Respondent contends that the prosecution's elimination rate as to Black females was 60 percent, or six out of 10, RB 133, but the correct figure is six out of nine. Perhaps respondent has incorrectly included the juror called to replace Juror #94 in his calculation. Struck juror #94 was replaced by Juror #105, also a Black female juror. See Appendix A to AOB, p. 4. However, the "elimination rate" consists of a numerator denoting the number of actual strikes made by a party against members of a protected class, and a denominator denoting of the total number of potential strikes that the party could have made against that same protected class. At the time the Batson-Wheeler motion was made, the strike rate numerator was six, as the parties agreed and as respondent acknowledges in his brief. RB 130. The denominator is the total number of Black females that the prosecutor could have struck, which is nine, consisting of the six whom the prosecutor had struck and the three whom the prosecutor had elected not to strike, i.e., Jurors #34, 63, and 98. The prosecutor had not had

an opportunity to strike juror #105 at the time of the Batson-Wheeler motion and #105 is, therefore, not includable in the elimination rate denominator.[2]

Respondent cites People v. Bell (2007) 40 Cal.4th 582, 597-598 for its statement that "[a] more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." RB 134. The proportion of a party's peremptory challenges used against a particular group is generally referred to as the "strike rate" in Batson cases,[3] and is by itself a useful indicator of potential discrimination. When the strike rate as to a particular group is compared to the representation rate of that group among the jurors subject to peremptory challenge, the result is the statistic referred to in Bell, and is generally referred to as the "exclusion rate" in the case law.[4]

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[2] The District Attorney's final elimination rate of Black females remained constant at 67 percent. The prosecutor struck a total of eight Black female jurors, the defense struck none, and four sat on the jury.

[3] Appellant uses the term "strike rate" in the manner generally employed in the Batson case law. "The strike rate is computed by comparing the number of peremptory strikes the prosecution used to remove Black potential jurors with the prosecutor's total number of peremptory strikes exercised." Abu-Jamal v. Horn (3rd Cir. 2008) 520 F.3d 272, 290.

[4] The "exclusion rate" is "calculated by comparing the percentage of exercised challenges used against Black potential jurors with the percentage of Black potential jurors known to be in the venire." Abu-Jamal, supra, ibid. This

Respondent correctly notes that the prosecutor had used six of its 12 total peremptory challenges against Black females at the time of the Batson-Wheeler motion, yielding a 50 percent strike rate. However, respondent incorrectly asserts that Black females "comprised approximately 29 percent of the prospective jurors who were subject to peremptory challenges [by] the prosecution [10 of 34]." Ibid. Only nine Black female jurors had been called to the jury box and were "subject to peremptory challenges [by] the prosecution" at the time of the Batson-Wheeler motion. The total number of jurors subject to peremptory consisted of the 12 jurors struck by the prosecution, the 11 jurors struck by the defense, and the 11 previously seated jurors who remained in the box following the prosecutor's strike of juror #94. Correctly calculated, Black female jurors comprised nine of 34 prospective jurors, or 27 percent, of the pool of jurors subject to peremptory challenge.

Using these numbers, the exclusion rate is correctly calculated as 50 percent [strike rate] divided by 27 percent [representation rate]. That yields a figure of 1.85, which means that the prosecutor was striking Black females at nearly twice the rate as their representation in the venire, with the effect of

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definition differs slightly from the formula in Bell, but makes the same type of comparison.

diminishing their proportional representation on the jury.[5] In sum, the three most widely recognized numerical measures of discrimination all support an inference of discrimination.

2. Respondent's unavailing effort to minimize the statistical indicia of discrimination.

Respondent acknowledges that the prosecutor's strikes against Black female jurors, when compared to their numbers on the venire, demonstrate an "apparent disparity" even under respondent's incorrect calculation, but argues that the disparity "is not all it appears," citing People v. Bonilla (2007) 41 Cal.4th 313, 345. RB 134. Respondent contends that "[a]t the time the Wheeler motion was made, 33 percent of the remaining prospective jurors who were subject to peremptory challenges were African-American women," and that "the ultimate composition of the jury (33 percent African-American women) essentially mirrored that of the prospective jurors who were subject to peremptory challenges," a pro-prosecution factor because "[t]he ultimate

[5] If a party's exclusion rate calculation yields a figure of 1.0, the party has exercised peremptories against that particular group in exact proportion to its representation among all jurors subject to challenge, in which case no inference of discrimination is warranted based on the exclusion rate. In contrast, as the exclusion rate rises above 1.0, as it does in this case, the inference of purposeful discrimination similarly increases.

composition of the jury is a factor to be considered in evaluating a Wheeler/Batson motion." Ibid. There are three flaws in this position.

The first is that the prosecutor's high elimination rate, high strike rate, and high exclusion rate directly resulted in absolutely and proportionately fewer Black females being seated on the jury, even if the ultimate composition consisted of 33 percent Black females. It appears that the random draw of prospective jurors from the voir dire yielded more Black female jurors than was acceptable to the prosecution, who responded with a high rate of peremptory strikes across all measures, indicating purposeful discrimination. In other words, the overall pattern of strikes supports the inference that the prosecutor may have been willing to accept a jury with a minority of Black female jurors, but when the random draw produced what looked to be a potential majority of Black female jurors, the prosecutor clamped down by the use of peremptories.

Respondent's argument is in essence that a prosecutor is entitled to strike members of a protective class solely based on their class membership so long as the prosecutor leaves the same proportion of the protected class on the jury as the protected class was represented in the venire. In other words, if the protected class comprised 25 percent of the venire, the prosecutor could strike as many members of that class as he wanted, with impunity under respondent's

theory, so long as he left three members of the protected class on the jury. This is a disguised quota system position that has no validity in Batson-Wheeler analysis.

Second, respondent confounds the concepts of discriminatory peremptory strikes and "fair cross section" in arguing that no inference of discrimination was warranted because the percentage of Black females who ultimately sat on the jury (33 percent) "essentially mirrored that of the prospective jurors who were subject to peremptory challenge." RB 134. The "fair cross section" principle relates to fairness in the selection of the venire as a whole, i.e., a fair mechanism to summon jurors. In contrast, on any given day, the jurors who actually appear may not represent the statistical cross section, a random variation or, more simply, a matter of luck. At that point, neither party is permitted to use peremptory strikes for the discriminatory purpose of negating what the party perceives as an unlucky draw of too many jurors from a protected class.

Third, respondent's reliance on the ultimate composition of the jury is largely a red herring, because that composition is inherently unknown to the trial court at the time of the motion. The ultimate composition of the jury is primarily relevant where the court had found a prima facie case, required the

prosecutor to state its reasons for the peremptory challenges, and made a determination whether the challenges were race-neutral versus discriminatory.

This principle is evident from an analysis of People v. Turner (1994) 8 Cal.4th 137, 168, cited in Bonilla, supra, as the justification for considering the ultimate composition of the jury. Turner makes clear that the ultimate composition of the jury is a relevant factor in the court's assessment of a prima facie case where the trial court knows the ultimate composition of the jury at the time of its ruling. Turner reviewed the trial court's Batson-Wheeler denial that had been made after the jury had been selected, and in that context, approved consideration of the final composition of the jury as "an appropriate factor for the trial judge to consider":

> Moreover, as the trial court expressly observed, both sides had excused Black jurors and the prosecutor had accepted a jury that included, as did the jury ultimately impaneled, five Blacks. While the fact that jury included numbers of a group allegedly discriminated against is not conclusive, it is an indication of good faith and exercise in peremptories, and an appropriate factor for the trial judge to consider in ruling on a Wheeler objection." 8 Cal.4th at 168 (emphasis supplied).

Here, the trial court had no idea what the ultimate composition of the jury would be at the time of the denial of the Batson-Wheeler objection. Moreover, in contrast to Turner, supra, the defense had not excluded any Black females,

and the prosecutor had not passed/accepted a panel that included Black females. The prosecutor did not accept a jury that included Black females until after the defense had passed three times, the prosecutor struck two additional Black female jurors, and the court admonished counsel in chambers to use more caution in their exercise of peremptory challenges. 13 RT 948-953.

In sum, the prosecutor's track record in striking Black female jurors establishes an inference of purposeful discrimination at the time the Batson-Wheeler motion was made under the standard of Johnson, supra, and the numerous federal cases applying that constitutional standard. Price v. Cain (5th Cir. 2009) 560 F.3d 284, 287, held that a prima facie case established where the prosecutor used six of 12 peremptory challenges to strike African-American prospective jurors, noting that "Batson intended for a prima facie case to be simple and without frills,," imposing "a light burden" that the petitioner successfully "carried." That strike rate of 50 percent against Black jurors is identical to the prosecutor's strike rate in this case. Price remanded for further proceeding in accordance with steps two and three of Batson. Because of the unusual passage of time since trial in this, that remedy is inappropriate, and reversal of the convictions is required. See Part C, infra.

3. The inference of discrimination arising from the positive juror profiles of the struck Black female jurors.

People v. Bell, supra, confirms that a Batson-Wheeler objector may show that the struck jurors shared a status as a protected group, and "that in all other respects they are as heterogeneous as the community as a whole." 40 Cal.4th at 597. In addition, an objector may show that the struck jurors were entirely qualified and suitable for jury service from the perspective of demonstrated social responsibility, community involvement, and personal integrity. Here, the jury questionnaires and voir dire indicate that all the struck jurors were gainfully employed and eminently respectable citizens, all of whom favored the death penalty. Respondent does not acknowledge the pro-social profiles of any of the struck jurors.

Juror #37

As noted at AOB 109, Juror #37 was by any measure a solid and responsible citizen, mature, married, employed, and a veteran of jury service in both civil and criminal cases where verdicts had been reached.

She specifically stated that "there are circumstances or cases that I felt warrant the death penalty." 15 CTS-I 4294-5. The prosecutor asked her one question on voir dire, whether she would have any problem imposing either life

without parole or the death penalty, and she answered immediately and unequivocally with "No." 12 RT 679.

Juror #53

Again, respondent fails to acknowledge the primary factors in her life that qualified her as a responsible juror, e.g., her longstanding employment at the Internal Revenue service, her religious commitments as a practicing Catholic, and her pro-death penalty attitude. See AOB III; 18 CTS-I 4951. She was also overtly pro-death penalty – "The death penalty for certain crimes and under certain circumstances is the only vehicle to maintain safety." 18 CTS-I 4951.

Juror #48

As set forth in detail at AOB 113, Juror #48 was a retired physical therapist who had lived in Los Angeles County for more than 28 years, owned her home, and had served in the military, reaching the rank of second lieutenant. She had also served on a criminal jury that reached a verdict. Regarding the death penalty, she believed it was imposed "too seldom," 17 CTS-I 4746 (emphasis supplied).

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Juror #9

Juror #9 was a Compton resident of some 15 years, employed by the U.S. Postal Service, and in favor of the death penalty. See AOB 114; 11 CTS-I 3151. Nothing in her questionnaire or voir dire casts doubt on her status as a responsible member of the community.

Juror #88

Juror #88 was employed by the Los Angeles Department of Social Services, a mother of five, and viewed the Bible as the most influential book in her life. See AOB 114-115. Nothing in her voir dire casts doubt on her status as a responsible member of the community, and she was affirmatively pro-death penalty. 23 CTS-I 6388-6391.

Juror #94

Juror #94 was a 33-year-old single mother of two, employed by the U.S. Postal Service for 11 years, and strongly pro-death penalty. AOB 116. Thus, the struck Black females were all eminently respectable, gainfully employed, mature, and in most cases religiously observant. They were all affirmatively in favor of the death penalty. Respondent fails to acknowledge that their primary social affiliations and community involvement made them eminently suitable as responsible jurors.

4. Respondent's flawed efforts to identify colorable grounds for the peremptory strikes as to the struck jurors.

Respondent ignores the pervasively positive characteristics of the struck jurors, and instead has attempted to identify juror responses in the questionnaires or in the voir dire that in respondent's view could conceivably have provided a race-neutral reason for the prosecution's peremptory strikes. At the outset, appellant seriously questions the legitimacy of this type of response in view of the admonition in Johnson v. California, supra, 545 U.S. at 172, "against engaging in needless and imperfect speculation when a direct answer may be obtained by asking a simple question." Notwithstanding that admonition, this Court has repeatedly rejected post-Johnson appeals as to the sufficiency of the prima facie showing by citing ostensibly colorable reasons that the prosecutor might have exercised the challenges. See, e.g., People v. Bonilla, supra, 41 Cal.4th at 347-348 ["In each of these two cases, the jurors' responses would give reason enough for a prosecutor to consider a peremptory, without regard to the juror's sex"].

This Court described its approach as a "methodology" in People v. Carasi (2008) 44 Cal.4th 1263, 1295, fn. 17, but as will be demonstrated, it is at best a flawed methodology. As applied by respondent in this case, most of the

hypothetical reasons identified by respondent as possible race-neutral reasons for prosecutorial strikes apply equally or more forcefully to other jurors that the prosecutor permitted to sit. A methodology worth its name cannot consist of an advocate cherry-picking the record for some colorable factoid that could conceivably have supported the prosecutor's strikes, while ignoring the remainder of the record that plainly rebuts any such inference.

Respondent purports to justify the strikes of Black female Jurors #37, #53, #48, and #9 largely on their responses to questions 151 and 152 of the jury questionnaire:[6]

> 151. Anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty. (circle one)
>
> a. Strongly Agree
> b. Disagree Somewhat
> **c.** Agree Somewhat
> d. Strongly Disagree
>
> 152. Anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty. (circle one)
>
> a. Strongly Agree
> b. Disagree Somewhat
> **c.** Agree Somewhat
> d. Strongly Disagree

[6] See RB 137 (Juror #37); RB 139 (Juror #53); RB 140 (Juror #48); and RB 141 (Juror #9).

In defense of the prosecutor's strikes, respondent points out that Juror #37 "disagreed somewhat" with both statements (15 CTS-I 4296-7); that Juror #53 "strongly disagreed" with both statements (18 CTS-I 4953-4954); that Juror #48 "disagreed somewhat" with the statements (17 CTS-I 4747-8); and that Juror #9 "disagreed somewhat" with both statements (11 CTS-I 3150-1). RB 137; 139-141.

First of all, respondent's position is untenable on its face because any juror who agreed with the statements as phrased would be subject to challenge for cause as excludable under Wainwright v. Witt (1985) 469 U.S. 412. It cannot be the law that a prosecutor's peremptory challenge can be immunized from Batson-Wheeler scrutiny because the juror took a position in a questionnaire response that was 100 percent consistent with the law of the land.

Second, respondent's effort to identify responses from the struck jurors as colorable (albeit hypothetical) reasons the prosecutor might have struck the jurors self-destructs under scrutiny. The majority of the seated jurors whom the prosecutor did not strike also disagreed with those statements. Five seated jurors "strongly disagreed" with one or both statements in questions 151 and 152 – Juror #29 (14 CTS-I 3969-70); Juror #30 (14 CTS-I 4010); Juror #63 (19 CTS-I 5363); Juror #104 (25 CTS-I 7045); and Juror #105 (25 CTS-I 7085-6).

Three other jurors disagreed "somewhat" with one or both statements – Juror #34 (15 CTS-I 4174-5); Juror #124 (27 CTS-I 7699-7700); and Juror #133 (29 CTS-I 8068).

This comparative analysis reveals that respondent's effort to conjure up putative race-neutral reasons for the prosecutor's strikes is unfounded. Miller-El v. Dretke (2005) 545 U.S. 231, 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination..."]. Where respondent's hypothetical reasons that the prosecutor might have struck a Black panelist apply equally to otherwise similar non-Black panelists who are permitted to serve, that is indicative that respondent's position is makeweight. See also Bennett v. Gaetz (7th Cir. 2010) 592 F.3d 786, 792 ["Based on this side by side comparison of excluded and non-excluded jurors, the prosecution would have been hard-pressed to justify the jurors' experience with crime as a race neutral reason had the court proceeded to Batson's second stage"].

Many of respondent's other proffered reasons that the prosecutor might have elected to strike the six Black female jurors are similarly rebutted by reference to the comparable attributes of the seated jurors.

Respondent suggested that the prosecutor may have struck Juror #37 because her son had been in trouble with the police. RB 135. However, three of the seated jurors also had relatives who were arrested and/or prosecuted for criminal charges – Juror #63 had a brother who was prosecuted and convicted for an insurance scam, for which he served time in jail (19 CTS 5344-45); the spouse of Juror #79 had been prosecuted and convicted driving under the influence on more than one occasion (21 CTS-I 6000-01); and Juror #133 answered affirmatively, although he was unaware of the specifics (29 CTS-I 8049-50).

Respondent also suggested the prosecutor might have struck Juror #37 because "[s]he strongly disagreed with the statement that the rights of the accused are too well protected." RB 136, citing 15 CTS-I 4288. That answer relates to question 117(a) of the jury questionnaire. However, 10 of the seated jurors also disagreed with that statement, either moderately or strongly.[7]

[7] Juror #29 moderately disagreed with that statement (14 CTS-I 3961); Juror #30 moderately disagreed with that statement (14 CTS-I 4002); Juror #34 strongly disagreed with that statement, as did struck Juror #37 (15 CTS-I 4166); seated Juror #63 moderately disagreed with that statement (19 CTS-I 5355); seated Juror #79 strongly disagreed with that statement (21 CTS-I 6011; Juror #98 moderately disagreed with that statement (24 CTS-I 6790); Juror #105 moderately disagreed with that statement (25 CTS-I 7077); Juror #124

Again, the majority of the seated jurors responded similarly on the particular characteristic that respondent has proffered as a possible reason for the prosecutor's strike, and two of the seated jurors responded exactly as did the struck juror, rendering another of respondent's hypothetical justifications untenable.

Regarding Juror #53, respondent contends that her responses "suggested that she would be unable to impose the death penalty in this case," RB 138, based on the references by Juror #53 regarding criminally insane individuals who could not be reformed. Respondent fails to note that Juror #53 stated, "The death penalty for certain crimes and under certain circumstances is the only vehicle to maintain safety," Q. 141, 18 CTS-I 495, and that Juror #53 answered "no" to the question, "Would you, for any reason, find it difficult to sit on a case where you might be called upon to impose the death penalty?" 18 CTS-I 4955. Nothing in Juror #53's questionnaire or voir dire in any way supported respondent's characterization that she would be "unable to impose the death penalty in this case." See 11 RT 727.

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moderately disagreed with that statement (27 CTS-I 7691; and Juror #133 moderately disagreed with that statement (29 CTS-I 8060).

Regarding Juror #48, respondent suggests that her disagreement with the statements in questions 151 and 152 indicate that she "had at best, lukewarm feelings toward the death penalty." RB 140. Respondent fails to note that seated Juror #29 manifested substantially more discomfort with jury service in general and the capital punishment in particular. He answered question 63 regarding his feelings about prior jury service as "not my favorite thing to do, but worthwhile." 14 CTS-I 3948. He moderately disagreed with the statement that "The rights of the accused are too well protected." 14 CTS-I 3961. Regarding his feelings about the death penalty generally, question 141, he stated "[i]n general, I am in favor of the death penalty for certain heinous crimes." 14 CTS-I 3967, emphasis supplied. He strongly disagreed with questions 151 and 152, insisting that he could not make a capital sentencing decision "without judging the facts."

More specifically with respect to his personal capacity to impose the death penalty, he answered "yes" to whether there was any reason he would find it difficult to sit on a capital case and explained – "The difficulty of making such a decision on another's life, in and of itself." 14 CTS-I 3971. In response to the inquiry as to how he felt about the responsibility that a vote for a death verdict would cause the defendant to be sentenced to death, he answered "I

don't like the idea, but would fulfill my duty based on the evidence." 14 CTS-I 3972 (emphasis supplied). Notwithstanding Juror #29's manifest reluctance to sit in judgment in a capital case, the prosecutor did not appear concerned about that during voir dire and asked him no questions regarding his attitude toward capital punishment, apart from one question about lingering doubt. 11 RT 638. Juror #29 was at least as "lukewarm" as to the death penalty, if not more so, than struck seated Juror #48.

Regarding struck Juror #9, respondent focuses primarily on her disagreement with the statements in questions 151 and 152, which appellant addressed above. Respondent also asserts that the prosecutor might have struck Juror #9 because of her voir statement which indicated, "If she heard that a defendant had problems growing up, she would not choose death over life without parole." RB 142, citing 11 RT 607. However, respondent has misunderstood Juror #9's response, and in fact got the import of what she said exactly backwards:

> Ms. Hamburger: So if you hear that the defendant has had problems growing up, as Mr. Meyers so eloquently put it before, you would choose death over life without parole? That was my question.

Prospective
Juror #9: No, I would not. 11 RT 606-607.

In context, defense counsel asked Juror #9 whether she would necessarily impose the death penalty if she heard that the defendant had problems growing up, and Juror #9 answered she would not necessarily impose the death penalty under that circumstance. Respondent is incorrect in suggesting that Juror #9 endorsed the entirely different proposition that she would necessarily not impose the death penalty if there was evidence the defendant had problems growing up. Respondent's efforts to characterize Juror #9 as undesirable from a prosecutorial point of view just do not pan out.

Regarding Juror #88, respondent refers to the criminal convictions incurred by the father of one of her children and to other relatives who had been incarcerated. As noted earlier, three of the sitting jurors also had friends and relatives who had been prosecuted and convicted of crimes. Respondent also refers to the fact that Juror #88 had been in the minority of jurors on a prior case where no verdict was reached, which relates to question 59. Seated Juror #63 also reported participating on a criminal jury in which no verdict was reached, 21 CTS-I 5941, and seated Juror #124, who had previously also sat on prior criminal cases, did not reach a verdict in one of them. 27 CTS-I 7677.

Regarding Juror #94, respondent suggests that her status as a victim of spousal abuse at the hands of her current boyfriend could have caused her to be "sympathetic with appellant Newborn," because "appellant Newborn had battered at least four of his girlfriends." RB 143. That is a real stretch from any commonsense point of view. Juror #94 explained she had sought a restraining order against the boyfriend, but that they had worked out the problems, and there had been no further incidents of abuse. Respondent does not suggest any psychological or emotional mechanism by which Juror #94 would likely be particularly sympathetic to appellant Newborn based on the evidence of his history of domestic violence.

Respondent's fallback position is "At the very least, prospective Juror #94 presented a 'wild card,' such that the prosecutor could have reasonably used a peremptory for reasons unconnected to prospective Juror 94's race and gender." RB 143. The term "wild card" generally suggests somebody or something that is unpredictable or volatile but as the jury questionnaire shows, Juror #94 was a very stable Los Angeles resident, a mother of two, and an 11-year employee of the United States Postal Service. 24 CTS-I 6602-03.

Respondent concludes with an assertion that "Prospective Juror #94's responses in her questionnaire indicated that she would not impose the death

penalty in the instant case," RB 143, but that is simply not supported by the record. She answered question 146 affirmatively that California should have the death penalty. 224 CTS-I 6633. She had no social philosophical or religious beliefs that would make it difficult for her to impose the death penalty, Q. 155, 14 CTS-I 6636, and would not find it difficult to sit on a case where she might be called upon to impose the death penalty. Q. 159, Ibid. Regarding question 166, how she felt about the responsibility of sentencing someone to death, she candidly answered "It's kind of scary," but that did not distinguish her from the other seated jurors who made similar candid responses regarding their personal feelings about assuming the responsibility of a death penalty deliberation.

In sum, respondent's efforts to offer hypothetical justifications for the prosecutor's strikes failed in virtually every instance primarily because those same purported justifications applied equally to many, if not most, of the seated jurors. The failure of respondent to make a persuasive case reflects not only the affirmative qualifications of the six struck jurors, but also the inherent pointlessness of this type of theoretical exercise in a Batson-Wheeler prima facie case analysis. The big picture here is that the prosecutor disproportionately struck objectively well qualified Black female jurors, whose views on the death penalty, the criminal justice system, and life in general were

entirely consistent with those of the seated jurors. That combination of factors compels the conclusion that appellants established a prima facie case under Johnson v. California, supra.

5. Additional confirmation of discriminatory purpose from the prosecutor's failure to conduct meaningful voir dire of most of the struck Black females.

The case law recognizes that a prima facie inference of discrimination is supported where a prosecutor strikes jurors without having conducted sufficient voir dire to elicit undesirable attitudes or experiences. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting the explanation is a sham and a pretext for discrimination." Miller-El, supra, 545 U.S. at 246. Accord: Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1079 ["the prosecutor failed to engage in any meaningful questioning of any of the minority jurors"].

Here, the prosecutor's voir dire of Juror #9 was cursory and did not address any issues that could have provided a colorable ground for a prosecution peremptory, and certainly did not address topics suggested by the Attorney General as colorable grounds. See 11RT 608-610. The prosecutor asked Juror #37 only two innocuous questions about her understanding of the two penalty options and immediately struck her. 11 RT 678-679. The

prosecutor asked Juror #48 no questions, but immediately struck her. 12 RT 704.

The prosecutor did ask Juror #88 a question relevant to question #150 on the questionnaire, the juror cleared up a misunderstanding, affirmed that she could impose the death penalty where there was a special circumstance like lying-in-wait (as was alleged in this case), but was nonetheless struck. 12 RT 843-844. This record of non-engagement supports an inference of discrimination.

B. The Requirement of Reversal.

The prosecutor struck eight Black female jurors, including six at the time the Batson-Wheeler motion had been made, and the trial court erred in failing to find a prima facie case. The erroneous exclusion of even one juror for race-based reasons requires reversal. Snyder v. Louisiana (2008) 552 U.S. 472, 477 [reversing conviction because of trial court error in accepting prosecutor's inadequate explanation for striking a single juror]. People v. Snow (1986) 44 Cal.3d 216, 226. Here, the prosecutor's disproportionate use of strikes against otherwise entirely respectable and responsible Black females is at least consistent with an inference of discrimination, Johnson v. California, supra, if not a compelling demonstration of it.

In People v. Johnson (2006) 38 Cal.4th 1096, on remand from the United States Supreme Court, this Court remanded to the trial court for further proceedings to determine whether a Batson violation had occurred, in light of the Supreme Court's determination that a prima facie case had been established.

Remand in this case is inappropriate because of the lengthy passage of time since the Batson-Wheeler proceedings in the trial court on August 24, 1995. Snyder v. Louisiana, supra, reversed the defendant's conviction rather than remand for further Batson-Wheeler convictions, citing the absence "of any realistic possibility that this subtle question of causation could profitably be explored on remand at this late date, more than a decade after petitioner's trial." 552 U.S. at 486. Nor is there any realistic possibility that the prosecutor's claimed reasons for the six strikes and their validity could be profitably explored on remand from this Court, given that any such remand would necessarily take place closer to two decades after petitioner's trial.

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A REPRESENTATIVE JURY BY THE ERRONEOUS EXCUSAL OF JUROR #126 FOR CAUSE.

Respondent answers this argument at RB 144-149.

The trial court excused for cause Juror #126, whom he characterized as "a female with pretty good credentials." 12 RT 949. In fact, Juror #126 was a

longstanding Los Angeles resident, mother, homeowner, and employed, just as were the six Black females previously stricken by peremptory challenge, entirely qualified and wrongfully excused.

Respondent first argues that the trial court did not preclude adequate defense voir dire so as to violate the due process guarantees of People v. Cash (2002) 28 Cal.4th 703, 720, and Wainwright v. Witt, supra. Respondent recognizes that the trial court did preclude counsel from follow-up voir dire as to whether a juror held views "that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." People v. Coffman and Marlow (2004) 34 Cal.4th 1, 47. That acknowledgement is unavoidable:

> The Court: Would you like to ask a couple of questions?
>
> Ms. Harris: I would, Your Honor, if I may.
>
> The Court: I am going to deny that. I am going to find cause. 12 RT 949.

The court then convened an in-chambers conference, where the court explained its position and reiterated that "I think the court has asked enough questions," and that while "Ms. Harris wants to ask questions," the court "do[esn't] think it is appropriate." Ibid.

Respondent focuses on the court's subsequent statement, "I just think you can make your record here a little bit. You can ask questions, but I can feel her heart and I don't think she wants to do that," as if the trial court had reversed its earlier denial of follow-up voir dire. RB 150. Fairly read, the trial court reiterated its denial of further voir dire in chambers, offered counsel an opportunity to "make your record here a little bit," i.e., provide further argument, but the bottom line was that the court could "feel her heart" and was not going to reconsider his excusal for cause. There is no fair reading of that passage that supports respondent's contention that the defense "abandon[ed] the request for further voir dire." RB 150.

Reversal is required under Cash, supra, because the juror was never asked about and, therefore, never demonstrated a bias "that would cause [her] not to follow an instruction directing [her] to determine penalty after considering aggravating and mitigating evidence." Coffman and Marlow, supra. Rather, she expressed only normal reservations about the awesome responsibility of sitting on a capital trial and was candid in her answers. Appellant is, therefore, entitled to a reversal of his conviction. See People v. Vierra (2005) 35 Cal.4th 264, 286; Morgan v. Illinois (1992) 50 U.S. 719, 736.

Reversal of appellant's death sentence is, therefore, required. People v. Heard (2003) 31 Cal.4th 946, 966.

III. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S EXCESSIVE RESTRICTIONS ON CROSS-EXAMINATION OF DESEAN HOLMES.

Respondent's argument on this claim is found at RB 167-184.

A. The Trial Court's Errors.

Respondent contends that the trial court's exclusionary rulings were either correct on their own terms or harmless error, individually and cumulatively. Appellant Newborn disagrees for the following reasons.

1. Exclusion of cross-examination regarding the nature and severity of the offense for which DeSean Holmes was already in custody in early-1995 when he was arrested for the McFee burglary.

Counsel for appellant homed in on Holmes' custodial status at the time he began informing on appellant Newborn. Using the date of his arrest for the McFee burglary as a reference point, Newborn's attorney elicited that Holmes was already in custody at that time and followed-up with the direct question, "What were you in custody for?" 17 RT 1583. After various prosecutorial objections, Holmes admitted he was in custody on a different charge. The

prosecutor moved to strike that answer, and the court responded "I will sustain [sic; overrule?] the objection," adding "[t]he answer ['] in custody ['] will stand." The court then stated, "I don't want to go into any detail unless I have something else. You can say yes if that is true." Holmes then said, "I was in custody for another case," but no more, in conformity with the trial court's ruling. 17 RT 1584.

The context of this interchange is that the prosecutor attempted to position Holmes as a witness who was testifying for the prosecution in the face of serious threats to his own physical wellbeing, as a basis from which the jury could infer that Holmes would not testify to Newborn's putative custodial statement unless it had occurred. The crux of the prosecutor's position was that a reasonable witness would not assume the serious risks that Holmes did by testifying against Newborn unless the testimony was true.

Defense sought to provide the jury with a countervailing basis for discounting or disregarding Holmes' testimony, i.e., that he may well have assumed some risk in testifying against Newborn, but he stood to gain significantly more for his own benefit from law enforcement leniency relating to his own criminal conduct.

Respondent argues that the court's "restriction on the cross-examination of the nature and severity of the offense for which DeSean Holmes was already in custody in early-1995" is "not cognizable on appeal," RB 169, because "appellant Newborn never made an offer of proof as to evidence of the underlying conduct of the arrest and did not ask to present any such evidence when the trial court gave him that opportunity." RB 170. Respondent cites Evidence Code section 354 subd. (a), which provides that a verdict shall not be reversed based on the erroneous exclusion of evidence unless it appears from the record that "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, and offer of proof, or by any other means." However, that subdivision applies only to the exclusion of extrinsic evidence that a party offers during the presentation of its affirmative case. Section 354 subd. (c) specifically states that no such offer-of-proof requirement applies where "[t]he evidence was sought by questions asked during cross-examination or recross-examination." Here, counsel was clearly engaged in his cross-examination of Holmes, as opposed to offering the evidence of Holmes' custody through a third party witness or other source. The Law Revision Commission Comments specifically reaffirm that "[a]n offer of proof is also unnecessary when objection is improperly sustained to a question

on cross-examination." Thus, respondent's invocation of Evidence Code section 354 as a shield to this Court's review of the trial court's ruling is unavailing.

The trial court did infringe on Newborn's state and federal constitutional rights of confrontation and cross-examination by precluding counsel from questioning Holmes regarding the nature of the case he was in custody for, and for which he clearly wanted law enforcement assistance.[8]

The Sixth Amendment violation here is directly analogous to that found in United States v. Larson (9th Cir. 2007) 495 F.3d 1094 (en banc). In that case, the district court had excluded evidence of the mandatory minimum sentence that the cooperating codefendant would receive unless the federal prosecutor made a motion to reduce his sentence. Defense counsel was permitted to elicit the fact that the witness had pled guilty, was facing a prison term, and that the federal prosecutor could use his influence to affect the term. Nonetheless, the Ninth Circuit held that the exclusion of the mandatory minimum sentence violated Larson's Sixth Amendment right of confrontation because "Although the [impeachment] evidence [that was admitted] did cast

[8] Holmes was in fact in custody for the carjacking of Majhdi Parrish. See Part A-4; infra. See 18 RT 1734-5.

doubt on Lamere's credibility, it did not reveal the magnitude of his incentives to testify to the Government's satisfaction." 495 F.3d at 1105 (emphasis supplied).

Larson referred to and relied on United States v. Chandler (3rd Cir. 2003) 326 F.3d 210. Two cooperating witnesses in Chandler were cross-examined regarding their expectation of benefits in return for their testimony, but not regarding the magnitude of those benefits and the witnesses' resulting incentive to satisfy the prosecution – "The limited nature of Sylvester's acknowledgement that he had benefited from his cooperation made that acknowledgement insufficient for the jury to appreciate the strength of his incentive to provide testimony that was satisfactory to the prosecution." 326 F.3d at 222 (emphasis supplied).

The same considerations demonstrate a Sixth Amendment violation here. The jury was apprised of the bare fact that Holmes was in custody for a burglary and a different unidentified offense, whose minimum penalties were never disclosed to the jury, which would have "borne directly on the jury's consideration of the weight, if not the fact, of their motives to testify as they did – facts, that is, which would have underscored dramatically their interest in

satisfying the Government's expectations of their testimony." Chandler, supra, at 222 (emphasis supplied).

2. The May 10, 1994 double homicide that DeSean Holmes attributed to Cooks and Holly in order to gain favor from law enforcement.

Counsel for Newborn sought to cross-examine Holmes with respect to his accusation to the police that two others, Cooks and Holly, had committed a double homicide on May 10, 1994, and to tie that accusation into Holmes' dating relationship with Holly's former girlfriend. This line of questioning was important because Holmes had denied any motive or interest "to get Mr. Holly into trouble," 17 RT 1655, during the same testimony that he denied any motive, interest, or bias against appellant Newborn – "I didn't have any reason to lie." 17 RT 1655-6. Counsel's intention was to demonstrate that Holmes was entirely willing to provide false accusations against others in addition to appellant to advance his own self-interests.

Respondent argues that the line of questioning "was tangential impeachment evidence at best," and that its probative value was outweighed by the undue consumption of time and confusion, citing Evidence Code section 352, but that was not the basis of the court's ruling. The trial court ruled solely on the basis of relevance, and had no basis for determination whether the line of

questioning would occupy undue amounts of time. Cross-examination regarding a witness's false accusations against others has long been viewed as an essential component of cross-examination and confrontation. See Franklin v. Henry (9th Cir. 1997) 122 F.3d 1270, relying on Crane v. Kentucky (1986) 476 U.S. 683.

3. The August 25, 1995 incident in which Holmes committed a noontime drive-by shooting, but later went to the police and gave a false exculpatory statement.

During cross-examination, Holmes contended that he had been the victim of the shooting in August 1995. When defense counsel sought to pursue Holmes regarding his victim status, the trial court curtailed cross-examination, and defense counsel made an offer of proof that Holmes was the driver in a drive-by shooting committed by the passenger, after which Holmes eluded police in a high-speed chase. Holmes later went to the police and gave a story in which he portrayed himself as a victim in the incident without any criminal liability. Notwithstanding this offer of proof, the trial court ruled "I don't think you can probe it legally," and told counsel that at most he would permit a stipulation that Holmes was not "a victim in that particular situation." 18 RT 1694.

That ruling further violated appellant's right of cross-examination because Holmes had affirmatively asserted during his cross-examination that he was a victim of a shooting, and defense counsel was entitled to prove the falsity of that testimony under oath and to put it in a reasonable context. 17 RT 1607; 1612. This was a Sixth Amendment violation akin to that which required habeas corpus relief in Slovik v. Yates (9th Cir. 2008) 543 F.3d 1181. In that case, the complaining witness stated on cross-examination that he was not on probation at the time of the alleged assault. Defense counsel sought to confront the complaining witness with evidence that he was in fact on probation, but the trial court precluded that questioning. The Ninth Circuit held that the ruling violated Slovik's right of confrontation because "[t]he evidence that [the complaining witness] was placed on five years probation...was not being proffered to establish that [he] was unreliable because he was on probation, but rather to establish that [he] was unreliable because he had had lied about being on probation," and that "the jurors might have formed a significantly different impression of [his] credibility if they had heard cross-examination showing that [he] was willing to lie under oath." 545 F.3d at 1186. The Ninth Circuit vacated the judgment because that ruling violated Slovik's Sixth Amendment

rights as guaranteed by Delaware v. Van Arsdall (1986) 475 U.S. 673, 679 and Davis v. Alaska (1974) 415 U.S. 308, 315.

Appellant's rights were similarly violated by the preclusion of cross-examination regarding Holmes' bogus story to the police and exposure of his subsequent lie under oath. The bare stipulation permitted by the trial court that Holmes was not a victim was no substitute for effective cross-examination, because the jury had no basis to determine whether Holmes was actively prevaricating under oath or merely mistaken as to his legal status.

4. Holmes' commission of a car jacking.

Defense counsel sought to prove that Holmes had committed a car jacking in which the victim was a man named Majhdi Parrish. Holmes had also testified that he was afraid of being a witness because that same Parrish had subsequently been killed. The trial court precluded any cross-examination regarding the car jacking. 28 RT 1704; 1709. Holmes had been charged with the Parrish car jacking and subsequently "pled the Fifth" when asked on cross-examination, "Was Mr. Parrish a complaining witness in a case filed against you and Danny Cooks?" 18 RT 1735.

Respondent argues that "The trial court could not compel him to testify regarding the car jacking and the violence against Parrish," RB 179, but the trial

court had to do something to protect appellant Newborn's right of confrontation. That may have entailed striking Holmes testimony unless the prosecutor offered him immunity, or some other procedural protection, but the preclusion of cross-examination was not permissible and constituted another infringement of appellant's right of confrontation.

5. DeSean Holmes' involvement and violence regarding Majhdi Parrish that resulted in a criminal charge against DeSean Holmes, after which Parrish was murdered.

In the aftermath of the car jacking referred to in item 4 above, Parrish was murdered. While Holmes contended he was afraid to testify because of potential retaliation, counsel sought to impeach him regarding the murder of Parrish, which likely occurred at Holmes' hand because Parrish was a witness against Holmes. That avenue of cross-examination was curtailed as well.

6. DeSean Holmes' civil lawsuit against the Pasadena Police Department.

Holmes testified on cross-examination that he had a lawsuit pending against the Pasadena Police Department. When asked what it was, the trial court sustained the prosecutor's relevance objection and let the bare answer "yes" stand – "Just the fact that he has a suit is sufficient." 18 RT 1721-22. Respondent argues that "Appellant Newborn never proffered to the trial court

that the Pasadena Police Department would have rewarded DeSean Holmes in a civil suit against the department based upon his testimony against appellant Newborn." RB 181.

That response is irrelevant because the focus of the cross-examination was Holmes' internal motive and bias to satisfy the Pasadena Police Department, regardless of the objective position of the Police Department in response. Holmes had obviously been in trouble and was a known criminal to Pasadena Police personnel, including Sgt. Korpal, and defense counsel was entitled to probe whether Holmes believed the Pasadena Police Department would let those bygones be bygones and reward him financially if he performed well in his testimony against appellant. The excluded evidence was directly relevant to demonstrating a "prototypical form of bias." Delaware v. Van Arsdall, supra.

B. The Resulting Prejudice.

The test for determining the prejudicial effect of a Sixth Amendment cross-examination restriction entails the assessment of the cumulative importance of the excluded information, the extent of impeachment otherwise permitted, and the relative strength of the other evidence of guilt presented by the prosecution. Delaware v. Van Arsdall, supra, 475 U.S. at 684. Respondent

concurs in that principle of law, RB 182, but argues harmless error because "DeSean Holmes' testimony regarding appellant Newborn's statement was substantially corroborated." RB 183.

The first piece of corroboration cited by respondent is that "DeSean Holmes was housed in proximity with appellant Newborn" in county jail, RB 183, but that merely establishes the opportunity for some kind of communication between the two and in no way corroborates the content of the communication. Respondent adds that "DeSean Holmes' testimony of what appellant Newborn had told him had occurred at McPhee's house was corroborated by McPhee, Charles Baker, and ballistics evidence." RB 183. The alleged admission that Holmes attributed to Newborn may well have been consistent with the other evidence that respondent refers to, but the Holmes-Newborn conversation occurred (if at all) some two years after the 1993 shooting, and Holmes could have obtained the information he attributed to Newborn from McPhee, from friends of McPhee, or from any number of underworld sources. The corroborating value is negligible.

Finally, respondent contends that the prosecution's overall evidence against appellant was strong. Respondent refers to such facts as appellant Newborn's putative "motive to participate in avenging his best friend's murder

by a rival gang," and Newborn's presence at Huntington Memorial Hospital after Hodges' murder, but mere motive and opportunity on someone's part are insufficient to permit a defendant to present evidence of third party culpability, see e.g., People v. Hamilton (2009) 45 Cal.4th 863, 913-4, much less cure constitutional error as in this case. The multiple and cumulative restrictions on cross-examination cannot be deemed harmless beyond a reasonable doubt. Chapman v. California (1967) 386 U.S. 18.

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

Respondent addresses this argument at RB 188-197.

Appellant Newborn contends that (1) the prosecutor should not have been permitted to elicit from Carr her grand jury testimony that she saw Holmes and Newborn at the hospital, because it was not inconsistent with her trial testimony; and (2) that the prosecutor should not have been permitted to elicit her testimony that her boyfriend Bowen had told her that Newborn and Holmes were at the hospital.

Respondent's position regarding the admissibility of her grand jury testimony that she saw Newborn at the hospital was "inconsistent in effect" with her trial testimony that she was not at the hospital, citing People v. Fierro (1991) 1 Cal.4th 173, 221, and People v. Hovarter (2008) 44 Cal.4th 983, 1008-1009. Fierro is not helpful to the issue here because it related solely to a trial witness who had a failure of recollection at trial with respect to certain details that she had conveyed to the police at the time of the offense. The relevant passage in Fierro is unclear as to whether the prosecutor attempted to refresh her recollection at the time of trial with her earlier statements, which would have been the correct procedure. Through some unexplained process, the earlier statements were admitted as prior statements inconsistent with her failure of recollection. In this case, Carr experienced no failure of recollection at trial, and the Fierro rationale provides no basis to support the trial court's ruling here.

Hovarter includes dicta regarding the admission of a witness's prior statement where the issue had been waived by trial counsel's failure to make a timely hearsay objection. The witness in Hovarter also experienced a failure of recollection at trial, and "a question arose whether her proclaimed lack of memory was a deliberate evasion, which could give rise to an implied

consistency..., or a true case of failed memory." 44 Cal.4th at 1008. This Court noted that because the defense attorney did not make a timely hearsay objection, the trial court was never obligated to decide that point, but the implication is that if it was a "true case of failed memory," the prior statement would not be admissible as a prior inconsistent statement. However, the Court then concluded, inconsistently, that "[i]n any event, Det. Pintane's testimony recounting [the witness] prior statement was sufficiently inconsistent in effect to qualify as a prior inconsistent statement." Ibid (emphasis in original).

Carr's grand jury testimony encompassed two statements, first that she was at the hospital, and second that Newborn, Holmes, et al., were at the hospital, and those two statements are independent. Carr could have been at the hospital while Newborn, et al., were not; Newborn, et al., could have been at the hospital while Carr was not; both Carr and Newborn, et al., could have been at the hospital; or neither could have been there. In her trial testimony, she denied being at the hospital and as to that point, her grand jury testimony to the contrary was admissible. The grand jury testimony that Newborn, Holmes, et al., were at the hospital is independent of her own whereabouts, and is not sufficiently related with the actually inconsistent statement to be deemed "inconsistent in effect."

Her testimony that her boyfriend Solomon Bowen had told her via telephone that Newborn, Holmes, et al., were at the hospital was equally inadmissible, notwithstanding respondent's argument that Carr's testimony about Bowen's hearsay statement "was also admissible as an explanation of the inconsistency between her trial and grand jury testimony." RB 192. That is not tenable because she specifically testified that she did not know why she lied to the grand jury on these points. She may well have believed that Newborn, Holmes, et al., were at the hospital based on what Bowen had told her, but that did not purport to explain why she lied at the grand jury and told the truth at trial, or vice-versa. It would be a different record if she had testified that she lied at the grand jury because she believed that Newborn, Holmes, et al., were at the hospital based on her telephone conversation with Bowen, and that she wanted to make her grand jury testimony more believable in order to more effectively incriminate Newborn and Holmes, for whatever reason. Nothing like that occurred in her testimony, and the trial court should have excluded her testimony about Bowen's telephone call when counsel first objected, 19 RT 1840, and should have stricken all the testimony that the prosecutor elicited on redirect when she re-invoked Bowen's telephone call and asserted "I'm pretty sure Solomon is not going to lie." 19RT 1882. Not only was she permitted to

reiterate the hearsay statement of Bowen, she was permitted to vouch for his credibility, all to appellant's prejudice.

V. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF PRESENCE BY THE TRIAL COURT'S ROGUE ACTION IN DETAINING WITNESS CARR OVERNIGHT WITHOUT DUE PROCESS AND IN APPELLANT'S ABSENCE.

Respondent answers this argument at RB 201-203.

A. The Trial Court's Errors.

The trial court summarily detained Lachandro Carr overnight in response to her apparently flippant attitude, likely skewing her subsequent testimony against appellant. Respondent fails to address the primary point that there was no showing of good cause that witness Carr would not return to complete her testimony the following day. The trial court's comments focused solely on what he perceived as her inappropriate attitude toward the proceedings, not any indicia or omens of flight. Evidence Code section 780 subd. (j) authorizes the jury to "consider in determining the credibility of a witness" a number of matters, including his/her "attitude toward the action in which he testifies or toward the giving of testimony." It does not authorize the court to detain a witness overnight based on perceived bad attitude. She appeared as scheduled for her first day of testimony, and nothing she said on or off the stand suggested

that she would not return the following day. In short, the record is totally without any evidence to support a finding that the witness "will not appear and testify unless security is required." Penal Code section 1332 subd. (a). There was no effort to comply with the statutory requirements, no effort to complete a "written undertaking" to ensure presence, but rather just an arbitrary action that the witness would have certainly perceived as an act of intimidation and coercion.

Respondent cites In re Francisco M. (2001) 86 Cal.App.4th 1061, but that case merely emphasizes the trial court's error in detaining witness Carr. The court below emphatically refused her any opportunity to be heard, stating, "I don't want to hear from her," and "I am not going to listen to her." 18 RT 1828. Francisco M. twice reconfirms that "The opportunity for the witness to be heard is an important aspect of the procedure to be followed under the statute." 86 Cal.App.4th 1073-1074 Francisco M. further explained that at the Penal Code section 1332 hearing, "The witness should have counsel, either retained or appointed," an opportunity to "controvert the allegation seeking his detention, and to be heard on all relevant issues, including whether he will agree to return if released and whether other alternatives to incarceration in lieu of security are feasible and adequate." 86 Cal.App.4th at 1076 (emphasis supplied).

Carr received none of these protections, all of which certainly contributed to her feeling of being isolated, vulnerable, and powerless in the face of the trial court's unilateral detention. She would certainly have viewed her best interests as going to the aid of the prosecution when she returned the following day. Respondent also argues that appellants had no right to be present at the hearing in which she was detained because it was not a critical stage of the proceedings, RB 203, but fails to acknowledge that the detention proceedings were likely perceived by Carr as coercive, with a clearly adverse consequences to appellant. The incident falls within the ambit of witness intimidation, In re Martin (1987) 44 Cal.3d 1, 31, rendering this a critical stage of the proceedings. Appellant Newborn was acquainted with Carr, and could have pointed out to his lawyers that the rogue treatment she was receiving from the trial court was likely going to intimidate her to his detriment. Even though Carr may not have been asked about the substance of her testimony during the hearing (the trial court refused to hear from her at all), appellant could have observed her reaction to these summary detention proceedings and urged his attorney to insist on affording her the due process protections contained in Penal Code section 1332, and subsequently elaborated on in Francisco M., supra.

Respondent also argues lack of prejudice, but fails to acknowledge that the following morning Carr repeatedly testified that Bowen had told her appellant Newborn and others had been present at the hospital after the Fernando Hodge's shooting. 19 RT 1833-1846. While she may have stuck to the testimony of the prior day that she was not at the hospital, at the same time she repeatedly reiterated the incriminating hearsay statements from Bowen that appellants were at the hospital. Respondent points to the snippet of cross-examination in which she agreed with the statement of appellant Newborn's attorney that "The truth is you don't know whether [appellant Newborn] was – he might well have been at the hospital, but you don't know whether he was there, right?," RB 201, citing 19 RT 1875, but as noted in Argument IV above, she also testified shortly after that that "I'm pretty sure Solomon [Bowen] is not going to lie" 19 RT 1882. The record strongly suggests that she was doing her best to help the prosecution without exposing herself to a charge of perjury. Under these circumstances, the trial court's unauthorized and coercive actions cannot be deemed harmless beyond a reasonable doubt. Chapman v. California, supra.

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VI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE COURT'S REFUSAL TO GRANT HIS MOTION TO SEVER FROM THE OTHER CODEFENDANTS.

Respondent answers this argument in the course of the omnibus severance section, RB 90-122.

Respondent argues first that Derrick Tate's testimony did not unfairly incriminate appellant Newborn, notwithstanding the likelihood that the jury would infer that appellant Newborn was one of Holmes' un-named crime partners. With Holmes, Newborn, and McClain on trial, the spotlight necessarily focused on appellant Newborn when McClain's attorney elicited in cross-examination that "Boom [Holmes] told [him] that Herbert McClain was not involved." 16 RT 1425. Severance was required because the trial court's ruling that benefited McClain unfairly redounded to Newborn's detriment.

Regarding the prejudicial spillover from McClain's bizarre testimony, respondent argues that "Appellant McClain's testimony could only be interpreted as suggesting that appellants Newborn and Holmes were also innocent and were not testifying upon advice of their attorney." RB 120. To the contrary, the most obvious interpretation is that the jury viewed McClain as affirming the widely-held commonsense belief that innocent men would stand

up and testify, regardless of what their lawyers said, whereas the guilty would stay off the stand. 37 RT 4053-4054. McClain's view very likely resonated with the commonsense view of most jurors, i.e., that a person who is innocent has everything to gain and nothing to lose by testifying on their own behalf. McClain also likely triggered the commonsense reaction that the guilty took refuge behind the Fifth Amendment privilege against self-incrimination. Under these circumstances, the trial court's refusal to sever appellant Newborn from McClain cannot be deemed harmless beyond a reasonable doubt. Griffin v. California (1965) 380 U.S. 609, 613.

This is particularly true in that the prosecutor affirmatively argued that many components of McClain's statements should be viewed as evidence of Newborn's guilt. 46 RT 4686-4690. Here, the primary error is not that the prosecutor affirmatively committed Griffin error as to Newborn by a direct comment on Newborn's failure to testify, but rather that the trial court's refusal to sever resulted in a prejudicial colloquy between the prosecutor and McClain that highlighted Newborn's decision not to testify. The prosecutor may well have contributed to this prejudicial development with his cute question to McClain, "Oh, by the way, Mr. McClain, if you did kill the kids, you would get up there and admit it, would you?" 37 RT 4053. That question was entirely

rhetorical and served only to elicit McClain's diatribe about the innocent demanding to testify while the guilt hid behind their lawyers, all to appellant's prejudice. Chapman v. California, supra.

VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY PROSECUTORIAL MISCONDUCT IN THE FORM OF FLAGRANT APPEALS TO THE JURY'S PASSION AND PREJUDICE DURING CLOSING ARGUMENT.

Respondent answers this argument at RB 218-231.

The final themes of the prosecutor's closing guilt phase argument were that guilty verdicts were necessary (1) to enable the decedents "to rest in peace"; and (2) to protect "their [appellant's] next victims," presumably innocent people, from similar violence. The prosecutor emphasized to the jury that their verdicts would "send a message," the message being that the jury stands forthrightly with the innocent victims – past, present, and future. That unfairly skewed the jury's deliberative process. The prosecutor's final exhortation was for the jury to "stand up for Edgar, Stephan, and Reggie. Come back with a guilty verdict so they can rest in peace." 44 RT 4701-4703. No civilized person would wish anything for innocent homicide victims other than

they "rest in peace," however that concept may have been understood by the various jurors, but it had no place in the deliberative process.

Respondent argues that "The prosecutor's statement was a fair response to the defense's argument and did not incite the passions and prejudices of the jury." RB 223. However, respondent frames that position in the context of "a response to appellant McClain's attorney's closing argument," which is (a) dubious rebuttal as to McClain; and (b) totally improper as to defendant Newborn.

Regarding the prosecutor's argument to convict the defendants to prevent hypothetical harm to other victims – "You are the only thing between them and their next victims," 44 RT 4702 – respondent contends that People v. Brown (2003) 31 Cal.4th 518, 553 authorizes this type of future dangerousness argument. Brown provides only the most tenuous support for this position. Brown relied entirely on People v. Hughey (1987) 194 Cal.App.3d 1383, for the proposition that a prosecutor's "suggesti[on] that a defendant will commit a criminal act in the future is not an inappropriate comment when there is sufficient evidence in the record to support the statement." 31 Cal.4th at 553. Hughey, in turn, relied entirely on People v. Baker (1974) 39 Cal.App.3d 550, in which a doctor was prosecuted for providing prescription medicine without

conducting medical examinations. The prosecutor argued to the jury that this conduct was dangerous – "That man, the defendant in this case, despite his age, and despite how he was described, a kindly old man – the kindly killer, potential killer –," at which point defense counsel objected. The trial court overruled the objection and the prosecutor continued, "To qualify that, Your Honor, addiction destroys the individual, does it not? And can lead to over dosage. So, he's a potential killer if the facts as related, on the evidence as portrayed to you by the People, if that is a fact. So that a 'kindly old man' doesn't mean a thing." 39 Cal.App.3d at 554-555.

The prosecutor in Baker, supra, argued that the offense for which the defendant was charged was a serious one with potentially fatal consequences. The prosecutor did not in any way argue for conviction in order to prevent "kindly" Dr. Baker from committing additional offenses in the future. Hughey was charged with assault, and the prosecutor argued to the jury, based on Baker "...you want this case a few months from now and the next time somebody is dead?" The Court of Appeal condoned this argument with the comment, "When the prosecutor suggested that future events may occur, his comments were reasonable inferences from the facts in proper argument." 194 Cal.App.3d at 1396.

Unfortunately for our California jurisprudence, those cases purvey an entirely spurious analysis – the perceived likelihood of the defendant committing future crimes is entirely irrelevant to the jury's determination of the defendant's guilt of a past crime.

In contrast, a defendant's future dangerousness is very much at issue in a proceeding to extend the commitment pursuant to the Sexually Violent Predators Act, but that is only after culpability for the commitment offense has been determined under the California Evidence Code and basic due process guarantees. Carried to its illogical extreme, if prosecutors are permitted to argue in this manner, they should be equally entitled to call a psychiatrist or even a police gang expert to testify that, not only was the defendant was guilty of the charged offense, he was likely to commit similar offenses in the future.

Appellant urges this Court to review and reject the suggestion in Brown, supra, in favor of the better reasoned authority of, inter alia, Comm. of Northern Marianna Islands v. Mendiola (9th Cir. 1992) 976 F.2d 475. Mendiola reversed a conviction based on improper and inflammatory closing arguments to the jury that "If you say not guilty, he walks right out the door, right behind you," coupled with an insinuation that the defendant, if acquitted, would recover the missing murder weapon and pose a threat to the general public. The Ninth

Circuit concluded that the prosecutor's "commentary on a defendant's future dangerous... [was] highly improper during the guilt phase of the trial." 976 F.2d at 487. Accord: United States v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142, 1150 ["While commentary on a defendant's future dangerous maybe proper in the context of sentencing, it is highly improper during the guilt phase of the trial," citing Mendiola, supra (emphasis supplied)].

Respondent argues that appellant's objection to the prosecutor's argument finale – that the jurors should convict so the decedents could "rest in peace" – was forfeited. RB 226. That is untenable in light of the record in this case. The trial court had just given the prosecutor 30 seconds to finish his argument, which the prosecutor did with this inflammatory flourish. The defense immediately moved for a mistrial outside the presence of the jury. 44 RT 4715. The defense clearly objected to the totality of the prosecutor's inflammatory arguments on the ground, as respondent acknowledges, "that the prosecutor appealed to the jury's passions and prejudice as objected to by the defense." RB 221. This Court must, therefore, view the totality of the circumstances to determine that appellant was deprived of due process by the cumulative impact of the prosecutor's improper argument. Darden v. Wainwright (1986) 477 U.S. 168, 181.

VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS JURY INSTRUCTIONS AND INSUFFICIENCY OF EVIDENCE AS TO THE SPECIAL CIRCUMSTANCE FINDINGS.

Respondent answers this argument at RB 270-272.

Appellant has argued that the lying-in-wait and multiple murder special circumstances were unconstitutionally found true as a predicate for the death penalty because (1) the jury was not instructed in accordance with Tison v. Arizona (1987) 481 U.S. 137, and (2) the evidence of appellant's culpability for the crime is insufficient to satisfy the constitutional minimum for capital punishment.

Respondent's only contention is that "[o]nly for a felony murder special circumstance [] is a jury required to find that a defendant acted with reckless indifferent to human life and as a major participant aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of a felony which resulted in the death of a human being." RB 272, emphasis supplied, citing Tapia v. Superior Court (1991) 53 Cal.3d 282, 298.

The flaw in respondent's argument is the incorrect assertion that the minimum culpability standards of Tison apply only in felony murder

prosecutions, rather than in all capital prosecutions. United States v. Johnson (8th Cir. 2007) 495 F.3d 951 applied the Tison standard to a federal defendant's contention that the death penalty was disproportionate because, as appellant Johnson argued, "She was only minimally involved in the murders, the deaths did not result from her actions, and she had not foreseen that life would be taken." 495 F.3d at 962. The Eighth Circuit applied the Tison standard to this non-felony-murder capital prosecution, and ultimately affirmed because "There is evidence that the killings resulted from her substantial participation in the murders," and that "[t]here was also evidence that she intended that the killings occur." Ibid.

Appellant Johnson was charged under 21 U.S.C. section 848 (e)(1)(A), which punishes murder while participating in a continuing criminal enterprise (a conspiracy with certain extra proof requirements) as punishable by death. That is indistinguishable from the conspiracy basis for appellant's conviction of murder for Eighth Amendment purposes. Johnson clearly demonstrates that the same Tison analysis applies to Eighth Amendment claims by California appellants regardless of whether the special circumstance alleged was one of the enumerated felony murder special circumstances, Penal Code section 190.2, subd. d (a) (17), or any of the other section 190.2 special circumstances.

Tapia, supra, cited by respondent, in no way purports to alter the above constitutional analysis. Tapia merely held that certain parts of Proposition 115 "change[d] the legal consequences of criminal behavior to the detriment of defendants" and, therefore could not be applied retroactively, including section 10 of Proposition 115, which provides that "an accomplice, for a felony murder special circumstance to be found true, must have been a major participant and have acted with reckless indifference to human life." 53 Cal.3d at 298. Tapia explained that section 10 of Proposition 115 "brings state law into conformity with Tison v. Arizona [cite], thus, changes state law to the detriment of defendant," citing to People v. Anderson (1987) 43 Cal.3d 1104, 1147.

The logic of the Eighth Amendment further refutes respondent's position. Tison and its predecessors require a certain baseline level of individual culpability as a prerequisite to the imposition of the death penalty. It would be entirely anomalous if an accomplice to a robbery who played a minor role and/or did not harbor reckless indifference to human life was immune to the death penalty, while a defendant who played a minor role in helping a friend or family member avoid arrest (Penal Code section 190.2 subd. 5) without harboring reckless disregard to human life was subject to the death penalty.

Respondent argues that "[t]he trial court instructed on the necessity of finding that an aider and abettor entertained an intent to kill; no more was required." RB 272. That formulation cannot constitute compliance with the Eighth Amendment because it contains no requirement whatsoever that the aider and abettor knew of, participated in, or assisted in the conduct constituting the special circumstance over and above the actus reus and mens rea necessary establish liability for first-degree murder.

Here, the inadequacy of the instruction is particularly evident in light of the jury's findings regarding appellant Newborn's lack of involvement in the shooting, in view of the evidence that he was not present at the Emerson Street/ Wilson Street shootings. The evidence viewed most favorably to the prosecution is that a group of youths at the hospital, appellant included, formed a conspiracy to retaliate in the aftermath of the murder of Fernando Hodges. At that point, the youths apparently separated and smaller groups went off in different directions. There is no evidence of any actual plan for any of them to lie in wait for Crips to shoot at or any engage in any other conduct that constituted a special circumstance. The youths who went to the Emerson Street/Wilson Street area may have engaged in lying in wait before the charged shootings, but there is no evidence that conduct was known to, contemplated,

approved, or counseled by appellant Newborn. Yet, in light of the constitutional deficiency in the definition of aiding and abetting liability for the non-felony murder circumstances contained in Penal Code 190.2 subd. d (c), the lying in wait allegation against appellant Newborn was found true under a rogue legal theory of strict liability based on his conspiracy to commit first-degree murder. The multiple murder special circumstance succumbs to the same infirmity.

The constitutional deficiency in this instruction is readily apparent by the following example. Suppose 10 youths form a conspiracy to retaliate against members of a rival gang in some unspecified manner, after which nine of them go off in their individual directions to effectuate the object of the conspiracy, while the 10th gets cold feet and goes home to watch TV. Further assume that each of the nine conspirators committed a murder in a manner that qualifies as a special circumstance, e.g., one of the nine tortured a member of a rival gang, another member of the nine killed a rival gang member by lying in wait, another member of the nine killed a rival gang member by fire bomb, etc. Under the erroneous instructions given in this case and in accordance with respondent's argument, the couch potato conspirator would be guilty of not only the nine murders under conspiracy theory, but also of nine separate special

circumstances wholly unknown to him and unauthorized by him, committed by the other nine co-conspirators. As a matter of Eighth Amendment law, the expansive scope of conspiracy law strains vicarious liability to its farthest reaches on its own, and cannot provide a strict liability basis for imposing the death penalty.

The underlying point of Enmund v. Florida (1982) 458 U.S. 782 and Tison, supra, is that capital eligibility can only be predicated on the combination of major participation in the capital qualifying event itself, coupled with a mental state at least equivalent to implied malice. Here, the jury may have been instructed and may have found that appellant entered a conspiracy while at the hospital, but the jury was not instructed and there was no basis to find that appellant Newborn had any knowledge of or participation in the conduct constituting the lying in wait special circumstance, or of the conduct constituting the multiple murders.

Respondent does not address appellant's insufficiency of evidence argument under Jackson v. Virginia (1979) 443 U.S. 307, AOB 211, but that argument compels this Court to not only reverse the special circumstance findings against appellant Newborn but also to dismiss them for insufficiency of evidence.

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS DECISION TO REQUIRE APPELLANT TO WEAR A STUN BELT, AND THE ERRONEOUS DISCLOSURE OF THE STUN BELT REQUIREMENT TO THE JURY.

Respondent answers this argument at RB 281-300.

A. The Trial Court's Error in Requiring the Codefendants to Wear Stun Belts in the Absence of Manifest Necessity and Based Solely on Verbal Venting.

Following the guilty verdicts, after which Holmes and McClain interjected verbal responses and a rude gesture, the trial court commented that "Mr. McClain used poor judgment and so did Mr. Holmes at that time." 46 RT 4784. "Poor judgment" on a defendant's part in verbalizing his disagreement with the jury's verdict in no way constitutes manifest necessity sufficient to warrant courtroom restraints, much less stun belts. The trial court did not act particularly concerned about the interjections by McClain and Holmes, and denied appellant Newborn's motion for mistrial. However, when the sheriff served notice to put stun belts on the defendants for no identifiable reason at all, the trial court acquiesced without making any findings that manifest necessity existed. To the contrary, the court explained to the defendants that "[t]he security is done by the security people involved, that is the bailiffs," and

"[b]ased on some activity, they requested that you do this and a document was given to you and you didn't want to sign it." 46 RT 4799 (emphasis supplied). Whatever the sheriff meant by "some activity" was apparently never disclosed to the trial court and certainly never put on the record.

Respondent recognizes People v. Mar (2002) 28 Cal.4th 1201 as the primary California authority, but does not address Deck v. Missouri (2005) 544 U.S. 622, which held that visible shackles were unconstitutional during both penalty and guilty phases, "unless that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial." Id. at 624, quoting from Holbrook v. Flynn (1986) 475 U.S. 560. The state interest in "courtroom security" entails the likelihood of physical danger to jurors, courtroom staff, the court, or the attorneys involved, and the likelihood of actual disruption of the judicial process. The case law includes numerous cases in which violent defendants attacked or threatened to attack any or all the participants in the trial, and in those cases security measures including stun belts were warranted.[9] Here, the defendants did nothing other than some verbal

[9] See, e.g., People v. Jackson (1996) 13 Cal.4th 1164, 1215 [trial court properly exercised discretion to shackle a defendant who had pending charges of escape from a county jail with false imprisonment of a correctional officer in the process, and had previously been convicted of escape in another state].

venting in response to an adverse decision, in no way impeded the process that led to that decision, and did not interfere with subsequent proceedings.

Respondent recognizes that People v. Mar, supra, confirms that stun belts may not be used to deter defendant from making verbal outbursts that may be detrimental to his own case, 28 Cal.4th at 1223, fn. 6. Notwithstanding the trial court's express statement to the defendants that "you are wearing a belt because you have acted up in this courtroom," 74 RT 7420, the extent of which is apparent from the record and consists of only verbal venting, respondent contends that the trial court's stun belt use was justified based on various inchoate factors unrelated to any particular threat to courtroom security, including appellant's prior criminal activity, gang membership, and misconduct in county jail.

The two problems with respondent's position are (1) the trial court never referred to or relied on any of those as a justification for the stun belt; and (2) they do not individually or cumulatively warrant the use of stun belt. None of those generic factors were tied to any particular threat to the security of this trial. There were no reports of menacing groups of gang members intimidating jurors as they entered or left the courtroom. There were no reports of any plans on the defendant's part to smuggle weapons into the courtroom for any type of

assault. This is a case in which the trial court was understandably annoyed and put off by the defendant's demonstrations of derision and disrespect for the judicial process, but a bad attitude[10] does not constitute manifest necessity for stun belts.

Respondent also argues that appellants waived any appellate claim regarding the stun belt order because "none of appellants' counsel made any objections," although appellants themselves refused to sign the stun belt notification form. Respondent fails to fairly acknowledge the colloquy between the trial court and the defendants after the court noted for the record that the defendants "didn't want to sign" the stun belt form. 46 RT 4798. The court then asked the defendants directly whether they understood why they were required to wear the stun belts, and appellant McClain specifically objected, "I

[10] The trial court made it clear that he was "not happy" with the "attitude" displayed by defendants following the prosecutor's decision to retry the penalty phase – "They told the court this and the jury, they're P-9's, they're damn proud of it." 60 RT 5778. After some further proceedings regarding the severance motion, the trial court asked the defendants directly, "Who was yelling last time we were here?" Appellant Newborn answered, "Me." The court then asked for a note of apology and appellant Newborn agreed. The court clearly viewed Newborn's conduct as inappropriate verbal venting, not any kind of threat of assault. Because the court viewed appellant Newborn's conduct as a breach of protocol, for which a note of apology was a suitable and adequate response, the imposition of a stun belt was unjustified and unconstitutional.

understand and I don't agree with those terms, though." 46 RT 4799. McClain explained that the stun belts were "like a slap in my face" because "I've been sitting here and I ain't done nothing hostile and none of that shit and still get that." 46 RT 4800. McClain's verbalization may have been phrased in the vernacular, but could not have more clearly conveyed his position that there was no manifest necessity for the stun belts in light of his conduct, because he had not done anything "hostile." Clearly, McClain was distinguishing between "hostile" in the sense of threatening versus mere vocalizing.

The fact that trial counsel may have sat on their collective hands in the face of the three appellants' refusal to sign the notification acknowledgement, and in the face of McClain's articulation of the legal theory that they should have interposed, cannot nullify the objections made by appellant's themselves. The stun belt order was erroneous and violated appellant's right to due process and a fair penalty trial.

B. The Trial Court's Error in Permitting the Prosecution to Inform the Jury that Appellants Were Wearing Stun Belts.

Respondent does not contest appellant's contention that, assuming the evidence of McClain's threat in Deputy Browning's presence was admissible as aggravation as to McClain, there was no reason whatsoever to include

testimony that appellant Newborn was wearing a stun belt during penalty trial. The testimony that appellant Newborn was having his stun belt fastened on at the time of McClain's purported threat was entirely irrelevant to the proof of McClain's alleged misconduct. Its only possible effect was the prejudicial spillover to the jury's consideration of Newborn's penalty.

Respondent next argues that the failure of trial counsel to object constitutes an appellate waiver of this claim, but respondent fails to acknowledge that appellants themselves objected to the original stun belt order. The testimonial disclosure to the jury must be regarded as the prejudice resulting from the initial erroneous ruling.

Further, counsel for appellants Newborn and Holmes did argue against the admission of evidence of McClain's misconduct because it "has such a prejudicial effect against all defendants." 73 RT 7312. After Deputy Browning testified before the jury that "every morning as we come in, we put an electronic device on each one of the defendants," 73 RT 7332, defense counsel requested an instruction that the use of the "electronic device" should not be held against any of the defendants, and the court told the jury, "It is a security device to assure tranquility in the court, security for everyone. 73 RT 7332 (emphasis supplied). Trial counsel clearly viewed the stun belt disclosure as

prejudicial, and respondent's assertion to the contrary, RB 297, is contradicted by the record.

Respondent's final argument is that the stun belts were described to the jury as "electronic devices" and that in the absence of the specific phrase "stun belt," the jury was merely informed "that the deputies placed electronic devices on appellants that were for security purposes." RB 297. Respondent approaches disingenuousness in suggesting that the jurors who heard the phrase "electronic device" would not use their common sense and understand that the "electronic device" was obviously a "stun belt." As of the time of this trial in 1996, stun belts were widely recognized in popular culture and in the news media as a technological breakthrough to maintain control in the courtroom. See Hawkins v. Comparet-Cassani (9th Cir. 2001) 251 F.3d 1230, 1230 [referring to 1996 newspaper articles about the courtroom use of stun belts]. To the extent respondent implies that some jurors may have thought that the "electronic device" was something in the nature of an innocuous beeper that a deputy could activate to give an audible reminder not to engage in an assault or some other serious misconduct is unpersuasive.

Prejudice is apparent because the penalty determination in this case was close. The first penalty trial ended in a mistrial, and appellants presented

credible evidence in mitigation. In light of the recognition by the United States Supreme Court of the "acute need" for reliable penalty determinations, Deck v. Missouri, supra, 544 U.S. at 633, the unwarranted use of the stun belts and a disclosure of their use to the jury cannot be deemed harmless beyond a reasonable doubt.

X. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE COURT'S REFUSAL TO SEVER HIS PENALTY RETRIAL FROM THAT OF CODEFENDANT McCLAIN.

Respondent's argument as to this claim is found at RB 276-278.

Defense counsel argued prior to the penalty retrial that defendant Newborn and Holmes "should not be saddled with the obscenities and the profanities that Mr. McClain used during the first trial," to which the trial court responded, "I agree with that." 60 RT 5778.

Respondent argues that McClain's "trial antics" did not warrant severance on the part of Newborn and Holmes. However, respondent relies on People v. Lewis and Oliver (2006) 39 Cal.4th 970, 997 for a broad proposition that a denial of severance was proper where "based in part on outbursts in the courtroom." RB 276. Respondent fails to acknowledge that the courtroom outburst in Louis and Oliver entailed a melee in which both codefendants were apparently involved in equally obstructive behavior. Nothing in Lewis and

Oliver supports the proposition that the obstructive behavior of one particular defendant is insufficient to warranty severance from other non-participating defendants. This Court's point in Lewis and Oliver was to reject "defendants' apparent assumption that they could mandate severance through their own misconduct." 39 Cal.4th at 998. Here, appellants Newborn and Holmes sought severance based not on their own conduct, but on that of McClain, over whom they had no control.

Regarding prejudice, respondent argues that appellants Newborn and Holmes "failed to point to any instance in which the jury held appellant McClain's antics against them." RB 277. The test for due process violation from the denial of severance is not whether the jurors specifically acknowledged holding the misconduct of a codefendant against another, but rather it is the likelihood of prejudicial spillover based on an objective review of the course of the trial. In this regard, the trial court specifically recognized the likelihood of prejudice to appellant Newborn after McClain threatened to kill a prosecution witness after he completed his testimony and was walking out of the courtroom. The trial court admonished McClain that his threats of violence were very likely to hurt himself and appellant Newborn as well:

> I know you don't mean to hurt Mr. Newborn. That is what happens. That is the reality here, and it also affects this man next to you. 66 RT 69608.

Given that the likelihood of prejudice from McClain's misconduct was readily apparent to the trial court,[11] an objective review of the circumstances of penalty retrial established that it was fundamentally unfair to deny severance to appellants Newborn and Holmes.

While respondent repeatedly characterizes McClain's misconduct as "antics," RB 276; 277, the word "antics" appears to have been chosen to provide an unrealistically benign characterization of McClain's conduct. "Antics" are generally defined as "playful tricks or pranks; capers." McClain's threats to witnesses cannot in any reasonable manner fall within the "playful trick or prank" rubric.

Appellant Newborn was prejudiced by the joint penalty retrial with McClain because the jury would likely have viewed McClain as speaking on behalf of the three of them, particularly in view of the prosecutor's repeated theme that P-9 members stick together, commit crimes together, conspire

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[11] After McClain's vitriolic and profane rant to the jury that "[t]hey don't want the real people who did that shit. They just want some gang bangers," 74 RT 7428, the court excused the jury and remarked to counsel, "We all anticipated this"; "you should have anticipated this"; and "The court anticipated it." 74 RT 7432. The defense anticipated it with a timely motion to sever.

together, etc. Appellant has chronicled the numerous incidents of inflammatory conduct on McClain's part during the penalty retrial. Prejudice is further confirmed by the fact that the penalty jury hung as to all three defendants when McClain was represented by counsel, but returned death verdicts against all when McClain went pro per and all too likely turned the jury against all three of them.

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE ERRONEOUS ADMISSION OF EVIDENCE THAT LOUISE JERNIGAN BELIEVED THAT APPELLANT HAD KILLED HER SON AND BY THE PROSECUTOR'S REPEATED EMPHASIS ON THIS TESTIMONY IN CLOSING ARGUMENT.

Respondent answers this contention at RB 327-332.

Respondent argues that the evidence of Ms. Jernigan's belief that appellant Newborn killed her son, viewed as "sincere by the trial court," 76 RT 7597, was admissible to establish unadjudicated criminal conduct under Penal Code section 190.3 (b). Respondent does not argue that her statements were directly relevant to any of the elements of Penal Code section 422 [criminal threats], but rather that "[a] victim's knowledge of a defendant's prior conduct is relevant to show actual sustained fear." RB 329, citing People v. Allen (1995) 33 Cal.App.4th 1149, 1156, and People v. Garrett (1994) 30 Cal.App.4th 962,

966. Those cases involved situations in which the trial court admitted evidence of proven prior violent or threatening conduct by the defendant toward the victim to establish that the victim experienced sustained fear. Neither case addressed, much less approved, the admission of evidence of a victim's unsupported belief that the defendant had committed prior homicides. That category of evidence is substantially less reliable and more prejudicial than, for example, the prior conviction for manslaughter deemed admissible in People v. Garrett, supra.

Penal Code section 422, as construed in the case law, requires that the prosecution prove the victim's fear of the defendant to be reasonable in order to sustain a conviction for criminal threats. A witness's apparently unsubstantiated belief as to the defendant's prior conduct is not probative of the reasonableness of the witness's fear, and carries a substantially higher risk of prejudice. Estelle v. McGuire (1991) 502 U.S. 62.

An individual's subjective and unsubstantiated belief as to prior violent conduct by another may well be relevant where a defendant raises a claim of imperfect self-defense to a homicide charge, regardless of the reasonableness of the defendant's belief. That is an entirely different legal concept than the "reasonable fear" element of Penal Code section 422.

The likelihood for prejudice was substantial, for the reasons that required reversal of capital murder convictions in People v. Robertson (1982) 33 Cal.3d 21, 41-42 and for the reasons that a prior homicide was found to be erroneously admitted in People v. Morris (1988) 46 Cal.3d 1, 39.

Respondent argues harmless error on the basis that "The incident of criminal threats was a minor portion of the overall evidence" in aggravation, but fails to acknowledge that the allegation of a prior murder dwarfed all the other relatively minor instances of domestic battery that comprised the evidence in aggravation. Under the circumstances, the erroneous admission of the evidence cannot be deemed harmless beyond a reasonable doubt.

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE ERROR IN ADMITTING EVIDENCE OF HOLDING CELL GRAFFITI IN THE ABSENCE OF ANY PROOF OF APPELLANT'S AUTHORSHIP OR ENDORSEMENT OF THE WRITING.

Respondent answers this contention at RB 305-309.

Respondent entirely fails to answer appellant's primary argument that there was never sufficient evidence to prove beyond a reasonable doubt that any particular defendant wrote or endorsed the graffiti. See AOB 283. Respondent accurately summarized the testimony of Officer Lopez regarding the graffiti, i.e., that he "did not know who wrote the graffiti, but he believed because that

because the graffiti had appellants' names on it, appellants were more than likely to have been possible individuals to have put up the graffiti." RB 308, citing 66 RT 6471. The prosecutor had asked Officer Lopez on redirect whether the presence of the three defendants' nicknames in the graffiti provided "any clue as to the range of possible individuals who are likely to have put that graffiti up there, and Officer Lopez answered, "more than likely the three people that are named." 66 RT 6475. The "more than likely" phrasing corresponds directly to the "preponderance of evidence" standard, and cannot reasonably provide a basis for finding beyond a reasonable doubt that appellant Newborn wrote or endorsed the graffiti.

There is no evidence that it was in his handwriting (or in any other specific person's handwriting for that matter), and no evidence that he was other than an involuntary observer of the graffiti as he was taken through the holding cell by the sheriff. While the most likely inference is that McClain wrote the graffiti, given his demonstrably outspoken streak that he repeatedly displayed to the detriment of himself and co-appellants, even that inference cannot be sustained beyond a reasonable doubt under this evidence.

This is not a "exercise of discretion" issue; it is a simple insufficiency of the evidence issue under the Fifth and Fourteenth Amendments. Jackson v.

Virginia, supra. Respondent has entirely ignored this fundamental constitutional claim.

Respondent does argue that "any error was harmless in light of the other gang evidence admitted, and all of the other aggravating evidence introduced at the penalty phase," RB 309, but fails to address the particularly prejudicial component of the graffiti, i.e., the apparent endorsement of the murder of law enforcement officers. Violence between gangs is a tremendous threat and burden to society, but it is not viewed anywhere near as heinous as the murder of a police officer. This is readily apparent from the fact that the legislature has always included murder of a police officer as a special circumstance, while the gang murder special circumstance was added relatively recently in 2000, per the Proposition 21 Initiative. Moreover, the prejudice from this graffiti compounded that from Louise Jernigan's testimony, portraying appellant as a murderer whose victims extended well beyond those charged in this case. Again, the initial penalty mistrial and the length of the final penalty deliberations confirm the closeness of the question and compel the inference that the evidentiary errors cannot be deemed harmless. Chapman v. California, supra.

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE ERRONEOUS ADMISSION OF THE VIDEOTAPE OF CODEFENDANT HOLMES' PROFANE OUTBURST AFTER THE JURY RENDERED HIS GUILTY VERDICT.

Respondent answers this argument at RB 300-305.

Respondent contends that Holmes' profanity-ridden in-court outburst was admissible at the penalty retrial under Penal Code section 190.3 subd. (a), "the circumstances of the offense." The offenses occurred on October 31, 1993, and the jury verdict that triggered the outburst occurred on December 22, 1995, more than two years later. As a matter of law, logic, and commonsense, a "circumstance of the offense" cannot encompass the conduct of a defendant more than two years after that defendant was arrested and incarcerated for the completed offense.

Respondent argues that People v. Blair (2005) 36 Cal.4th 686, 749 so expanded the meaning of "circumstances of the crime" to encompass the post-offense courtroom outburst in this case. Respondent drastically over-reads Blair.

Blair had poisoned two of his neighbors with cyanide, apparently for financial gain. At penalty trial, the prosecution was permit to present evidence that he had taken a chemistry course two years before the murders, and that he

had elected to devise a laboratory experiment that entailed the use of cyanide. The chemistry teacher testified that she had extensively warned Blair about the dangerous properties of cyanide, had shown him how to handle it safely, and had permitted him to proceed with the experiment. This Court affirmed the trial court's admission of the chemistry teacher's testimony because it "tended to demonstrate that defendant was peculiarly interested in cyanide and familiar with its dangerous properties," relevant to both identity of the defendant as the poisoner and as relevant to defendant having the means to commit the murder by poisoning. 36 Cal. 749.

Respondent asserts that "Blair is indistinguishable from the instant case," RB 303, but the 190.3 subd. (a) evidence in Blair, supra, occurred some years before the crime and was relevant to the perpetration of the crime, while the contested evidence here occurred years after the murder had occurred and shed no light whatsoever upon the commission of the crimes.

Regarding the prejudice issue, respondent fails to distinguish between the prejudice to appellant Newborn, who in no way participated in, authorized, or otherwise adopted the outburst, versus Holmes himself, for whom the outburst may have been an admission, a self-inflicted evidentiary wound.

Respondent's other prejudice arguments are manifestly weak. Respondent acknowledges that "The prosecution initially characterized the outburst as a threat during opening statement," 65 RT 6411 (emphasis supplied), but argues it was "unlikely the jury would have viewed the outburst as a threat against jurors," notwithstanding the prosecution's direct characterization to that effect because the prosecutor did it only once. Since when is once not enough?

Respondent does not address appellant's argument that the prosecutor combined the evidence regarding Holmes' outburst with the adverse inferences from the holding cell graffiti, and McClain's threat against Deputy Browning as a foundation for the rhetorical question, "What is fair for people like this?" 75 RT 7378. Clearly, the prosecutor explicitly urged the jury to return a death verdict against appellant Newborn based on the conduct of Holmes, McClain, and/or persons unknown during the course of the trial. This violated appellant's rights to due process and a reliable penalty determination.

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE ERRONEOUS EXCLUSION OF THE FAVORABLE DISPOSITIONS GRANTED THE CODEFENDANTS BOWEN AND BAILEY, AND BY THE UNFAIR PROSECUTORIAL MISCONDUCT IN EXPLOITING THE EXCLUSIONARY RULING.

Respondent addresses this argument at RB 309-312.

Respondent relies on decisions by this Court to the effect that a "sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation." People v. Bemore (2000) 22 Cal.4th 809, 857, cited at RB 310. Respondent does not address the concurring opinion of Judge Ferguson in Morris v. Ylst (9th Cir. 2006) 447 F.3d 735, which explained the fundamental unfairness in permitting a prosecutor to single out a particular defendant among equally guilty perpetrators without so informing the jury. Moreover, the cases relied on by respondent and the cases decided by this Court to date do not address the particularly unfair combination of the trial court's exclusionary order regarding codefendant's lesser sentences, coupled with the prosecutor's argument that the crimes are the "worst of the worst," such that "only death will make it just." 75 RT 7415. The jury should have been permitted to know that the prosecutor's argument to the jury was disingenuous. Bowen and Bailey may well have been the actual shooters in the assault, but the prosecutor obviously deemed it "fair" and "just" to afford them a non-capital sentence.

Respondent argues that there is no evidence that Bowen and Bailey were equally culpable with appellant, and that they had denied being present at the shooting scene. RB 311. Everybody charged with these offenses denied being present at the shooting scene, but that did not deter the prosecutor from seeking

death against Newborn, McClain, and Holmes and declining to do so against Bowen and Bailey. Respondent also argues that "Even if Bowen and Bailey were equally culpable for the murders, there is nothing to indicate that they were equally deserving of the death sentence based on their record and character." RB 311. Respondent misses the fundamental point that the prosecutor said the only appropriate penalty based on the crimes themselves, irrespective of mitigating considerations, as the death penalty because the crimes were the "worst of the worst." Therefore, the prosecutor was arguing in a disingenuous manner to appellants' jury regardless of the respective amounts of mitigation mustered by the various defendants. In effect, the prosecutor took inconsistent positions as to whether the crimes themselves mandated the death penalty, to the detriment of appellants. See In re Sakarias (2005) 35 Cal.4th 140.

The prosecutor's argument in favor of the death penalty could never have been made if the prosecutor had not first successfully excluded the evidence of Bowen and Bailey's dispositions. This was misleading in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments as occurred, inter alia, Simmons v. South Carolina (1994) 512 U.S. 154. Simmons addressed an analogous instance of unconstitutional unfairness based on a prosecutor's successful effort

to preclude an instruction that if given life in imprisonment, the defendant would be completely ineligible for parole, but then argued in favor of the death penalty on the basis of deterring future acts of violence not limited to a prison setting. "The state is free to argue that defendant will pose a danger to others in the future," but "may not mislead the jury by concealing accurate information about the defendant's parole ineligibility. 512 U.S. 165, fn. 5.

Here, the prosecutor could have constitutionally (albeit implausibly) argued to the jury that the crimes by themselves were so heinous as to demand the death penalty, but only if the jury was apprised of accurate information regarding the prosecutor's contrary stance toward codefendants Bowen and Bailey. Under these circumstances, appellant's death sentence must be vacated.

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS REGARDING THE PRESENTATION OF EVIDENCE RELATING TO LINGERING DOUBT.

Respondent answers this argument at RB 312-326.

Respondent contends first that appellant failed to "identify any evidence [he] sought to admit, which was excluded." RB 312. However, defense counsel told the jury in opening statement exactly what the evidence supporting a life

sentence based on reasonable doubt was, i.e., that there was no identification testimony placing appellant at the scene of the homicides; nor any physical evidence connecting him to the homicides; nor any confessions or admissions. 65 RT 6388-6390. Thus, the evidentiary presentation for appellant's lingering doubt argument was based on the absence of persuasive prosecution evidence, rather than an affirmative presentation such as alibi. Appellant should have been permitted to present testimony to that effect, particularly where the penalty jury was different than the guilt jury, and where the guilt jury deliberated for 16 days before returning verdicts.

Respondent contends that "[a] defendant has no federal constitutional right to present evidence of lingering doubt at the penalty phase," citing Franklin v. Lynaugh (1988) 487 U.S. 164, 173-174, but Oregon v. Guzek (2006) 546 U.S. 517, 524 confirmed that a defendant should be permitted at a penalty trial to present evidence contesting guilt that was previously presented at the guilt trial. That was exactly what defense counsel sought to do here, albeit couched in terms of the prosecution's failure to present persuasive evidence, rather than in the form of affirmative evidence of innocence. Both must be viewed as equally viable and permissible avenues to raise lingering doubt for the penalty determination.

Respondent discusses People v. Gay (2008) 42 Cal.4th 1195, 1221 and attempts to distinguish it from the facts of this case. This Court reversed Gay's death verdict because of the exclusion of lingering doubt evidence and an instruction that told the jury that it had been "conclusively proven" that Gay had personally committed the murder. 42 Cal.4th at 1215. The particular facts regarding the evidence excluded may be somewhat different in this case, and the trial court was somewhat more ambivalent in its rulings and instructions regarding lingering doubt, but the same type of damage was done as far as deflecting the jury from full consideration of the weaknesses in the prosecution's evidence of guilt.

Prejudice is apparent from the penalty jury's numerous questions and obvious interest in the nature and quality of the evidence of guilt. The prejudice was compounded by the trial court's penalty instruction that "I repeatedly admonished and stated to you what the lawyers say is not evidence... Do not consider [what they say] as evidence." 75 RT 7498. The jury would certainly have understood that instruction to neutralize defense counsel's remarks in opening statement regarding the absence of persuasive prosecution evidence of guilt. Under these circumstances, including the failure of the first penalty jury

to agree as to any of the defendants on a 9-to-3 vote, appellant's death sentence must be vacated.

XVI. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERRONEOUS RESTRICTION AND DEFENSE COUNSEL'S JURY ARGUMENT REGARDING THE EXERCISE OF MERCY.

Respondent answers this argument at RB 332-337.

Defense counsel correctly stated the law of the Eighth Amendment regarding the exercise of mercy to the jury with the statement that "If you had only factors in aggravation and little, if any factors in mitigation, something as little and simple as mercy, you could still vote life without parole." 74 RT 7467. The trial court erred in sustaining the prosecutor's objection "That is a misstatement of the law." Ibid. Respondent cites People v. Lewis (2001) 26 Cal.4th 334, 393, in which this Court held that a trial court properly declined to give an instruction that "In determining whether to sentence the defendants life in prison without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant." Lewis concluded that a "pure mercy" instruction was improper because of the potential for "an arbitrary of capricious exercise of power rather than reasoned discretion based on particular facts and

circumstances. People v. Irvine (2009) 47 Cal.4th 745 held that the trial court properly refused to prevent defense or the prosecutor from using the word "mercy" in the closing arguments because the jury was instructed that they could consider sympathy, passion, or pity for the defendant, which was sufficiently synonymous with "mercy" to ensure that there was "no reasonable likelihood that the jury was misled as to its ability to grant defendant mercy." Id. at 802.

There is a tension between this Court's jurisprudence regarding the permissible scope of argument and instructions regarding the exercise of mercy in the penalty decision with that of the United States Supreme Court. Morgan v. Illinois, supra, included a summary of capital jurisprudence emanating from Gregg v. Georgia (1976) 428 U.S. 153 and concluded that "This Court decreed...[that] the jury must always be given the option of extending mercy." Id at 751. In this case, the jury was not given a constitutionally adequate opportunity to extend mercy, because the trial court curtailed counsel's argument to that effect, directing counsel to argue it "another way."

There is no other way to argue for mercy than by invoking that specific concept, because it is not co-extensive with sympathy, compassion, or pity. Those concepts have very different connotations and do not individually or in

the aggregate substitute for a clear directive that the jury may extend mercy based on the state of the record. It is entirely conceivable that a jury could feel no sympathy whatsoever because of the heinousness of the capital murder, could feel no compassion whatsoever for the defendant because of a lack of remorse, and could feel no pity for the defendant because the defendant committed the murder with full volition. At the same time, the jury could be moved to extend mercy because of prior wrongs inflicted on the defendant, such as child abuse, which likely played a role in turning the defendant into the unsympathetic, cold, and remorseless adult whom they convicted of capital murder.

Appellant suggests that this Court's concerns in Lewis, supra – that an explicit instruction on mercy could lead to arbitrariness and capriciousness in the imposition of the death penalty – is unwarranted. A similarly concern was rejected in Gregg v. Georgia, supra, (1976) 428 U.S. 153, 206, as a constitutional challenge to the validity of the death penalty under the Eighth Amendment. The Supreme Court concluded that acts of jury leniency to some capital defendants did not call into question the validity of jury verdicts of death for other capital defendants. Appellant's death sentence must be vacated for the further reason that counsel's argument for a life sentence based on mercy was

impinged, and the jury was never directly informed that it had the option of extending mercy. Morgan v. Illinois, supra.

XVII. PETITIONER WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS BY THE FAILURE OF PENAL CODE SECTIONS 190.2 AND 190.3 TO REQUIRE THAT THE JURY FIND THE EXISTENCE OF AGGRAVATING FACTORS UNANIMOUSLY AND BEYOND A REASONABLE DOUBT AS A PREREQUISITE TO THE IMPOSITION OF THE DEATH PENALTY AND BY OTHER CONSTITUTIONAL DEFECTS.

Respondent addresses appellant's arguments regarding the constitutionality of the California statute at RB 337-338, and the parties' claims are adequately set forth on the briefing as it stands.

XVIII. APPELLANT'S DEATH SENTENCE MUST BE REVERSED FOR CUMULATIVE ERROR AS SET FORTH IN ARGUMENTS XI THROUGH XVI.

Respondent addresses this contention at RB 370-371.

The combination of erroneous evidentiary rulings, improper prosecutorial tactics in misleading the jury, and misleading jury instructions regarding capital sentencing concepts cumulatively require the reversal of appellant's death sentence.

The verdicts demonstrate that the jury rejected the prosecution's theory of the case that appellant Newborn shot any of the deceased or wounded

victims. The jury found not true all of the personal firearm use allegations relating to victims. The jury found true only one of the overt acts alleged in Count X, the Penal Code section 182 conspiracy charge, i.e., that "at Pasadena Avenue and Blake Street, on October 31, 1993 at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen, and unnamed co-conspirators fired numerous rounds from a 9mm gun at or near the residence of an individual believed to be a Crip." VI CT 1598. Even that verdict was accompanied by a not true finding on the accompanying firearm allegation. VI CT 1599. In sum, the jury believed that appellant Newborn's role in the charged offenses was both minor and carried out in absentia. The jury refused to make a true finding on Overt Act #5, that appellant Newborn was present "at or near 569 Wilson Avenue." VI CT 1598.

The strength of the prosecution's evidence overall was weak, consisting of hearsay from witnesses of dubious credibility such as Lachandra Carr, and of generic gang membership evidence. The jury deliberated over the course of 16 days as to guilt, from December 6 until December 22. VI CT 1460; 1590. That is a clear demonstration of the closeness of the case, such that the likelihood that trial errors resulted in prejudice under the standards of either Chapman v. California, supra, and People v. Watson (1956) 46 Cal.2d 818.

The likelihood of prejudice with respect to the penalty verdict is underscored by (1) the failure of the original jury to reach a penalty decision; and (2) the entirely foreseeable and inflammatory effect of co-appellant McClain's provocative conduct at the penalty retrial.

This may have been a difficult case for the trial court to manage, but the inescapable conclusion upon review is that the cumulative effect of the trial court's errors requires reversal of the judgment. See: People v. Holt (1984) 37 Cal.3d 436, 458-459; U.S. v. McLister (9th Cir. 1979) 608 F.2d 785; Derden v. McNee (5th Cir. 1991) 938 F.2d 605, 610 ("Several errors taken together [ ] violated petitioner's right to due process and cause the trial to be fundamentally unfair"); U.S. v. Tory (9th Cir. 1995) 52 F.3d 207 ("We conclude that the cumulative effect of the errors deprived the defendant of a fair trial and requires a new trial on count one"); "Even if no single error were [sufficiently] prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'." (Killian v. Poole (9th Cir. 2002) 282 F.3d 1204, 1211 (quoting United States v. de Cruz (9th Cir. 1996) 82 F.3d 856, 868).

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XIX. JOINDER IN CO-APPELLANTS' ARGUMENTS

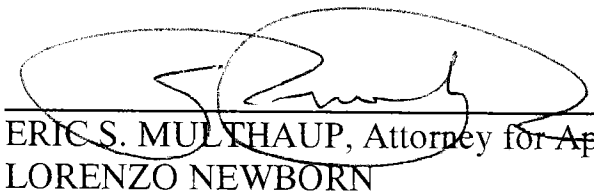
Appellant joins in the arguments presented by appellants Holmes and McClain in so far as they relate to the arguments made by appellant Newborn on this appeal.

CONCLUSION

Wherefore, for the foregoing reasons appellant respectfully requests that this Court reverse his convictions and death sentence.

Dated: March 22, 2010

Respectfully submitted,

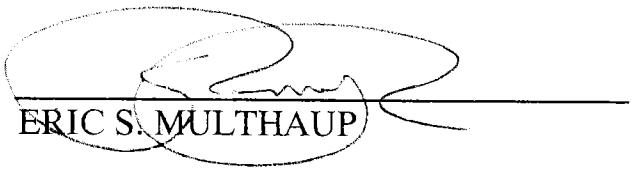


ERIC S. MULTHAUP, Attorney for ~~Appe~~llant
LORENZO NEWBORN

CERTIFICATE OF WORD COUNT

I certify that this Appellant Newborn's Reply Brief consists of 18,935 words.

Dated: March 22, 2010



ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: People v. Newborn; S058734
Los Angeles County Superior Court No. BA092268

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

APPELLANT NEWBORN'S REPLY BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

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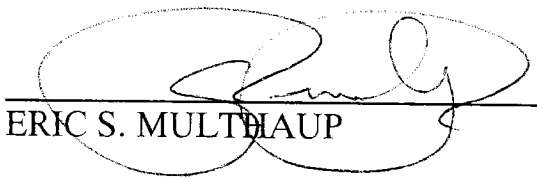
I declare under penalty of perjury that service was effected on March 22, 2010 at Mill Valley, California and that this declaration was executed on March 22, 2010 at Mill Valley, California.



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