IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPEAL FROM IMPERIAL COUNTY SUPERIOR COURT
HONORABLE DONAL DONNELLY, JUDGE

APPELLANT GAINES' ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No. S20997
Plaintiff-Respondent,	)	Court of Appeal Nos. D057655/57686
v.	)	
FLOYD LAVENDER III and MICHAEL JAMES GAINES,	)	Superior Court Nos. JCF21566 JCF21567
Defendants-Appellants.	)	

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INTRODUCTION

Theoretically, this Court granted review in this case to settle an important question of law or secure uniformity of decision in the Courts of Appeal. (California Rules of Court, Rule 8.500(a)(1).) Yet the Attorney General's merits brief fails to suggest how this important question of law should be resolved in all cases, not just this case. Nor does it propose a way to ensure uniformity of decision in the Courts of Appeal. Instead, the Attorney General's position is that it wants this case sent back to the trial court so it can put on additional evidence and persuade the trial judge, who denied the motion for new trial once before, to again deny Michael Gaines – not William Gaines, as stated in the Attorney General's merits brief – and Floyd Lavender a new trial. The Attorney General wants a different result. No more, no less.

In making these arguments, the Attorney General makes several serious

and troubling errors. First, it fails to present all of the evidence relevant both to the juror misconduct claims themselves and to the jury's verdicts, which is relevant for determining whether the prosecution rebutted the presumption that Mr. Gaines and Mr. Lavender were prejudiced by the juror misconduct. (Compare *People v. Nesler* (1997) 16 Cal.4th 561, 584-585 [explaining importance of trial evidence in appellate court's independent assessment of prejudice]; *In re Carpenter* (1995) 9 Cal.4th 634, 678 [the "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant].)

Second, the merits brief appears to introduce an entirely new argument, that the juror affidavits were ambiguous and, as such, did not even establish any juror misconduct, even though the trial court agreed there was misconduct and the Attorney General conceded there was misconduct during briefing in the Court of Appeal. Third, and perhaps most importantly, it fails to explain how this Court should resolve the question presented generally except to say that it wants this particular case remanded to the trial court.

This Court should reject the Attorney General's entreaties to reverse the Court of Appeal. Justice McDonald thoroughly and meticulously examined

the facts of this case, the landscape of juror misconduct law, and the three cases cited by this Court in its first order granting review. Joined by both of his colleagues on the panel, Justice McDonald explained why no further trial court proceedings are necessary to resolve the juror misconduct claim presented here and why justice requires that Mr. Gaines receive a new trial.

STATEMENT OF THE CASE

Mr. Gaines agrees with and joins the statement of the case presented in the merits brief filed by Mr. Lavender.

STATEMENT OF FACTS

Mr. Gaines agrees with and joins the statement of facts presented in the merits brief filed by Mr. Lavender. He adds these additional facts.

The general theme of the prosecution's case was that Mr. Gaines and Mr. Lavender tortured a group of methamphetamine-using teens to get the teens – Michael Hughes, Kristen Mark Martin, Thayne Tolces, and decedent Courtney "Tory" Bowser – to confess to stealing some checks. After Bowser confessed, the defendants supposedly took her away, and she was never seen again. The problem with this narrative was that it was riddled with wild and improbable inconsistencies, both between and among the witnesses, and between the witnesses and the forensic evidence. As the opinion below noted, no forensic evidence whatsoever tied either defendant to Bowser's death. This

problem was compounded by the fact that investigators inexplicably needed 2½ years to identify Bowser's body, and didn't charge Mr. Gaines or Mr. Lavender for another 2 years. The delay placed the defendants at a distinct disadvantage in defending the case.

The prosecution's star witness, Angela Vereen, used the term "niggers" and accused the defendants of being "Bloods" even though no evidence showed they had any gang ties[12]. Both defendants are African-American. Vereen was perhaps the most inconsistent witness presented. The all-night torture and interrogation supposedly happened in her apartment, even though her young children were present and she was 20 years older than the teen witnesses. Vereen spoke with law enforcement in relation to this case at least three times before Mr. Gaines was arrested, in January 2004 [2 CTG 405]; October 2007 [2 CTG 443]; and February 2008. [2 CTG 361.] Her story remained a moving target throughout the trial.

Vereen insisted at trial that the confrontation at her apartment lasted

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[1] Because the Imperial County Superior Court prepared separate records for Mr. Lavender and Mr. Gaines, the pagination of their trial records is not identical. For that reason, Mr. Gaines refers to the record in his case as "RTG" for the reporter's transcript and "CTG" for the clerk's transcript.

[2] See 4 RTG 753 [telling officers "10 niggers were coming over"]; Exhibit HH at pp. 29, 37; 2 CTG 406, 408 ("Mike, the black guy, the blood"), 432, 462; 13 RTG 1365 [law enforcement had no information the defendants were gang members].

only a couple of hours and that nothing approximating torture occurred. [7 RTG 345-346.] The first time Vereen spoke with police – in a confused and rambling 2004 statement – she insisted the black guys had not been in her apartment at all. [2 CTG 461.] She also told officers that some local drug was making girls drop like flies and that a witness who was identified by the parties but who did not testify – Renn Shores – was behind "these girls missing" in Palm Desert. [2 CTG 407.] And it appeared, during that 2004 statement, that Vereen's primary concern was clearing her own name regarding accusations that she had killed Hughes. [2 CTG 409.]

In October 2007, Vereen spoke with Imperial County authorities and adamantly denied any girls had been held involuntarily in her apartment over some checks or that the black guys had been in her apartment. [2 CTG 449, 461.] When she spoke to authorities again in 2008, Vereen said no one was tortured in any way during an interrogation about checks, but Martin may have been threatened with a cigarette, and some knife game was played with Hughes. She then said Bowser said Tolces had taken the checks and given them to Bowser, that Bowser and Martin had hidden the checks, and that the last time she saw Bowser was when she and Martin left Vereen's apartment with Mr. Gaines to find the checks.

Other serious contradictions arose regarding the nature of the alleged

torture. Hughes claimed Vereen punched and kicked him, but no witness corroborated that. [8 RTG 633-634.] He also claimed one of the defendants put a chisel up against his head and hammered the blunt side of nails against his head, covering him with blood. [8 RTG 645, 9 RTG 811.] Hughes added that Mr. Lavender used a heated spoon to burn Martin and Bowser, and Tolces claimed the two girls had serious burns that looked like big open wounds, especially near their breasts. [8 RTG635-637, 702; 10 RTG 1000-1001.] Martin never sought medical attention and Bowser's body showed no evidence at all of such burning.

Hughes claimed the defendants forced Tolces to shave a significant piece of hair from Bowser's head, and Tolces agreed. [8 RTG 653-656, 10 RTG 1002-1003.] Martin told investigators Bowser's whole head was shaved and she looked like Demi Moore in the movie "G.I. Jane." Martin also claimed Mr. Gaines forced Hughes, not Tolces, to shave Bowser's head. [11 RTG 1157, 1199-1202.] None of Bowser's hair was missing or shaved when Dr. Darryl Garber performed the autopsy. [14 RTG 1694-1696, 1738; 1691-1693.]

Particularly troubling was the fact that another teen who was friends with the teen witnesses claimed to have been present in Vereen's home during the torture, even though he ended up having to admit he was incarcerated at

Juvenile Hall when Bowser disappeared. Joshua Thibedeaux told investigators, among other things: "you gotta understand like small details like what we were doing and stuff I don't really remember but I remember huge things like when Mike, Thayne and Tori, were all, like they were gonna take the checks, you know what I mean" [2 CTG 497]; "Like they would beat the shit out of Thayne because Thayne and Tori were the ones who had the most to do with taking those checks." [2 CTG 499.] "They put a gun to Thayne's head. They tied up Tori. They were fucking burning her with like spoons and fucken torches and shit." [2 CTG 500.]

Thibedeaux told them another girl was there and said, "Yeah, Mary," when Imperial County Officer Miguel Leon suggested the girl's name was Mary. When Leon then said, "what about Kristen Mark?" Thibedeaux said, "That's my ex-girlfriend. I'm pretty sure I'd know if she was in there." [2 CTG 501.] Then he vacillated about whether Kristen was there or not. [2 CTG 504-506.]

Thibedeaux said he was "sure" everyone was bleeding, except for him, because he wasn't targeted. [2 CTG 535-536.] He told Leon, "I don't mean no offense, but I don't really like black people." [2 CTG 523.]

Medical evidence

Pathologist Garber did not find any pathognomic evidence of drowning,

i.e., no distinctive symptom indicating drowning had to be the cause of death. [12 RTG 1394.] Although he would normally expect to see foam in the lungs and frothy liquid in the airways, he did not find evidence of either. He blamed the decomposition of the body. Garber testified the presence of water in the lungs is irrelevant to the cause of death. [12 RTG 1351-1353.]

Because drowning is a diagnosis of exclusion – meaning the pathologist has to rule out other causes of death before concluding drowning is the actual cause – he had to rule out strangulation, smothering, natural disease, intoxication, and accidental injuries before concluding Bowser had drowned. [12 RTG 1354.] Garber claimed he waited until he received the toxicology report to make his final determination on the cause of death. [12 RTG 1381-1382.]

The toxicology report showed a GHB level of 49.6 milligrams per liter in Bowser's spleen blood. [12 RT 1384-1386.] Garber also testified that testing on the vitreous fluid from the eye showed levels of GHB, but he was not able to say what the normal level found in the body is because that fact was outside his area of expertise. [12 RT 1389.]

Relying on information from toxicologist Maureen Black, who did not testify, Garber ruled out drug overdose as a cause of death. [12 RT 1417, 1423.]

The defense pathologist, Harry Bonnell, reviewed the autopsy report and toxicology report and noted that Garber reached his opinion about the cause of death before receiving the toxicology report. [14 RTG 1709.]

Garber found no burning injuries on the body. [12 RTG 1378.] None of her hair was missing or shaved, and the autopsy report did not note any evidence her hair was shaved. [14 RTG 1694-1696, 1738.] He believed she had been in the water 1-2 days or less. [12 RTG 1342.] She could have been there as few as six hours. [12 RTG 1406.]

Defense pathologist Bonnell found no evidence of the stab wounds supposedly inflicted by a fork, no evidence of any burns, and no evidence Bowser's head had been shaved. [14 RTG 1691-1693.]

Bonnell would not have classified the death as a homicide. The GHB findings could have caused or contributed to her death. He didn't know whether she had ingested the GHB voluntarily and accidentally took too much or whether someone else gave her too much. [14 RTG 1716.]

Bonnell further testified that he could say, with medical certainty, that Bowser did not drown because there was no evidence to support a diagnosis of drowning. [14 RTG 1729.] He believed there was a strong possibility that Bowser overdosed on GHB but he could not prove it. [14 RTG 1731.]

Bonnell testified he could not exclude GHB intoxication as a cause of

death because the lab results showed elevated levels of GHB in Bowser's body. [14 RTG 1700.] He testified that in individuals who have died, the highest level of naturally occurring GHB found was 7 milligrams per liter. The bodies that showed levels greater than 7 mg/L – such as the level of 54 found here – had ingested GHB prior to death. [14 RTG 1707.] Bonnell testified the body normally produces less than 1 mg per liter of GHB. [14 RTG 1708.]

Bonnell believed very strongly that Bowser died within 6 to 12 hours of being found. He could only conclude that she was in the water for an hour or more. [14 RTG 1711.] There was no evidence in the photos, like sunburn or blisters, showing Bowser's body had been exposed to the intense summertime sun found in Imperial County. [14 RTG 1712.] Bonnell said the level of the decomposition was not severe. He believed she was dead when she was placed in the canal. [14 RTG 1712.]

Bonnell explained that some people use GHB because other people at a party are using it. They also use it because it gives them a buzz and mellows them out. Some people give excessive amounts to other people to try to make them unconscious, a.k.a. using it as a date rape drug. [14 RTG 1722.] Thibedeaux told police "everybody was doing Tori . . .they were passing her around." [2 CTG 545.]

Bonnell testified the half-life of GHB varies from 18 to 60 minutes, depending on the person. [15 RTG 1970.] If the half-life in Bowser was 18 minutes, the level in her body before she died could have been as high as 400 a little over an hour before she died. [15 RTG 1971.] If a level as high as 300-400 shortly before her death could have put Bowser into a coma, her body would have continued to metabolize the drug until she died. [15 RTG 1971.]

Bonnell reiterated that he could not rule out GHB intoxication as the cause of death because the levels high above 7 milligrams per liter showed she had ingested it. GHB is a respiratory depressant that slows down a person's breathing rate until she passes into a coma. Then her respiratory draw decreases until her oxygen levels get so low she gets an irregular heartbeat and dies. [15 RTG 1972.]

Over defense objection, the prosecutor tried to impeach Bonnell with the fact that one of the toxicologists in San Diego was convicted of murdering her husband with drugs stolen from the lab, and supposedly "several people in that lab were investigated as far as that murder investigation." [15 RTG 1976.]

Mr. Gaines' arrest

Hughes had moved to Michigan by the time the charges in this case were filed. He actually had spoken to police in Riverside County around Christmas 2003, when he claimed to have seen Mr. Gaines and Mr. Lavender

chasing and threatening him. On that occasion, Hughes behaved so erratically police believed he was using drugs, and Hughes admitted having been awake for several days. [12 RTG 1289-1292.]

Hughes spoke with investigators again in June 2007 and November 2007.

Even though Hughes told police in December 2003 that his girlfriend had disappeared and he and Vereen spoke with police off and on several times over the years, the complaint in this case was not filed until March 11, 2008. [1 CTG 1.] Mr. Gaines was not arrested until March 12, 2008. [Probation report at 24.]

ARGUMENT

I.

THIS COURT SHOULD FIND NO JUSTIFICATION TO REMAND THIS CASE FOR FURTHER FACTUAL DEVELOPMENT

A. Introduction

As an initial matter, Mr. Gaines joins Mr. Lavender's discussion of the general law regarding juror misconduct claims.

Moving to the merits, the Attorney General has framed the question presented here thus: Where a reviewing court is presented with conflicting affidavits that create material, disputed issues of fact regarding the nature and extent of juror misconduct, should it remand the matter to the trial court for a limited hearing so that the record may be fully developed before it determines whether the presumption of prejudice has been rebutted? This question itself leads to several additional questions, none of which are answered by respondent's merits brief.

The first question is when do material, disputed issues of fact regarding the nature and extent of juror misconduct require remand proceedings for evidentiary hearings. Although respondent framed this question in terms of ***whether*** reviewing courts must send cases back for evidentiary hearings, and not in terms of ***when*** those hearings must be held, Mr. Gaines believes

respondent is not asking this Court to overrule or modify *People v. Hedgecock* (1990) 51 Cal.3d 395, to hold that ***all*** evidentiary disputes require hearings. Thus, this Court must decide which circumstances require evidentiary hearings.

The second question is when and how, if ever, might a litigant forfeit its right to an evidentiary hearing on a material disputed issue of fact.

The third question is whether the facts of this case require a remand for further factual development.

B. Not every material disputed issue of fact requires a remand hearing.

In *Hedgecock*, this Court held that courts ***may*** hold evidentiary hearings to resolve factual disputes, but it explicitly held that evidentiary hearings are not necessary in every instance. (*Hedgecock, supra*, 51 Cal.3d at p. 415.) Indeed, in *Hedgecock* itself this Court was faced with a record showing sharp contradictions between witnesses regarding serious allegations of juror misconduct, yet this Court remanded the matter to the trial court and directed that court to decide whether to hold a hearing to resolve the conflicts. This Court did not itself direct that a hearing be held.

Mr. Gaines' case presents the obvious next question of when courts ***must*** hold evidentiary hearings to resolve factual disputes.

This state's courts have acknowledged that not every material disputed

issue of fact must be resolved at an evidentiary hearing. In *People v. Avila* (2006) 38 Cal.4th 491, 604, this Court said, "[A]n evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict ***that can only be resolved at such a hearing***." (*Avila*, 38 Cal.4th at p. 604, emphasis added.) The Court of Appeal recently reaffirmed this notion in *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1465, when it said, "Thus, it is within the trial court's discretion to determine whether an evidentiary hearing is necessary, even when there are conflicts in the declarations."

Mr. Gaines submits that no hearing is needed when the reviewing court does not need to resolve an apparent conflict in the evidence to rule on the issue, when the conflict presented does not involve a credibility finding, when fact-finding procedures in the trial court have been adequate to allow each side to present its position, and when there is no change in the law that would have affected the quantity or quality of evidence presented.

C. The court need not hold an evidentiary hearing when the reviewing court does not need to resolve an apparent conflict in the evidence to rule on the issue or when one party has failed to allege facts that, if proved, would allow it to prevail.

The courts have acknowledged in a variety of contexts that sometimes reviewing courts do not need to resolve conflicts in the evidence to rule on issues. These contexts include instances in which even accepting one party's factual allegations as true, the other side would necessarily prevail.

Thus, in the habeas corpus and prosecutorial misconduct arenas, courts have found that no evidentiary hearing is necessary unless the defendant has alleged facts that, if proved true, would warrant relief. In the recent case of *Packer v. Superior Court* (2013) 219 Cal.App.4th 226, the Court of Appeal found the trial court did not abuse its discretion in denying an evidentiary hearing on a motion to recuse the prosecutor under Penal Code section 1424 because the defendant had failed to allege facts which, if credited, would establish a conflict of interest so grave as to make a fair trial unlikely. (*Id.* at pp. 239-240.)

In *People v. Polk* (2010) 190 Cal.App.4th 1183, the Court of Appeal found no evidentiary hearing was necessary because the alleged juror misconduct could not have been prejudicial, even if it were believed. One juror had made comments suggesting she knew about media reports about the trial but she only discussed media reports regarding her having a romantic relationship with another juror, not about the defendant's guilt or innocence. Another juror made comments suggesting she may have discussed the defendant's pro per status with a non-juror. Because neither act, even if true, was related to the issue of the defendant's guilt, it could not have been prejudicial, and the trial court did not err in refusing to hold a hearing. (*Id.* at pp. 1202-1203.)

In *People v. Guthaus* (1962) 208 Cal.App.2d 785, the Court of Appeal found the trial court did not err in deciding a juror misconduct claim on disputed declarations and counterdeclarations where the evidence on both sides was weak and failed to name any specific jurors as engaging in misconduct.

Similarly, in the *Romero* context, the courts have held that a reviewing court need not direct a trial court to consider its discretion to strike a prior serious or violent felony when the record contains overwhelming evidence that any such ruling would constitute an abuse of discretion. (E.g., *People v. Askey* (1996) 49 Cal. App. 4th 381, 389 [defendant seeking exercise of *Romero* discretion had 13 prior felony convictions arising from seven different violent episodes, including four attempted murders and four residential burglaries); *People v. DeGuzman* (1996) 49 Cal. App. 4th 1049, 1054-1055 [defendant admitted he had extensive juvenile record beginning at age 9, and total record included robberies, burglaries, and assault with a firearm, and probation report listed seven circumstances in aggravation and none in mitigation].) Although *Romero* motions do not necessarily involve the resolution of disputed facts, these cases demonstrate that appellate courts may reject remand hearings when remanding for a hearing would be futile based on facts before the court on appeal.

Here, the prosecution failed to file any affidavits contradicting the defense claim that at least one juror who discussed the defendants' failure to testify specifically discussed tying that failure to inferences of guilt. Furthermore, the prosecution's argument against a new trial relied heavily on the factual allegation that the foreman quickly quashed the discussion. But the Court of Appeal correctly found that even if the foreman quickly quashed the discussion, that behavior could not cure the harm of having even one juror discussing the fact that the defendants' failure to testify constituted proof of guilt, particularly in the troubling factual circumstances of the evidence presented at trial.

In other words, then, the reviewing court here essentially accepted all of the allegations in the prosecution affidavits as true, and held that even if the prosecution's declarations were all credited, the prosecution failed to rebut the presumption of prejudice. No hearing was necessary.

Respondent also has failed to describe or proffer what additional admissible, material evidence it would elicit at an evidentiary hearing. "Although courts have used different terminologies to define 'materiality,' a majority of [the United States Supreme] Court has agreed, '[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' " (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57, quoting *United States v. Bagley* (1985) 473 U.S. 667, 682. See also CALCRIM 2610 [information is material if it is significant or important].)

Respondent claims it needs to present evidence of the nature and extent of the discussions in this case. But there was already admissible evidence, in the form of juror declarations, establishing the nature of the discussions – the jurors discussed the failure of the defendants to testify. There was also admissible evidence establishing that at least one juror, and perhaps more, discussed the fact that the failure to testify constituted evidence of their guilt.

Respondent also seems to assert that it would like an opportunity to demonstrate whether jurors drew an improper inference from the failure to testify. But evidence of what jurors thought about the failure to testify, as opposed to what they said about the failure to testify, is inadmissible under Evidence Code section 1150. (See also *People v. Nesler* (1997) 16 Cal.4th 561, 584 [juror testimony that extraneous information did not affect her deliberations was inadmissible].)

Because respondent has failed to proffer what additional admissible evidence it would elicit at an evidentiary hearing and because a new trial is required even if this Court accepts all of the prosecution's declarations as true,

no further evidentiary hearing is warranted.

D. No hearing necessary when reviewing court does not need to consider credibility of declarants to resolve a claim.

Appellate courts are perfectly well suited to review conflicting evidence and weigh the importance of evidence. Indeed, they do so all the time. (E.g., *In re Carpenter, supra*, 9 Cal.4th at pp. 655-656 [considering evidence from death penalty trial and juror misconduct hearing to determine whether prejudice from misconduct rebutted].) The task for which they are not suited is weighing credibility. "[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court." (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) "It stands to reason that when a de novo evidentiary hearing is necessary for the independent finding of facts or exercise of discretion – for example, when the findings depend upon the credibility of witness testimony – the remand court must conduct a de novo hearing." (*People v. Anderson* (2009) 169 Cal.App.4th 321, 332.)

Thus, if the question presented on appeal requires a credibility determination, a remand hearing would be appropriate. This case, however, does not present any credibility issues.

In *People v. Duran* (1996) 50 Cal.App.4th 103, the Court of Appeal found there was no need for an evidentiary hearing on juror misconduct

allegations when neither side claimed any declarant was lying and both sides had plenty of opportunity to make their record below. There, the defense submitted a declaration stating one of the jurors did not reveal during voir dire that she had started dating the cousin of a murder victim. The defense argued it should have been given an opportunity to question the juror further about her relationship with the cousin, but the Court of Appeal rejected this argument. It noted the defense had ample opportunity to question the juror prior to the hearing on the motion. Second, it noted, the prosecution did not contest the facts alleged but simply argued they did not constitute misconduct. Third, it said, hearings are not to be used as fishing expeditions. (*Id.* at p. 114.)

Here, the prosecution has not alleged that any of the jurors were lying. Indeed, the prosecution's brief seems to suggest it wants a hearing not for the trial court to assess the credibility of conflicting declarations but to adduce additional evidence not presented in the declarations. [E.g., OBM at 19.] Thus, because respondent is not seeking a hearing to have the lower court resolve credibility issues, a remand hearing is unnecessary.

E. The court need not remand for an evidentiary hearing unless the trial court's rulings interfered with the fact-finding process.

The three cases cited by this Court in its prior grant and remand order stand for the proposition that a remand hearing is appropriate when the prior fact-finding procedures in the trial court were deficient.

In *People v. Von Villas* (1992) 11 Cal.App.4th 175, neither juror who supposedly reported jury misconduct agreed to sign a declaration under penalty of perjury. Instead, the court accepted declarations from the defense team explaining what the jurors told them. Additionally, when the time came to possibly question the jurors about what they would or would not say, the prosecutor threatened to prosecute both of the jurors for contempt and/or perjury, and both jurors invoked their privileges against self-incrimination. Thus, neither the trial court nor the Court of Appeal had any sworn evidence directly from the jurors to consider. Furthermore, the appellate court held that if the allegations were substantiated, they would have constituted serious misconduct, since it was alleged that jurors knew about and discussed a prior robbery conviction as well as the co-defendant's separate conviction for murder.

Here, by contrast, the defense submitted declarations signed under penalty of perjury stating that three jurors heard discussions linking the defendants' failure to testify to evidence of their guilt, as well as a sworn declaration from a defense investigator impeaching later statements from two of the jurors who tried to explain portions of their defense declarations. Thus here, both the trial court and the Court of Appeal reviewed substantial, admissible evidence of misconduct. Indeed, the Attorney General has never

argued there was no misconduct. The only questions before the Court of Appeal were (a) whether the prosecution rebutted the presumption of prejudice arising from the misconduct and (b) whether the trial court incorrectly refused to consider admissible evidence in deciding whether the presumption was rebutted.

In *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1462-1471, both the prosecution and defense submitted unsworn declarations regarding the alleged misconduct and agreed to waive any defects in the declarations. There, the defense submitted one unsworn declaration from a juror stating that a juror had accessed information about the definition of reasonable doubt by using a cell phone and discussed the question of penalty in deciding whether to convict the defendant. The prosecution responded with the unsworn declaration of a district attorney investigator who recited the unsworn statements of all 12 jurors. Those additional unsworn statements raised a number of conflicts about what happened. The appellate court ultimately held that the initial allegations, if true, were serious, but that it was error for the trial court to reach the issue of juror misconduct without the sworn affidavits required by law. Again, this case is different from Mr. Gaines' case. The defense here submitted sworn, admissible declarations establishing misconduct occurred and that the prejudice was not rebutted.

Finally, in *People v. Perez* (1992) 4 Cal.App.4th 893, the trial court again conducted an even more procedurally flawed hearing. After the jury returned its verdict, defense counsel sought funding to investigate juror misconduct and proffered the justification that jurors had discussed the defendant's failure to testify. The trial court said the proffered basis for investigating juror misconduct was not proper and it would deny the funding request. Then, over defense objection, the court construed the funding request as a motion for new trial based on juror misconduct, and it stated it would assume that all 12 jurors discussed the defendant's failure to testify. Even with that assumption in mind, the trial court denied the motion for new trial without stating any reasons therefore. The trial court never reviewed any sworn declarations, either from defense counsel or from jurors.

The Court of Appeal, recognizing that the allegations were serious, remanded the matter for a hearing and reminded the trial court that it was not permitted to assume that any juror did anything improper. Again, the appellate court was faced with serious jury misconduct allegations unsupported by sworn affidavits and addressed through an entirely deficient trial court hearing and without any admissible evidence before it.

The implicit rule followed in *Perez*, *Bryant* and *Von Villas* mirrors that stated in other contexts in which judicial error has thwarted the fact-finding

process. Thus, in *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 972-973, the trial court misunderstood the law that applied to a petition to compel arbitration and "apparently abdicated its role as trier of fact," requiring a remand for fact-finding. In the *Marsden*[3] context, the most common ground for a reversal and remand is the trial court's failure to entertain a defendant's complaints about his attorney, e.g., *People v. Stewart* (1985) 171 Cal.App.3d 388, 396-397, or the trial court's abdication of its fact-finding duty by appointing counsel to investigate the claims, e.g., *People v. Eastman* (2007) 146 Cal.App.4th 688.

Here, although the trial court incorrectly excluded from its consideration relevant portions of several declarations, it understood its role as fact-finder, it understood the law of juror misconduct, and it agreed with the prosecutor that the declarations before it did not present any material disputed facts. The defect here was not in the fact-finding process but in the lower court's application of the law.

Furthermore, the trial court refused to hold a hearing at the prosecution's urging. There was no flaw in the fact-finding process that prevented the prosecution from presenting all the relevant evidence it could gather on the questions of misconduct and prejudice.

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[3] *People v. Marsden* (1970) 2 Cal.3d 118, 124.

F. The court need not remand for an evidentiary hearing unless a change in the law changes the quantity and quality of evidence necessary to decide the issue.

The fact-finding process in the trial court may be inappropriately skewed when the relevant law changes after the trial court rules and new or different facts become relevant to the ruling at hand. That was the situation presented when this Court examined the propriety of remanding a case for a new trial, rather than remanding for a new suppression hearing, in *People v. Moore* (2006) 39 Cal.4th 168. There, the trial court denied a motion to suppress under Penal Code section 1538.5 because the defendant was subject to a parole search condition. While his appeal was pending, however, this Court decided *People v. Sanders* (1993) 19 Cal.4th 743, and held that police had to know of the parole search condition for the search to be valid. The Court of Appeal reversed the conviction outright, but this Court found that remand for an evidentiary hearing was more appropriate because the trial court could not have anticipated the change in the law and had not taken evidence on the issue of whether officers knew of the parole condition. Furthermore, before *Sanders* was decided, the prosecution had not had any reason to present different or additional evidence in the trial court. (*Id.* at p. 176.)

Here, the Court of Appeal did not rely on any change in the law to rule in the defendants' favor. Thus, there was no change in the law that prevented

the prosecution from presenting all the evidence it could gather in the trial court in support of its position.

G. A party can forfeit its right to a hearing to resolve material disputed issues of fact by failing to seek a hearing in a timely manner or affirmatively opposing a hearing.

Litigants can forfeit their right to a hearing if they fail to seek or invoke that right in a timely manner. (See, e.g., *People v. Simon* (2001) 25 Cal. 4th 1082, 1086 [criminal defendant forfeits right to challenge venue by failing to timely assert an objection]; *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1224, fn. 10 [animal owner forfeits right to hearing on seizure of animals by failing to timely assert right]. See generally *In re Sheena K.* (2007) 40 Cal.4th 875, 881, fn. 1 ["forfeiture" refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege].)

"The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (*People v. Saunders* (1993) 5 Cal.4th 580, 590, internal quotations and

citations omitted; see, e.g., *People v. Scott* (1994) 9 Cal. 4th 331, 353-356; *People v. Welch* (1993) 5 Cal. 4th 228, 235; *People v. Walker* (1991) 54 Cal. 3d 1013, 1023.)

In *People v. Braxton* (2004) 34 Cal.4th 798, this Court examined the proper remedy when a trial court refuses to hear the defendant's motion for new trial. One issue presented was whether the defense had forfeited its right to a hearing by not filing a second motion for new trial under Penal Code section 1202. This Court found the defendant did not forfeit his right to hearing because he asked for a hearing.

This Court noted, however, that such a forfeiture could be found if a party failed to press for a hearing or acquiesced in the court's failure to hear the new trial motion. (*Id.* at p. 814.) This Court also stated the general rule that "a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission was probably inadvertent. [Citations.]" (*Id.* at pp. 813-814.) The Court continued, "'"[i]n the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them."' [Citations.]" (*Id.* at p. 814.)

Similarly, in *People v. Vera* (2004) 122 Cal.App.4th 970, the trial court conducted a *Marsden* hearing but failed to inquire into and evaluate each of the defendant's claims; however, the defendant failed to renew his motion when invited to do so. (*People v. Vera, supra*, at p. 981.) On appeal, the court stated, "Defendant's failure to take advantage of this offer can only be interpreted as an abandonment of his unstated complaints. [Citation.] While we are aware of no precedent finding abandonment of a *Marsden* motion, it is established that a defendant's conduct may amount to abandonment of a request to represent himself ... . [Citations.] If a defendant can abandon his request to substitute himself for counsel, a defendant can abandon his request to substitute another counsel." (*Id.* at pp. 981-982.)

Here, the prosecution did not just acquiesce in the trial court's decision not to hold a hearing – it affirmatively opposed a hearing. Furthermore, the record shows the prosecution actually had several jurors present in court who could have testified at that hearing had one been held at that time. And the prosecution continued to actively oppose a hearing throughout proceedings in the Court of Appeal until it faced a full reversal.

Thus, this Court should find that the prosecution in this case has forfeited any right to an evidentiary hearing in this case by actively opposing a hearing for years.

This Court should also find a remand hearing barred by the similar principle of judicial estoppel. Although the Court of Appeal found it unnecessary to rule on Mr. Gaines' assertion of estoppel, it found that the elements appeared to be present in this case. [Slip op. at p. 42, fn. 32.]

During the trial court hearing, the district attorney successfully persuaded the trial court to refuse an evidentiary hearing. [18 RTG 2324, 2336-2337.] The district attorney said,

> Your Honor, I think that the declarations that the defense submitted have been rebutted by the People. When asked for a – when asked specifically about their earlier declarations, they did clarify what they meant. And the declarations that have been submitted are, indeed, consistent and independently received from each of those jurors. And I think that Mr. Yturralde is correct that the law is clear, that any mention of a defendant not testifying is misconduct. However, the Court has also found that any mention that is found to be misconduct is not reversible. And in this situation, each of the declarants said that the foreperson immediately admonished that one juror, and some of them say other jurors also admonished and that was the end of the discussion. That is not the type of misconduct that should cause a new trial. And, indeed, many courts have found it would be impossible for any jury to be perfect throughout the deliberation process, which is why the courts do disfavor going in and starting a *Hedgecock* hearing when the record before the Court is sufficient to deny the motion. The People would oppose any *Hedgecock* hearing and ask the Court to deny the motion for a new trial. I believe the evidence before the Court is sufficient to do so.

[18 RTG 2324-2325.]

In its responding brief in the Court of Appeal, the Attorney General

again argued there was no material conflict in the evidence requiring an evidentiary hearing. [Respondent's Brief at 20, see slip op. at 3, fn. 3.] Indeed, the Attorney General stated that once "the court determined that appellants' juror had discussed their decision to forgo testifying, there was no other 'factual issue' to resolve." [Ibid.] It is only now, after the Attorney General is faced with a full reversal, that the prosecution wants a hearing. This Court should find this request barred by principles of judicial estoppel.

California courts consider five factors in determining whether judicial estoppel applies. In *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987, the Supreme Court held: "'The doctrine [most appropriately] applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.]" The purpose of judicial estoppel is to prevent litigants from playing fast and loose with the courts. It precludes a party from gaining an advantage by taking one position, then seeking a second advantage by taking an incompatible position. (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.)

Here, the prosecution took the position below that no hearing was necessary because there was no conflict in the evidence. Now the prosecution claims there is an irreconcilable conflict that can only be resolved at a hearing. These two positions, taken during judicial proceedings, are totally inconsistent. Furthermore, by opposing a hearing in the trial court, the prosecution delayed any possible hearing by at least two years, substantially reducing the likelihood that any hearing could be helpful or reliable.

Because the prosecution has consistently argued for years that there is no meaningful conflict in the evidence regarding juror misconduct, and because it has only requested a hearing after a court ruled against it, this Court should apply the doctrine of judicial estoppel to reject the Attorney General's request for a remand hearing.

II.

THE COURT OF APPEAL CORRECTLY DETERMINED NO FURTHER EVIDENTIARY HEARING IS NECESSARY BY EXERCISING ITS INDEPENDENT JUDGMENT TO DETERMINE THE PREJUDICE WAS NOT REBUTTED

This Court should examine the facts of this case and find that the Court of Appeal correctly determined that no further evidentiary hearing is warranted.

In examining this case and the facts before it, the Court of Appeal correctly explained that: (1) the prosecution's declarations claiming to clarify

the defense declarations failed to explain the discrepancies between them [slip op. at 20, fn. 21]; (2) because jurors here expressly linked the defendants' failure to testify to adverse inferences of guilt, the foreman's act of quashing the discussion would be unlikely to "have any curative effect on a jury that has already evinced a willingness to disregard the court's instructions" [slip op. at 37, fn. 31]; (3) the evidence in this case was so conflicted in every regard that it would be difficult for the prosecution to rebut the presumption of prejudice [slip op. at 34-38][4]; and (4) it would be unfair to order a hearing now "because the defense in this case, having 'proved *once* that the trial was unfair, [should nearly] three years later [not be] require[d] to prove it again.'" [Citations omitted.] [Slip op. at 48.]

Respondent failed to address any of these concerns or to address the actual evidence presented at trial that led the Court of Appeal to find the prosecution had failed to rebut the presumption of prejudice.

The evidence here was extremely conflicted on the question of whether Bowser was even murdered, much less whether the defendants were

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[4] Neither *Perez*, nor *Von Villas,* nor *Bryant* involved such flimsy and conflicted facts as this case involved. *Perez* involved an inmate-on-inmate assault eyewitnessed by a guard; *Von Villas* involved two police officers who were hired to kill a man and against whom the woman hiring them testified; and *Bryant* involved a distinctive-looking defendant who was arrested minutes after he stole a car at gunpoint and was identified by the victims immediately.

responsible for her death. No forensic evidence tied them to her death or her disappearance. No forensic evidence corroborated any of the prosecution's many versions of the torture, even though Bowser's body was found within hours after she supposedly was tortured and killed. The defendants' supposed motive to kill Bowser made no sense because the prosecution's witnesses claimed Tolces also was responsible for stealing the checks and he was barely touched during the alleged attack.

The forensic experts could not agree on Bowser's cause of death. Mr. Gaines' alternative theory, that Bowser may have accidentally overdosed on GHB and was dumped in the canal afterward, was considerably more plausible than the prosecution's theory, particularly given the undisputed evidence that Bowser and her friends were all drug users and Bowser was a chronic runaway, making her a vulnerable target for a "date rape" drug. Further, if Bowser had accidentally overdosed while partying with her friends, that event would have explained the friends' failure to call police about her death better than the version given at trial, in which everyone was brutally victimized by the defendants for hours before they kidnaped Bowser to kill her, but not a single person bothered to contact police about the crimes or seek treatment for their injuries.

Finally, it is important to note that the unexplained delay in identifying

Bowser's body and identifying Mr. Gaines and Mr. Lavender as the suspects hampered their ability to defend the charges, particularly their ability to put together an alibi defense. (Compare *People v. Boysen* (2007) 165 Cal.App.4th 761 [explaining how lengthy delay in prosecution prejudiced defendant's ability to offer an alibi defense]; *People v. Hartman* (1985) 170 Cal.App.3d 572, 580 [same].)

In sum, the fact that the defendants were convicted based on such flimsy and contradictory evidence raises a distinct possibility that at least one juror took their failure to testify into consideration as substantive evidence of guilt. The admissible evidence presented at the motion for new trial confirms this. And the Attorney General's explanations of what it wants to show during an evidentiary hearing – whether jurors actually considered the failure to testify as evidence of guilt – is inadmissible under Evidence Code section 1150 and therefore not a legitimate basis for rebutting the presumption of prejudice.

As the Court of Appeal concluded,

> We conclude that, because the evidentiary landscape here was devoid of forensic certainties and therefore turned entirely on close and substantial credibility assessments of the veracity of prosecution witnesses whose testimony was at best in disarray, and a "defendant is entitled to have all 12 jurors make this [credibility] evaluation without considering whether the defendant took the stand to deny the accusations [and] [t]he defendant's silence should not be a factor adding to any inferences that the victim is telling the truth" (*Cissna, supra*, 182 Cal.App.4th at p. 1121), the presumption of prejudice from

the misconduct has not been rebutted.

[Slip op. at p. 38.]

This Court should affirm the Court of Appeal's order for a new trial.

III.

THIS COURT SHOULD REJECT RESPONDENT'S QUEST TO OBTAIN A DIFFERENT RESULT

Finally, it bears repeating that respondent has sought review and a remand in this case only to try to obtain a different result and not to answer an important question of law. First, and most importantly, it is obvious that respondent's quest for an evidentiary hearing is an afterthought because it actively opposed an evidentiary hearing until after it received the Court of Appeal's first opinion reversing the matter for a new trial.

Second, respondent fails to acknowledge that the determination of whether the prosecution rebutted the presumption of prejudice from the conceded misconduct requires an examination of the entire record of the trial, not just juror declarations and testimony.

Third, respondent fails to provide this Court with a proffer of the facts it would attempt to prove at a remand hearing.

Fourth, respondent fails to acknowledge that the presence of even one biased juror on the panel – a fact that respondent did not rebut in the trial court – requires a new trial for the defendants.

Fifth, respondent fails to acknowledge that the trial prosecutor actually invited the misconduct committed in this case by commenting on the defendants' failure to testify during closing argument. [Slip op. at 30, fn. 27.] She stated during rebuttal, "[w]ell, guess what, if they had an alibi, there's nothing stopping them from presenting it." [Ibid.]

In sum, respondent seeks reversal in this Court to try to obtain a different result, not because the opinion below broke new ground or created a conflict among the Courts of Appeal. This Court should affirm the judgment of the Court of Appeal and remand the matter for a new trial.

IV.

THIS COURT SHOULD REJECT ANY NEW ISSUES RAISED BY THE ATTORNEY GENERAL

In its brief on the merits, respondent discusses the case of *Krouse v. Graham* (1977) 19 Cal.3d 59, and seems to suggest that the affidavits filed in Mr. Gaines' case were so ambiguous that it is not even clear that jurors engaged in misconduct. [Opening Brief on the Merits "OBM" at 15-17.] Respondent states, "It is equally unclear whether the statements as set forth in the defense declarations constitute 'overt acts,' which are 'objectively ascertainable' and thus admissible as evidence of an explicit agreement by the jurors to disregard their instructions, or whether they merely verbalize the jurors' subjective mental processes, and thus are not to be considered by the

trial court in ruling on appellants' new trial motion." [OBM 16.]

This Court should reject this argument as beyond the scope of the question presented, as forfeited because it has never been raised before, and as barred because respondent has previously conceded the record established misconduct.

To the extent respondent is arguing that any of the juror statements actually considered by the trial court are not "overt acts" rather than evidence of the jurors' subjective mental processes, it forfeited that argument by failing to make it in the Court of Appeal. To the extent respondent is arguing the Court of Appeal incorrectly found additional statement to be admissible as overt acts rather than inadmissible evidence of juror thought processes, see slip opinion at pp. 29-31, it also has forfeited that issue because it never petitioned this Court to review that ruling.

V.

MR. GAINES JOINS THE ARGUMENTS OF MR. LAVENDER

Pursuant to California Rules of Court, Rule 8.200(a)(5), Mr. Gaines joins the arguments made by Mr. Lavender in his brief on the merits, filed in this Court on September 25, 2013.

CONCLUSION

For the reasons set forth herein, in Mr. Lavender's brief, and most especially in the well-reasoned opinion by the Court of Appeal, Mr. Gaines asks that this Court find that this case does not warrant a remand for an evidentiary hearing on the juror misconduct claim.

Respectfully submitted,

Dated: October 9, 2013 By:_____

REBECCA P. JONES
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Attorney for Defendant-Appellant
MICHAEL GAINES

CERTIFICATE OF COMPLIANCE

I, Rebecca P. Jones, counsel for Michael Gaines, certify pursuant to the California Rules of Court that the word count for this document is 9,126 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360. This document was prepared in Word Perfect and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Diego, California, on October 8, 2013.

Respectfully submitted,

Dated: October 9, 2013

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MICHAEL GAINES

People v. LAVENDER AND GAINES
Case No. S209975

PROOF OF SERVICE
C.C.P. 1013a, 2015.5

I declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States and employed in the City and County of San Diego. I am over the age of eighteen (18) years and not a party to the within above-entitled action; my business address is 3549 Camino del Rio South, Suite D, San Diego, California 92108; on this date I mailed APPELLANT GAINES' ANSWER BRIEF ON THE MERITS addressed as follows:

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The above copies were deposited in the United States mail, first class postage prepaid, at San Diego, California. I declare under penalty of perjury that the foregoing is true and correct. Executed October 9, 2013, at San Diego, California.

REBECCA P. JONES