IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent
vs.
KARL HOLMES, HERBERT McCLAIN
and LORENZO NEWBORN
Defendant and Appellant

AUTOMATIC APPEAL
Supreme Court
No. S058734

Los Angeles County
Court No. BA092268

/

APPELLANT KARL HOLMES' REPLY BRIEF

Appeal from the Judgment of the Superior Court of Los Angeles County

Ho. J.D. Smith, Judge Presiding

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INTRODUCTION

Appellant's capital jury trial and subsequent penalty phase were fatally infected with constitutional error which requires reversal by this Court. As argued in Appellant Holmes's Opening Brief and below, the trial court's failure to sever appellant from his codefendants deprived appellant Holmes of his Sixth and Fourteenth Amendment rights to counsel, to due process and a fair trial. The trial court admitted evidence that was legally inadmissible and the prosecutor seized on that evidence and committed misconduct in argument. Ultimately, the evidence against appellant was insufficient to support the convictions.

Appellant's penalty phase was littered with inadmissible evidence and prosecutorial misconduct. Again, the trial court erroneously denied severance from appellant's codefendants and then denied appellant's right to present evidence and argue lingering doubt. These errors and the prosecutor's misconduct resulted in the denial of appellant's rights to due process and to a fair and reliable sentencing determination by an impartial jury, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and 17 of the California Constitution. Reversal is required.

ARGUMENT [1]

I. THE TRIAL COURT'S FAILURE TO SEVER APPELLANT FROM CODEFENDANTS NEWBORN AND MCCLAIN DEPRIVED HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

As respondent recognizes, in the trial court, appellants made a number of motions to sever their guilt trials and each argues the trial court's error in denying those motions on appeal. (AHOB 77-118; AMOB 237-248; ANOB

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[1] For ease of reference, appellant Holmes responds to the arguments of respondent in the order and under the numeral employed in respondent's brief. Where an argument of respondent addresses an argument of one or both of appellant Holmes's co-appellant's only, that is noted under the applicable heading. (See Respondent's Arguments II, XVI, XVII. XIX, XXVII, XXVIII, XXIX, XXX, XXXI, and XXXII.)

194.) Respondent addresses each appellant's arguments in one omnibus response (RB 90-122), and concludes "the trial court properly denied the defense motions for severance from codefendants and properly admitted the statements [of codefendants]." (RB 90.)

Appellant Holmes disagrees, and replies to those portions of the Response which address his argument that the trial court's failure to sever appellant from his codefendants deprived appellant Holmes of his Sixth and Fourteenth Amendment rights to counsel, to due process and a fair trial. As should be evident, appellant Holmes' interests, and the basis for his contentions that his trial should have been severed, are substantially different from those offered by his codefendants.

A. Trial With Newborn

Appellant Holmes argued in his opening brief that the introduction of DeSean Holmes' testimony requires reversal on three bases: (1) codefendant Newborn's admission to DeSean Holmes that he and Bowen participated in a shooting at McFee's was redacted in a misleading fashion that gave the impression that appellant Holmes was present at that shooting; (2) DeSean's testimony that appellant's counsel (Nishi) attempted to dissuade him from testifying implied appellant's guilt and Nishi's belief therein, as well as suggesting that appellant's counsel committed misconduct of an egregious

nature; and (3) DeSean Holmes' testimony and admitted written agreement that DeSean agreed to implicate only codefendant Newborn revealed his desire not to implicate appellant Holmes, creating the impression that he sought to protect appellant or, to the contrary, coupled with the threats he testified to, that he was fearful appellant Holmes would retaliate against him. Respondent disagrees with each of appellant Holmes' claim of error.

(1) Newborn's Admission of Being a Shooter at McFee's

Respondent contends DeSean's testimony that Newborn said he was a shooter at McFee's house and that "there were other people there" was acceptable under the confrontation clause. (RB at 108.) However, the shooting at McFee's house was alleged to have occurred only an hour before the capital murders and McFee's house was in close proximity to those murders. (17 RT 1542; 23 RT 2405-2406, 2411.) Most telling, APPELLANT HOLMES WAS CHARGED WITH CONSPIRACY AND THE ONLY OVERT ACT THE JURY FOUND TO BE TRUE as to appellant Holmes was that "at Pasadena Avenue and Blake Street (McFee's) on October 31, 1993, at about 9:00 p.m., Lorenzo Newborn, Solomon Bowen and unnamed co-conspirators fired numerous rounds from a 9 mm gun at or near the residence of an individual believed to be a Crip." (CT 1611-1621, 1696-1702.) Clearly, the jury believed appellant Holmes was

one of the "unnamed co-conspirators" and that Newborn's admission to DeSean implicated appellant Holmes in the conspiracy, the shooting at McFee's – and by extension the capital murders.

(2) DeSean's Testimony re: Contact with Holmes's Trial Counsel Nishi

In his opening brief, appellant Holmes argued numerous grounds why the trial court should have severed appellant's case from defendant Newborn based on the expected testimony of Desean Holmes's "conversations with Holmes's attorney Nishi." (AHOB at pp. 103-111.) Respondent's only response is that joinder with Newborn and the introduction of DeSean's testimony did not result in "gross unfairness" to appellant Holmes. (RB 114.) Appellant Holmes disagrees.

Before DeSean testified, trial counsel for appellant Holmes, Thomas Nishi, advised the trial court that certain difficulties would arise which required severance. Specifically, Nishi informed the court that DeSean was expected to testify that he had more than one conversation with Nishi, in which he would contend that Nishi, at the very least, suggested he did not have to testify, and that DeSean Holmes might testify that Nishi went so far as to attempt to dissuade his testimony. (17 RT 1521-1522.)

The trial court's response was simply to caution DeSean to be careful to answer only the questions he was asked. (17 RT 1534.)

DeSean testified that Newborn told him about a burglary and that the shooting Newborn committed with severed codefendant Bowen and "some other people that he socialized with" was at the home of William McFee. DeSean testified Newborn told him about his participation in Halloween crimes, DeSean also testified extensively that he was afraid to testify because of threats made against him and his family. (17 RT 1540-1573.) [2]

On cross-examination, at the prompting of Newborn's counsel, DeSean testified that Nishi told him to "do like Furman and take the Fifth" and that DeSean "had the right not to say anything" and "to do what Furman did in the OJ trial." (17 RT 1588-1589.) Also, at Newborn's counsel's prompting, DeSean repeated again that Nishi advised him not to testify. (17 RT 1590-1591.) On redirect, the prosecutor elicited Nishi had advised DeSean that he had a right "just like Furman not to testify, to take the Fifth." DeSean added that Nishi said he would get in contact with his lawyer and try to get him out of custody. These conversations took place over two days. (17 RT 1668-1669.)

On cross-examination, appellant's trial counsel Nishi attempted to persuade DeSean that it was Newborn's counsel, Jones, rather than Nishi, who told him not to testify; that line of questioning failed. (17 RT 1660-

[2] See Argument XII. below.

1661, 1665-1667.) In other words, Nishi did nothing to nothing to dissuade the jury that the conversations DeSean testified to did not exist, but rather sought to place the blame on Jones...who likely would not have raised the issue if it was he who engaged in the alleged illegal witness tampering.

As recognized by counsel, both before and after De Sean Holmes testified, DeSean's testimony put Nishi in a position of conflict of interest; not only was he disparaged and accused of gross professional misconduct, but he could not counter the testimony without testifying himself (17 RT 1521-1552), – which is also a conflict. Thus, the court's denial of severance inflicted huge damage on appellant Holmes's right to counsel, and the court had an obligation to avoid that.

Respondent would ask this Court to find that the error in denying severance which would have prevented this testimony from DeSean Holmes – which obviously implied that Nishi was attempting to manipulate the justice system and likely did so because of Nishi's belief of or knowledge of the guilt of his client – was cured by a stipulation. (RB 114-115.) No so. The stipulation only served to confirm that there were in fact discussions between Nishi and DeSean; that the issue of DeSean's custody status was discussed, and that based on DeSean's request, Nishi contacted DeSean's attorney in order to convey his wishes. (42 RT 4318-4319.) That Nishi

denied encouraging DeSean not to testify was of little value given the confirmation that some discussions did in fact take place, the detailed description by DeSean of "Furman" "OJ" and taking the "Fifth" (in fact, in the presence of the jury DeSean attempted to "take the Fifth" -- TWICE [18 RT 1733, 1735]), and confirmation that Nishi discussed DeSean's custody status with DeSean's attorney. Moreover, contrary to respondent's assertion that the trial court "made clear that Nishi was a 'great lawyer' and would not have encouraged DeSean Holmes not to testify" (RB 115), the record only reflects that during an *in camera* hearing the trial court said that he thought he had told this to the jury. (41 RT 4262.) However, the record does not contain any such comment from the trial court to the jury that Nishi would not have encouraged DeSean Holmes not to testify.

Appellant Holmes's Sixth Amendment right to counsel was seriously impacted by the court's failure to sever his case from his codefendants' cases. Nishi had been accused of criminal acts in open court, and could not contest them factually without testifying himself. His client – and his ability to represent him adequately – were tarred by these allegations. The court created the conflict by its failure to sever.

Predictably, the prosecutor capitalized on the opportunity to malign Nishi, and did so in a manner which vouched for the credibility of DeSean,

first by calling Nishi a liar, and then retracting a bit only to submit that perhaps DeSean may have "misunderstood" Nishi's intentions. (44 RT 4675-4676.)

(3) DeSean's Agreement

When trial counsel Nishi advised the trial court that DeSean was expected to testify in such a manner as to give the jury the impression that Nishi had attempted to dissuade DeSean from testifying, he also advised the court that severance should be granted because as part of DeSean's agreement with the prosecution, it was agreed, in writing, he would not testify against his cousin – appellant Holmes. Newborn's counsel Carl Jones indicated that he intended to ask questions about appellant Holmes and the plea agreement. (17 RT 1521-1522.) Again, the trial court's response was simply to caution DeSean to be careful to answer only the questions he was asked. (17 RT 1534.)

Ultimately, the jury was presented with a copy of the written agreement in an unredacted form. The document contained DeSean's statement "I will not testify against my cousin, Karl Holmes" and "by my initial here I make no representation whether or not I have information concerning Karl Holmes." (People's Exh.C; 41 RT 4256, 4258.)

Respondent claims that based on the agreement "the more reasonable

inference" for the jury to have drawn was that DeSean had no information against appellant Holmes. (RB 116.) However, if severance had been granted, the document would have no probative value and would not have been presented to the jury at all. Instead, in a joint trial with Newborn, the document was admitted and jury was free to draw the more likely inference that, coupled with testimony of threats made to DeSean and his family, DeSean was loyal to appellant Holmes and therefore refused to reveal information he had which implicated appellant Holmes, or that he was fearful for the safety of himself and his family and for that reason refused to reveal information which implicated Holmes.

Further, respondent refuses to acknowledge that the prosecutor argued that the plea agreement documented DeSean's fear, the "pressures...were placed upon [him]" and that his testimony was credible and corroborated. (41 RT 4259, 42 RT 4430-4431.) The prosecutor went so far use Newborn's statements to DeSean to implicate appellant Holmes and to remove Ernest Holly as a shooter at McFee's – implying once more appellant's Holmes' participation – which DeSean would not or could not discuss. (See 43 RT 4454, 44 RT 4659-4660.)

B. Trial with McClain

Appellant Holmes argued his joint trial with McClain resulted in such

gross unfairness as to deprive him of a fair trial and due process of law, and that the prosecutor committed misconduct by eliciting testimony highlighting and then commented on, the failure of appellant Holmes to testify. (AHOB at pp. 115-118.) Respondent contends that "when viewed in context" the prosecutor's questions to McClain "could not be interpreted as a direct or indirect reference to appellant Holmes's... failure to take the stand..." (RB at p. 120.) Viewed in context, the dialogue between the prosecutor and McClain must have left the jurors with the impression that appellant Holmes' failure to testify implied his guilt – which of course the prosecutor forcefully argued to the jury.

> Myers: Oh, by the way, Mr. McClain, if you didn't kill the kids, you would get up there and admit it, wouldn't you?
> McClain: I wouldn't get up here.
>
> Q: If you did kill the kids, if you were on the stand right now - --
>
> Harris: Objection: asked and answered.
>
> McClain: I am saying my homeboys got to do what their lawyers tell them for their best interest. I'm saying that I – my personal feeling is that I feel you all are going to try to railroad me anyway, so fuck with that your lawyer is talking about. I'm going to get up here and let everybody know what time it is. (37 RT 4054.)

Clearly, the prosecutor's comments on McClain's decision to testify highlighted the fact that appellant Holmes had chosen not to. The reasons for his refusal were left to be explained by a belligerent, hostile and unruly

codefendant.

C. The Errors Requires Reversal

Respondent asserts that any error in failing to sever appellant Holmes's trial from McClain and Newborn was harmless. (RB at pp. 109-110.) Again, appellant disagrees. In the instant case, the prosecutor took advantage of the evidence against Newborn and McClain – which would not otherwise be relevant or admissible in a trial of appellant Holmes alone -- and argued it applied to appellant Holmes. For example, he persuaded the jury to apply group think. His theory that since P-9 members had planned to retaliate for the death of Fernando Hodges and appellant was a P-9 – as were his codefendants – all actions of each was part of conspiracy to which appellant belonged and which ultimately culminated with the death of three innocent boys.

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II. APPLICABLE TO APPELLANT MCCLAIN

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III. APPELLANT WAS DEPRIVED OF DUE PROCESS, EQUAL PROTECTION, AND A REPRESENTATIVE JURY BY THE TRIAL COURT'S ERROR IN REFUSING TO REMEDY THE PROSECUTOR'S IMPROPER EXERCISE OF PEREMPTORY CHALLENGES [3]

[3] On this issue, appellant Holmes joined Appellant Newborn's AOB argument. As appellant Holmes's anticipates filing his Reply before appellant Newborn, appellant Holmes's Reply briefing on this issue has been taken in large part from Appellant Newborn's Reply – whose arguments, as

Respondent asserts that the prosecution "properly exercised it peremptory challenges" in exercising those challenges against six African American women. (RB at p. 129.) Appellant Holmes disagrees.

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

1. The statistical facts.

The defense made a *Batson-Wheeler* motion immediately after the prosecutor Juror #94, who was the sixth Black female the prosecution had struck, and who was the prosecutor's 12th peremptory strike overall. (See RT 907-908.) 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 totaling a 67 percent strike rate.[4] The record reflects that the defense had not struck any Black female jurors. 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 Newborn's Opening Brief, p. 4.) As argued in the Opening Brief, that strike rate by itself satisfies the standard of

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well as appellant McClain's arguments as applicable to Holmes, he joins.

[4] 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.

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." *Johnson v. California, supra,* 545 U.S. at 168.

In responses to appellants' assertion that the strike ratio is 67 percent (or six out of nine prospective jurors), respondent contends "[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), and the prosecutor had struck six of them (#9, #37, #48, #53, #88, and #94), a 67 percent strike rate.

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 ANOB, p. 4.) However, the "strike rate" consists of a numerator denoting the number of actual strikes made by a party against 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 is therefore not includable in the strike rate denominator.

The District Attorney's final strike 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. Thus, the prosecutor ultimately struck eight out of 12 Black female jurors, the same 67 percent ratio as was extant at the time of the *Batson-Wheeler* motion.

Respondent cites *People v. Bell* (2007) 40 Cal.4th 582, 597-598, for its contention 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.) That comparison is closely related to the measure of discrimination generally referred to as the "exclusion rate."[5] Respondent

[5] The "exclusion rate" is "calculated by comparing the percentage of

correctly notes that the prosecutor had used 50 percent of its peremptory challenges against Black females at the time of the *Batson-Wheeler* motion, but 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.*) Black female jurors who had been called to the jury box and were thus "subject to peremptory challenges [by] the prosecution" numbered nine, not 10. The relevant number of jurors for this calculation consists 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 #96. Correctly calculated, Black female jurors comprised nine of 34 prospective jurors, or 26 percent, of the pool of jurors subject to peremptory challenge. Using these numbers, the exclusion rate is correctly calculated as 50 percent divided by 26 percent. That yields a figure of 1.9, which means that the prosecutor was striking Black females at virtually twice the rate as represented in the venire, clearly indicating that he was trying to minimize their representation on the jury.

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exercised challenges used against Black potential jurors with the percentage of Black potential jurors known to be in the venire."(*Abu-Jamal, supra.*) This definition differs slightly from the formula in *Bell.*

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," (RB 134, citing *People v. Bonilla* (2007) 41 Cal.4th 313, 345.) 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 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 flaw is that the prosecutor's high strike rate and high exclusion rate directly resulted in fewer Black females being seated on the jury. 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, indicating purposeful discrimination.

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, that is a matter of luck. At that point, neither party can use peremptory strikes for the discriminatory purpose of negating an unlucky draw of 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 evidence 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." (*People v. Turner, supra*, 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. (See, e.g., *Price v. Cain* (5th Cir. 2009) 560 F.3d 284 (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".)

2. 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." (*People v. Bell, supra*, 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.

a. Juror #37.

As noted at ANOB 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.)

b. 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 ANOB 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.)

c. Juror #48.

As set forth in detail at ANOB 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.)

d. 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 ANOB 114; II CTS-I 3151.) Nothing in her questionnaire or voir dire casts doubt on her status as a responsible member of the community.

e. 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 ANOB 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.)

f. 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. (ANOB 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.

3. Respondent's untenable imputation of hypothetically undesirable attitudes to the struck jurors.

Respondent ignores the fundamental characteristics of the struck jurors, and instead has plucked from the records various responses that in respondent's view could conceivably have provided a race-neutral reason for the prosecution's peremptory strikes. 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 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 "methodology" in *People v. Carasi* (2008) 44 Cal.4th 1263, 1295, fn. 17, but as will be demonstrated, it is a flawed methodology because most of the hypothetical reasons identified by respondent as a possible race-neutral reason for a prosecutorial strike applies equally or more forcefully to other jurors that the prosecutor permitted to sit.

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

> 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 c. Agree Somewhat
> b. Disagree 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 c. Agree Somewhat
> b. Disagree Somewhat d. Strongly Disagree

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 (RB 137, 139-140; 11 CTS-I 3150-1.)

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. It cannot be the law that a prosecutor's peremptory challenge can be isolated 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 cherry pick responses from the struck jurors and offer them as hypothetical reasons the prosecutor might strike the jurors self-destructs under scrutiny. Of the seated jurors whom the prosecutor did not strike, the majority also disagreed with those statements. Five seated jurors "strongly disagreed" with one or both statements in questions 151 and 152 – Juror #29 (CTS-I 3969-70); Juror #30 (CTS-I 4010); Juror #63 (CTS-I 5363); Juror #104 (CTS-I 7045); and Juror #105 (CTS-I 7085-6). Three other jurors disagreed somewhat with one or both statements – Juror #34 (CTS-I 4174-5); Juror #124 (CTS-I 7699-7700); and Juror #133 (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. Dretko* (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; the spouse of Juror #79 had been prosecuted and convicted driving under the influence on more than one occasion; and Juror #133 answered affirmatively, although he was unaware of the specifics.

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. Of the seated jurors, Juror #29 moderately disagreed with that statement (CTS-I 3961); Juror #30 moderately disagreed with that statement (CTS-I 4002); Juror #34 strongly disagreed with that statement, as did struck Juror #37 (CTS-I 4166); seated Juror #63 moderately disagreed with that statement (CTS-I 5355); seated Juror #79 strongly disagreed with that statement (CTS-I 6011; Juror #98 moderately disagreed with that statement (CTS-I 6790); Juror #105 moderately disagreed with that statement (CTS-I 7077); Juror #24 moderately disagreed with that statement (CTS-I 124*; and Juror #133 moderately disagreed with that statement (CTS-I 8060). Again, the majority of the sitting jurors responded similarly on the particular characteristics 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 vehicle to maintain safety," (Q. 141, CTS 14951), 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?" (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 RT 727.)

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 Juror #29 manifested substantially more discomfort with jury service in general and the capital punishment issue specifically. He answered question 63 regarding his feelings about prior jury service as "not my favorite thing to do, but worthwhile." (CTS-I 3948.) He moderately

disagreed with the statement that "The rights of the accused are too well protected." (CTS-I 3961.) Regarding his feelings about the death penalty generally, in answer to question 141, he stated "[i]n general, I am in favor of the death penalty for certain heinous crimes." (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 assessment of his 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." (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." (CTS-I 3972.) 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. (RT 638.) Juror #29 was at least as "lukewarm," if not more so, than struck 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.) In fact, 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 converse proposition that she would necessarily not impose the death penalty if there was evidence the defendant had problems growing up.

Regarding Juror #88, respondent refers to the criminal convictions incurred by the father of one of Juror #88's children and 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. Juror #63 also reported sitting on a criminal jury in which no verdict was reached (CTS-I 5941.) Seated Juror #124 also sat on prior criminal cases and did not reach a verdict in one of them. (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, she was a very stable Los Angeles resident, a mother of two, and an 11-year employee of the United States Postal Service. (25 CTS-I 6600.)

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. Juror #94 answered question 146 affirmatively that California should have the death penalty. (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, 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, Juror #94 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 representative of those of the seated jurors. That combination of factors compels the conclusion that appellants established a prima facie case under *Johnson v. California, supra.*

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. (*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. Appellant is, therefore, entitled to reversal of his convictions.

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IV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A REPRESENTATIVE JURY BY THE ERRONEOUS EXCUSAL OF JUROR NO. 126 FOR CAUSE

The state contends that the trial court properly dismissed juror number 126. (RB at p. 144.) Respondent reasons that the record supports the trial's excusal for cause and that the trial court did not err in prohibiting trial counsel an opportunity to voir dire the juror. (RB at p. 149.) Respondent is wrong.

As this Court noted in *People v. Cash* (2002) 28 Cal.4th 703,

> "Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) 'The real question is " ' "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*" ' " ' [Citations.] Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*Cash, supra*, 28 Cal.4th at pp. 719-720.)

In the instant case, the dialogue between Juror no. 126 and the trial court does not establish that the juror held such views on the death penalty

which would *prevent or substantially impair* her performance in this case. The juror responded that generally she was for the death penalty, or at most, was ambivalent. (28 CTS-I 7779.) Her response that she had "never really thought about it" demonstrated that she held no firm beliefs whatsoever. (28 CTS-I 7779.) In the following passage -- a most thoughtful response -- she shared that she would be for imposition in some cases and against in others:

> I'm not really sure how I feel about the death penalty. I guess it would be ambivalence on one hand. On one hand I believe in time and with help people can change their way of life, how they see and do things. On the other, maybe there are some people who will never change, who have no conscious [sic], remorse, or other feelings of guilt. (28 CTS-I 7787.)

In its oral questioning of the juror, the trial court asked the juror to explain her use of the term "ambivalent." Before the juror could complete her answer, the trial court pre-instructed her on the "awesome" responsibility in imposing death effectively steered the juror to acknowledge the "awesome responsibility" of imposing the death penalty so that she concluded she was uncertain if she could so vote. (13 RT 945-949.) Although he asked the follow-up question of whether the juror could articulate any circumstances when she could give the death penalty, the trial court did not permit the juror to answer. Thereafter he abruptly announced he would not "push" the juror; would not permit the lawyers to "push the juror and recessed to chambers with defense counsel. (*Ibid.*)

In chambers the trial court made clear his conclusion that, Juror 126 was a potential juror with "pretty good credentials." The court appeared to give defense counsel the opportunity to "make a record" in chambers and place on the record the question counsel might like to ask, but suddenly concluded about the juror "I can feel her heart" and that no matter what questions were asked or how she would answer his conclusion was that "in effect...she really couldn't do it [impose death]." (*Ibid.*) The matter was then submitted.

The trial court's refusal to permit defense counsel to question Juror no. 126 was error. In *Cash*, this Court found error in the trial court's refusal of the defense's proposed voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder. This Court reasoned:

> "Because in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred." (*People v. Cash*, *supra*, 28 Cal. 4th at p. 721.)

Here, the trial court concluded the thoughtful and honest comments of a potential juror who obviously realized in responsibility of the task she

could face somehow translated into an inability to perform the task at hand. However, as stated by appellant Newborn in his opening brief "the juror's understandable feelings of ambivalence and discomfort are simply no disqualifying attitudes." (ANOB at p. 129.) Moreover, having "seen into her heart" and gallantly stepped up to protect the juror from the "pushing" of defense counsel, the trial court was not inclined backtrack to permit defense counsel to question the jury to determine whether she truly "lacked impartiality." (see generally *Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

Because the trial court erroneously excused a juror who should have been permitted to sit, reversal is required. (*In re Anders*on (1968) 69 Cal.2d 613, 619-620; *People v. Heard* (2003) 31 Cal.4th 946, 966.)

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V. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT HOLMES' CONVICTIONS FOR CONSPIRACY, FIRST DEGREE MURDER, ATTEMPTED MURDER, AND THE GUN USE ALLEGATION

In his opening brief, appellant Holmes argued there was insufficient evidence to support the convictions for conspiracy, first degree murder, attempted murder, and a true finding for the gun use allegation. (AHOB at pp. 176-195.) Respondent asserts that sufficient evidence supported the convictions. (RB at p. 150.)

A. The Crime of Conspiracy

As argued in appellant's opening brief, under California law, "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement ...." (Pen. Code, § 184; see also Pen. Code, § 182, subd. (b).) Thus,

> "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy.'" (*People v. Russo* (2001) 25 Cal.4th 1124, 1131, citing *People v. Morante* (1999) 20 Cal.4th 403, 416.)

In the instant case, both evidence sufficient to establish appellant entered into an agreement to kill the victims and evidence establishing a necessary overt act are legally lacking.

As argued in his opening brief, there was NO evidence of appellant's "agreement" to commit the crimes of murder or attempted murder. Viewing the evidence in the light most favorable to the prosecution – which consists entirely of the later recanted grand jury testimony of LaChandra Carr -- Holmes was present with 20-30 others at Huntington Hospital, where Fernando Hodges was brought and eventually died. (15 RT 1194-1195.) There was no evidence – direct or circumstantial – which tied appellant to any conversation with any person at the hospital – let alone any agreement to

commit murder.

Also as argued in appellant Holmes's opening brief, any evidence that appellant was associated with a criminal street gang does not rise to the level of proof of his entering an agreement to commit murder. (AHOB at pp. 182-183; see *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1247.)

Attempting to distinguish the instant case from *Garcia*, respondent cites a litany of facts culminating with the shootings at Wilson Street and at McFee's home which could have led a rational tried of fact to find that "appellants agreed and had the specific intent to commit murder, specifically that appellants agreed and intended to murder a Crip and that they and co-conspirators had committed the overt act of firing at and near McFee's home in furtherance of the conspiracy." (RB at pp. 154-157.)

The fault in respondent's logic, when applied to appellant Holmes, is obvious. As the only evidence against Holmes was his alleged presence at the hospital, in order to demonstrate sufficient evidence against appellant Holmes, of either an agreement or the element of an overt act, respondent must rely on the evidence against co appellant's Newborn and McClain and severed defendants Bailey and Bowen. (RB at pp. 154-158.) This evidence would not have been admitted against appellant Holmes, had his trial been severed from those of codefendants Newborn and McClain. (See, Argument

I of this brief and AHOB, incorporated herein by reference.)

Respondent acknowledges that there is no evidence that appellant Holmes spoke with appellants Newborn, McClain, Bailey or Bowen at the hospital. Moreover, respondent does not dispute appellant Holmes's contention that (1) there was no testimony appellant left his car; (2) there was no testimony that at the hospital appellant was wearing clothing associated with perpetrators such as a trench coat, a hooded sweatshirt or a Halloween costume; (3) appellant was not implicated in the McFee shooting; and that (4) none of the witnesses who testified to the circumstances at Huntington Hospital indicated that appellant acted suspiciously and none gave testimony which could even circumstantially support the theory that after he left the hospital he went on to commit the charged crimes. (See RB at pp. 157-158; AHOB at pp. 184-185.) Nevertheless, respondent reasons that Carr "did testify before the grand jury that there was a discussion at the hospital that the Crips shot Hodges and they discussed retaliation." (RB at p. 158.) Under this analysis, appellant submits that any of the 20 to 30 other individuals present at the hospital, but not charged with any offense herein, is equally guilty as appellant Holmes of conspiracy. Such non-evidence of criminal acts is plainly insufficient for conviction, and violates the most basic constitutional protections. In the context of a capital case, permitting a

capital sentence to rest in part on some vague and unproven association with perpetrators offends the protection against cruel and unusual punishment, as well as offending due process. For that reason the conviction for conspiracy must be reversed.

B. The Crimes of Murder and Attempted Murder

In its unavailing effort to demonstrate sufficient evidence, respondent points to the testimony of a "jailhouse" informant and the conflicting, improbable, and unbelievable "eyewitness" testimony of Gabriel Pina. (RB at pp. 160-163.)

However, as argued in various arguments of appellant's Holmes's opening brief, (See AHOB at pp. 75 [Prosecutorial Misconduct at Guilt Argument], 119-131 [Unlawful Treatment of and Admission of Statements of LaChandra Carr], 133-148 [Convictions Based on Gang Membership and Guilt by Association] and 150-174 [Failure to Suppress Pina's Unreliable Testimony], the admission of prejudicial gang association evidence, guilt by association evidence, and the scare tactics and misconduct employed by the prosecution unlawfully contributed to the verdict against appellant. On the properly admitted evidence, even when viewed in the light most favorable to the prosecution, there is insufficient evidence to support these convictions.

C. The Gun Use Allegation

Appellant Holmes argued that the truth of the gun use allegation rested entirely on the last minute testimony of Lillian Gonzales, and appellant's alleged comment to jailhouse informant Derrick Tate. (AHOB at pp. 193-195.) Respondent would like to vouch for the veracity and probative weight of Tate's testimony, but, at most can only assert that Tate's testimony was not *inherently unreliable*. (RB at p. 164.) Similarly, respondent can not ignore the inherent unreliability of Gonzales's last minute description – which was is direct conflict with testimony over the course of two trials and numerous police interviews -- of appellant Holmes in possession of a gun. (RB at pp. 164-165.)

In this instance, the most respondent can assert is that it was "solely for the jury to determine the credibility of Gonzales's statement." (RB at p. 165.) However, if jury verdicts were unassailable, there would never be a reversal of a conviction for insufficient evidence. Thankfully, they are not. Factually, Gonzales's testimony was inherently unreliable. Gonzales failed on every previous occasion –except during an interview with prosecutor a month before her testimony -- to mention she had seen the man (allegedly appellant Holmes) in the trench coat with a gun. Gonzales could give no salient details regarding the gun. Gonzales's vision was 20/400, extremely nearsighted, she could not see anyone clearly, and she was not wearing

glasses. (22 RT 2231, 2233-2234, 2242, 2265.)

The error in permitting this alleged, late-breaking, and unreliable identification of appellant Holmes with a gun was particularly egregious and damaging in the context of this case. This case was fraught with prosecutorial misconduct and scare tactics. Three children were murdered, and three more nearly so. Gang evidence permeated every aspect of the case. Because the trial court erroneously refused to sever his trial, appellant Holmes was saddled with the outrageous and prejudicial behavior and testimony of his codefendants. (See AHOB at pp. 76-118 [Trial with Newborn and/or McClain Should Result in Reversal].)

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VI. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL AND HIS RIGHT TO CONFRONTATION IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY THE TRIAL COURT'S RESTRICTIONS ON CROSS EXAMINATION OF DESEAN HOLMES [6]

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

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[6] On this issue, appellant Holmes joined Appellant Newborn's AOB argument. As appellant Holmes's anticipates filing his Reply before appellant Newborn, appellant Holmes's Reply briefing on this issue has been taken in large part from Appellant Newborn's Reply – whose arguments, as well as appellant McClain's arguments as applicable to Holmes, he joins.

either correct on their own terms or harmless error, individually and cumulatively. Appellant Holmes 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 Newborn homed in on DeSean Holmes's 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 DeSean 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, DeSean Holmes admitted he was in custody on a different charge. The prosecutor moved to strike that answer, and the court responded "[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." DeSean 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 DeSean 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 DeSean 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 DeSean 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 DeSean 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 DeSean Holmes was already in custody in early-1995" is "not cognizable on appeal," 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 169-170.) 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 DeSean Holmes, as opposed to offering the evidence of DeSean 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 the appellants' state and federal constitutional rights of confrontation and cross-examination by precluding counsel from questioning DeSean Holmes regarding the nature of the case he was in custody for, for which he clearly wanted law enforcement assistance.

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 doubt on Lamere's credibility, it did not reveal the magnitude of his incentives to testify to the Government's satisfaction." (*United States v. Larson, supra,* 495 F.3d at 1105 (emphasis supplied).) *Larson, supra*, 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." (*United States v. Chandler, supra,* 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 DeSean 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." (*United States v. Chandler*, *supra*, 326 F.3d 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 DeSean 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 DeSean Holmes had denied any motive or interest "to get Mr. Holly into trouble," 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 1655-1656.) Counsel's intention was to demonstrate that DeSean 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 DeSean Holmes committed a noontime drive-by shooting, but later went to the police and gave a false exculpatory statement.

During cross-examination, DeSean Holmes contended that he had been the victim of the shooting in August 1995. When defense counsel sought to pursue DeSean Holmes regarding his victim status, the trial court curtailed cross-examination, and appellant's attorney subsequently made an offer of proof in which DeSean Holmes was the driver in a drive-by shooting committed by the passenger, after which DeSean Holmes eluded police in a

high-speed chase. DeSean Holmes later went to the police and gave his story, in which he portrayed himself as a victim 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 DeSean Holmes was not "a victim in that particular situation." (18 RT 1694.)

That ruling further violated appellant's right of cross-examination because DeSean 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 is 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 question 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." (*Slovik v. Yates*, *supra*, 545 F.3d at 1186.) The Ninth Circuit reversed 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 his subsequent lie under oath that equally violated appellant's right of cross-examination. The bare stipulation permitted by the trial court that DeSean Holmes was not a victim was no substitute for effective cross-examination, because the jury had no basis to determine whether DeSean Holmes was actively prevaricating under oath or merely mistaken as to his legal status.

4. DeSean Holmes' commission of a car jacking.

Defense counsel sought to prove that DeSean Holmes had committed a car jacking in which the victim was a man named Majhdi Parrish. DeSean 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.) DeSean

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 DeSean 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 DeSean 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.

DeSean 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 DeSean Holmes' internal motive and bias to satisfy the Pasadena Police Department, regardless of the objective position of the Police Department in response. DeSean 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 DeSean 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. This is a prototypical form of bias that was excessively and unconstitutionally truncated.

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 Holes 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 DeSean 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.

Next, 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.)

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VII. APPLICABLE TO APPELLANT MCCLAIN

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VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION IN VIOLATION OF FIFTH, SIXTH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF INCRIMINATING HEARSAY FROM LACHANDRA CARR [7]

Respondent contends that the trial court properly admitted the statements of LaChandra Carr. Respondent reasons that Carr's grand jury

[7] As argued in appellant's opening brief and below, this error was compounded by the trial court's overnight detention of Carr. (See AHOB at pp. 126-132.)

statements -- that on the night of the Halloween killings appellants Newborn and Holmes were present when she was at the hospital, and Bowen told her he was a driver but not a shooter -- were admissible as inconsistent statements. (RB at pp. 188-192.) Respondent is only partly correct. The only portion of Carr's trial testimony which was inconsistent with her grand jury testimony was that she was not at the hospital. Any additional grand jury testimony elicited by the prosecutor as to whether Newborn and Holmes were present and the activities of Bowen was not inconsistent and was otherwise inadmissible as hearsay offered solely for the truth of the matter. (See *People v. Miranda* (2000) 23 Cal.4th 340, 460-465 [while the implicating hearsay recitation of a non-testifying codefendant may be admissible to establish probable cause at a preliminary examination, they are not admissible at trial].)

In the instant case, the defense continuously objected to these statements and the trial court erred in admitting them. The error was not harmless. (See AHOB Arg. II, incorporated herein.)

Predictably, the prosecutor capitalized on these hearsay statements placing Holmes at the hospital, and implicating his friend Bowen in the commission of the killings. The prosecutor concluded his examination of Carr by asking, "Is it fair to say that the reason that you're not scared now

and you were scared then is because you are not implicating Mr. Newborn and Mr. Holmes and you implicated them at grand jury?" Carr responded "Correct." (19 RT 1856.) The prosecutor also argued the alleged truth of Bowen's hearsay comments to Carr – leaving appellant Holmes unable to confront and cross-examine their source -- that Holmes was present at the hospital. He informed the jury that not all of the perpetrators were brought before them. He laid out a case that Bailey and Bowen were involved and presented evidence of the connection between Bailey, Bowen and the defendants. Bowen's inadmissible admission that he had participated but that he was not a driver or a shooter strongly and improperly implied that the perpetrators were the defendants before this jury. (42 RT 4412, 44 RT 4630.)

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IX. 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 IN THE ABSENCE OF ANY REASONABLE GROUNDS, AND IN APPELLANT'S ABSENCE

Appellant Holmes refers to and incorporates the argument set forth in his Opening Brief, at pp. 126-132.

Respondent contends that the trial court's detention of LaChandra Carr, which occurred out of his presence and without reasonable grounds, did not violate appellant Holmes's rights to confrontation and to due

process. (RB at pp. 197-203.) Relying on the dialogue between the trial court and Carr, respondent concludes that because Carr was deemed evasive, the trial court was within its "power to compel the attendance and testimony of witnesses." (RB at pp. 197-198.) This is simply not so. In what can only be described as something of a temper tantrum, without due process or finding of good cause, the trial court summarily removed the defendants from the courtroom and incarcerated Carr overnight.

The dialogue between the trial court and Carr is represented by both appellant and respondent, (see AHOB at pp. 127-126; RB at pp. 197-198), but bears repeating here:

> Court: You do think you're kind of cute. Let me tell you something. We have three young men into eternity, three men are facing the death penalty. Do you understand that?
>
> Carr: Yes.
>
> Court: These jurors are here, these lawyers are doing their job and you think this is cute, so I will tell you what – --
>
> Carr: How is it cute when I'm telling the truth?
>
> Court: Listen to me: I'll put you in jail. We're going to do, we will stop the proceedings tonight. You think about how cute proceedings are. Tomorrow morning 8:45. Tomorrow morning be here on time.
>
> Myers: Your Honor, may we approach?
>
> Court: No.
>
> Myers: May I?

Court: 8:45, Mr. Myers. I don't want to hear anything more about it.

Myers: Yes, sir.

Court: Now, you think about what cute is. (18 RT 1825-1826.)

At this point the defendants were taken from the courtroom. (18 RT 1826.) The court then continued out of the presence of defendants.

> Court: All right. Defendants are not present. This is a hearing on this witness. I am going to put you in custody because I don't think you're going to return. Because you testified before the grand jury and you haven't been cross examined, that means you would be unavailable. This is a very serious case. You don't think it is. I do, and so what I'm going to do is keep you in custody and make sure you return tomorrow. If you think you're helping either side here, you're not. What you are doing is acting like this is for you. These lawyers put a lot of time and on both sides. The defendants' lives are at stake and we have two people, three people who are already dead. The jurors are trying to do their job and you're sitting there acting like you don't care and you don't want to answer any questions, and I'm not going to tolerate it. Do you understand?
>
> Carr: Yes.
>
> Court: I am not into that stuff. You're going to be here tomorrow and I'm going to ensure that by putting you in custody and make sure that you come back tomorrow. You can answer however you want tomorrow, but I'll tell you something, you're not helping either side here. This is a court of justice that is what we are going to have. Thank you. (18 RT 1826-1827.)

Although Carr's trial testimony may have been inconsistent with her grand jury testimony, respondent can cite nothing in the record which should have provoked the court to place her in custody against her will.

As argued in appellant Holmes's opening brief (AHOB at p. 129) and recognized by respondent (RB at p. 200), California has a well-established procedure for determining when it is appropriate to incarcerate a material witness to ensure that witness's presence at trial. Penal Code section 1332 provides when the court is satisfied, *by proof on oath*, that there is good cause to believe that any material witness will not appear and testify unless security is required, the court may order the witness to enter into a written undertaking to the effect that she will appear and testify at the time and place ordered by the court or that she will forfeit an amount to the court which the court deems proper. Only if the witness *refuses compliance with the order for that purpose*, may the court may commit the witness if an adult, to the custody of the Sheriff. (Penal Code section 1332(b), emphasis added.) No such proceeding took place here.

In this argument, appellant does not claim the error in the court's detention of Carr violated Carr's constitutional rights, thus respondent's assertion that appellant lacks standing is not quite right. (RB at p. 201.) As respondent recognizes "[t]he coerced testimony of a witness other than the accused is excluded in order to protect the defendant's own federal *due process* right to a fair trial, and in particular, to ensure the *reliability* of testimony offered against him." (*People v. Boyer* (2003) 38 Cal.4th 412, 444

citing *People v. Badgett* (1995) 10 Cal.4th 330, emphasis in original; RB p. 201.) In the instant case, the following morning, when Carr resumed her testimony -- over repeated defense objection -- Carr gave incriminating hearsay testimony that her boyfriend Solomon Bowen had told what had happened but that he was not a driver and he was not a shooter, and that appellant Holmes was at the hospital where retaliation for Hodges death was discussed. (19 RT 1833-1835, 1839, 1844-1846.) As noted in appellant's opening brief, the prosecution asked the jury to believe Carr's grand jury testimony that she was at the hospital and that she saw Holmes and Newborn there. (42 RT 4412, 44 RT 4630.) Thus, the former statement was urged as substantive evidence of appellant Holmes' guilt and appellant Holmes had no opportunity to confront the alleged source of the information, Bowen.

Appellant Holmes has demonstrated how the trial court's incarceration of Carr resulted in coerced testimony which "directly impaired the free and voluntary nature of ['Carr's] anticipated testimony in the trial itself." (*People v. Boyer, supra,* 38 Cal.4th at p. 444.) For that reason, appellant Holmes' conviction must be reversed.

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X. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS GABRIEL PINA'S UNRELIABLE EYEWITNESS TESTIMONY, WHICH RESULTED FROM HIGHLY SUGGESTIVE PRETRIAL PROCEDURES

Respondent submits that the trial court properly allowed Pina's

testimony. (RB at p. 204.) For all of the reasons stated in his opening brief and below, appellant Holmes disagrees. (See AHOB Arg. V, incorporated herein.) Pina's unreliable eyewitness testimony was a result of highly suggestible pretrial procedures, and should have been suppressed.

As a preliminary matter, respondent relies on this Court's opinion in *In re Arturo D.* (2002) 27 Cal.4th 60, 77 fn. 8, for the proposition that "[i]n reviewing the trial court's suppression motion, this Court considers only the evidence that was before the trial court when it ruled on the motion to suppress identification" and argues that because of *Arturo D.*, "Pina's subsequent trial testimony is irrelevant for the issue of whether the trial court, at the time of the pretrial ruling, properly suppressed the identifications." (RB at p. 211, see too RB at p. 212.) Respondent's reference to *Arturo D.* does not support this proposition. (See *In re Arturo D, supra*, 27 Cal.4th at p. 77 fn.8, where this Court resolved the issue of when a driver who has been detained for citation for a Vehicle Code infraction fails to produce vehicle registration or personal identification documentation upon the request of the citing officer, whether the officer may conduct a warrantless search for such documentation, and, if so, the permissible scope of such a search. Footnote 8 reads: "See, e.g., *Carroll v. United States* (1925) 267 U.S. 132 [45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790] and *United*

States v. Ross (1982) 456 U.S. 798 [102 S.Ct. 2157, 72 L.Ed.2d 572] (both permitting warrantless vehicle searches supported by probable cause).")

Regardless, contrary to respondent's assertion, appellant's Holmes's argument that the trial court erred does not heavily rely on Pina's trial testimony, but rather the numerous and continually evolving pretrial statements he made.

A. Summary of Pina's Evolving Descriptions [8]

Between the night of the homicides and appellant's trial, Pina had 13 to 14 contacts with people from law enforcement or the prosecutor's office. (26 RT 2694-2695.) Pina refused all requests to speak to defense counsel prior to his testimony. (RT 2694-2695.)

Initially, approximately 30 minutes after the homicides, when he spoke to Pasadena Police Officer Chavira, Pina mentioned that he had seen people run **from** the cars, and that he saw a person exit a residence in the neighborhood. Pina did not describe any of the people that he had seen, and could only describe one of the cars. According to Officer Chavira, if Pina had stated that he could identify any person or had given any physical description it would have been in his notes. (36 RT 3883-3885, 3894-3897.)

[8] As Pina's testimony at various interviews and proceedings always differed in detail and content, appellant Holmes summarizes relevant statements here, and refers this Court to his full discussion of Pina's testimony as contained in his opening brief. (AHOB at pp. 152-163.)

A few hours later, Pina added color to the first and second car, but still had no descriptions about anyone associated with the cars. (35 RT 3742-3744.)

Four days later, Pina added additional details to the description of the first car, but again, had no memory of the people associated with the car. Other than describing the driver of the first car as a Black man from 22-23 years old, with a jheri curl and shoulder length or long hair, Pina could not describe occupants of the cars. (36 RT 3903-3904, 3920.)

On December 24, 1993, nearly two months after the crimes, notice that a financial reward was offered for information about the crimes was published in the news. The T.V. report contained some photos, which Pina stated that he merely glanced at. Nevertheless, Pina decided to contact the police. Pina went to the police department on December 29, 1993. (2 CT 461; 25 RT 2664; 26 RT 2718-2720.)

When Pina went to the police station, he was shown a series of six-pack photographic lineups. Piña told the officers, "I heard that you caught some of the people, and they had a little brief commercial program about looking for some people, and I wanted to see if I was going to pick the right one...." (25 RT 2664.) *Pina therefore admitted that he went to the police station to identify one of the individuals he had seen on the TV.* (26 RT 2755-2758.)

Initially, Pina saw photographs among the two six-pack photographic lineups that looked familiar. When he asked to see another view of this individual, he was shown a newspaper which contained a picture of appellant Holmes. Although he had seen appellant Holmes's picture in the photographic six-pack lineups, he did not choose any of appellant Holmes' photographs at the time, but only made an identification after he had been shown the newspaper photographs. (26 RT 2758.)

The individual Pina had seen getting into the second car had blemishes on his face. Pina "locked into that." (26 RT 2764- 2765.) However, from the witness stand, Pina was unable to make out blemishes on appellant's face. (26 RT 2771.)

Pina's grand jury testimony differed significantly from his statements to the police. When he testified to the grand jury, Pina stated that he had seen four cars. His description of the cars was limited to the first being a dark green or blue '93 or '94 MR-2 or Corrolla; the second was possibly a white Nissan Sentra, the third, a brown or maroon Honda Civic hatchback; the fourth not at all. (2 CT 431-437.)

As for occupants of the cars; the first car had a Black male driver, probably 20-25 years old. The second car was occupied by a Black male with short curly or nappy hair who appeared clean cut and to be in his 20's.

The driver of the third car appeared to be its only occupant and he was described as a young and clean cut with nappy hair cut close to his head. The fourth car held two or three occupants who Pina cold only describe as Black. One wore a white shirt. (2 CT 433-438.) Pina told the grand jury that he saw the driver of the first car a second time. Pina was "focused" on the first car. (2 CT 442.) After he heard gunshots, Pina two people running – one of whom was wearing a trench coat. (2 CT 452-453.)

Testifying before the grand jury, Pina stated that a month or two later, Pina believed he saw the driver of the first vehicle on T.V. He went to the police and was shown six pack photographic line-ups. Pina "had a hard time with the folders at first." Pina was then shown another picture of one individual from the newspaper. "Right then [he] recognized him [as the driver of the first car]." When Pina was shown a photograph from the newspaper, there were other pictures shown to him as well. Pina testified he did not pay much attention to these other photographs. (2 CT 461-464.)

As Pina was shown six-pack photographic lineups he recognized another individual – who he later identified at trial as appellant—as the one who went into the back seat of the Nissan. (2 CT 464.) Pina testified: "I remember his face and his features and he had also little blemishes on his skin that would stand out that made me remember him." (2 CT 465.)

At trial, the defense introduced Exhibit K, which the prosecutor stipulated was the exhibit used by Pina during his testimony at the grand jury. (26 RT 2766.) Pina recalled putting the thumbtack in its present position on Exhibit K. Noting the vast distance between where he said he was and where he saw the individual identified as appellant, he commented: "I am not Superman. I can't see from there." (26 RT 2769.) Pina acknowledged that no one could make an identification from the position marked on Exhibit K. (26 RT 2770.) Thus, Pina admitted that he could not possibly have seen appellant Holmes clearly. Nevertheless, Pina's statements and testimony continued to evolve in every detail, and culminated with a certain identification of appellant Holmes at trial, despite the fact he could initially describe no individual.

B. Application of the Law to the Facts

As appellant Holmes argued in Argument V of his opening brief an unnecessarily suggestive pretrial identification which results in an unreliable trial identification violates due process of law. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 113-115; *Neil v. Biggers* (1972) 409 U.S. 188, 196-198; *Simmons v. United States* (1968) 390 U.S. 377, 383-384; *People v. Kennedy* (2005) 36 Cal.4th 595, 608.) Such a violation occurs when an identification procedure is "so impermissibly suggestive as to rise to a very substantial

likelihood of misidentification." (*Simmons, supra*, 390 U.S. at p. 384.) To determine whether or the circumstances of an identification are impermissibly suggestive, a court must look at the" totality of the circumstances" surrounding the identification. (*Stovall v. Denno* (1967) 388 U.S. 293, 302; AHOB at pp. 164-165.)

In additional to being completely unreliable, Pina's identification of appellant Holmes was the result of unduly suggestive procedures. Appellant Holmes was a suspect whose picture had been displayed on television and in the newspaper. It was not until after Pina was shown the newspaper, which contained a photograph which had been displayed on the television, that Pina picked appellant from a six pack photographic lineup. Obviously, by that time appellant's appearance was known to Pina, as well as the fact the police considered him a perpetrator.

When law enforcement employs unnecessarily suggestive identification procedures, the next question is whether in light of the totality of the circumstances, there was a "substantial likelihood of misidentification." (*Simmons*, *supra,* 390 U.S. at p. 384.) Under *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200:

> "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of

certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

While respondent agrees this is the applicable law, it contends that even if appellant has met his burden of showing unduly suggestive identification procedures, the identification was nevertheless credible and reliable under the totality of the circumstances. (RB 214.) Respondent is wrong – even Pina agreed he could not possibly have identified appellant Holmes. (26 RT 2769-2775.)

Contrary to respondent's claim, Pina did not have an opportunity to observe the person he purported to identify at trial as appellant Holmes. (RB at p. 214.) It was night. Pina was a minimum of 100 yards away. (26 RT 2772.) Pina admitted that he could not have viewed appellant Holmes from the position he testified he was in at the time he observed people in cars, including the person he suggested was Holmes. (26 RT 2769.)

Likewise, Pina did not have a high degree of attention at the time. Pina stated over and over again that he really did not pay attention at the time of the incident (2 CT 434-436; 25 RT 2645, 2712-2713; 36 RT 3747), and that "everything in [his] body was going supersonic"; he was tired then fell asleep and woke up and went down to the police station. "[Pina] wasn't all hundred percent there at that time." He admitted to having made various mistakes and assumptions. (26 RT 2742, 2744, 2748, 2749, 2759, 2761,

2763.)

Pina's description was not accurate. There was no testimony that at the hospital appellant was wearing the trench coat, hooded sweatshirt or Halloween costume Pina identified appellant as wearing. The prosecution had every opportunity to ask witnesses how appellant was dressed but did not do so. [9]

Pina expressed uncertainty as to the facts surrounding his ultimate identification of appellant Holmes. Pina never mentioned that anyone in the group he had seen was wearing a trench coat; in fact, he testified that they were all wearing Halloween costumes. Other than describing the suspect whom Pina ultimately identified as appellant Holmes, as a Black male with facial blemishes, Pina was never able to physically describe the individual he saw a running toward or getting into the second vehicle. In fact, until his identification at the police station, Pina could offer no further description than "black male." Pina acknowledged than he had a hard time describing things in words. He testified "that is how I remember things, by looking." (26 RT 2713.) Pina also stated he could gave only "possible" descriptions because he was not certain. (2 CT 439, 441; 36 RT 3882-3886; 26 RT 2713,

[9] No witness, including Wanda Martin, the mother of appellant's son, who he was with that evening, was asked what appellant was wearing and whether or not he owned a trench coat, a hooded sweatshirt, or Halloween costume. These clothing descriptions were given of the possible suspects in the case.

2738.) Pina did not attempt to identify a suspect until 59 days after the homicides. (26 RT 2696.) Finally, the cross-racial nature of the identification is indicative of its unreliability.

Pina did not pay attention to the car appellant was "seen" to enter and then gave varying descriptions of the car. His own testimony that there was only one person in the car belies his "observation" the car was a two door and that appellant Holmes pushed forward the seat to get inside. (2 CT 434-436, 454; 26 RT 2745, 2747-2750; 35 RT 3742-3743; 36 RT 3885.)

Examined in light of the totality of the circumstances, there is a substantial likelihood the Pina's purported identification of Holmes was tainted, and so unreliable that the jury should not have heard it, and therefore reversal is required. (*Stovall v. Denno* (1967) 388 U.S. 293, 302; *Neil v. Biggers* (1972) 409 U.S. 188.)

Gabriel Pina's identification of appellant Holmes was absolutely critical to the prosecution's case. Holmes did not dispute being at the hospital; and the prosecution's case against appellant consisted entirely of Pina's purported identification and appellant Holmes's alleged extra-judicial admission to Tate. Pina was the only witness who could place appellant near the scene, and coupled with the testimony of Lilian Gonzales, Pina's girlfriend's, put a gun in appellant Holmes's hand, thus leading to a true

finding of the weapon use allegation.

The jury deliberations were lengthy – more than 30 hours. They requested a read-back of Pina's testimony from the time he first saw the four cars until the time he saw the suspects returned to the waiting cars. (44 RT 4662-4664.) This illustrates the great importance of jurors placed on this unreliable testimony in reaching what was obviously a very close decision.

In a close case, a substantial error may require reversal and any doubts as to prejudice must be resolved in the favor of the appellant. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

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XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY PROSCUTORIAL MISCONDUCT IN THE FORM OF FLAGRANT APPEALS TO THE JURY'S PASSION AND PREJUDICE

Appellant Holmes joined appellant Newborn's argument that he was deprived of due process and a fair trial by prosecutorial misconduct in the form of flagrant appeals to the jury's passion and prejudice. (See AHOB at p. 75; ANOB at pp. 195-206.) Respondent disagrees and contends that the prosecutor did not commit misconduct during his closing argument. (RB at pp. 218-231.) Again, respondent is wrong.

The parties agree to the relevant portions of the closing argument at issue. (See ANOB at pp. 196-198; RB 219-220.) Respondent provides a more complete discussion of the defendants' motion for mistrial based on

prosecutorial misconduct. (ANOB at p. 199; RB at pp. 221-222.) Appellant Holmes maintains that those additional passages serve to highlight the misconduct as well as the trial court's error.

A. Applicable Law

A prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade.., the jury." (*People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Prosecutorial misconduct in closing argument can render a trial so fundamentally unfair as to deny defendant due process. *(Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-645; People v. Harris (1989) 47 Cal.3d 1047, 1084.) Under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (*California v. Ramos* (1983) 463 U.S. 992 at pp. 998-999), including scrutiny of the prosecutor's penalty phase arguments *(Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-334, 337-341.)

To be compatible with principles of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, capital sentencing . statutes must "channel the sentencer's discretion by clear and objective standards, that provide specific and detailed guidance, and that make

rationally reviewable the process for imposing a sentence of death." *(Godfrey v. Georgia* (1980) 446 U.S. 420,428, internal citations and quotation marks omitted.) Appeal to the passions and prejudice of the jury, by the prosecution in a capital case violates "the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is considering." (*Sandoval v. Calderon* (2000) 231 F.3d 1140, 1150, citing *Godfrey v. Georgia, supra.*)

The Eighth Amendment requires that a verdict of death must be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynauah* (1989) 492 U.S. 302,328.)

In the instant case, the prosecutor urged the jurors to send a message to the defendants and to society; to render a guilty verdict so that the victims might rest in peace, and to stand up for the victims.

Although the trial court agreed that the prosecutor's comments were improper, the prosecutor defied the trial court and continued to appeal to the jury's passions and prejudice by arguing that they alone stood between society and the defendants, and that their verdict would send a message. (44 RT 4701-4703.)

The prosecutor's misconduct in argument was compounded by his use of multiple photographs of the deceased victims. While he had argued that, for the purpose of admissibility at the guilt phase, the relevance of the photographs was to show bullet trajectories, he used them in argument to appeal to the passions of the jury. No one contested that the death of the victims was a horrible occurrence. The relevant issue was identity and, contrary to respondent's contention (RB at pp. 224-225), that the photographs were properly used in argument for no purpose other than to shock and outrage the jurors. Appellant Holmes would request this Court view the photographs of these young victims as displayed at trial. Certainly, they would have appealed to the passions of a juror.

B. The Errors were not Harmless

Respondent contends that the remarks of the prosecutor were "brief and fleeting." (RB at p. 230.) Not so. Even after he had been reprimanded by the trial court, the prosecutor continued his attempt to persuade the jury that they had a stake in the outcome; were the protectors of society and were responsible for whether the victims rested in peace.

Under any standard of review, the judgment must be reversed. The case was a close one, even with these egregious arguments. The error cannot be considered harmless. There is a reasonable possibility

(*People v. Brown* (1988) 46 Cal.3d 432, 446-448), that absent the prosecutor's improper plea to the passions and prejudices of the jury in his final remarks to them, the verdict would have been different. Stated otherwise, the prosecution cannot establish beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 984.)

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XII. AS A RESULT OF THE TRIAL COURTS ERRORS AND THE PROSECUTOR'S MISCONDUCT, APPELLANT WAS CONVICTED EITHER BECAUSE THE JURY BELIEVED HE WAS A GANG MEMBER, OR BECAUSE OF THE PREJUDICIAL ASSOCIATION WITH HIS CO DEFENDANTS -- AGAINST WHOM ABUNDANT AND PREJUDICIAL GANG EVIDENCE WAS OFFERED – BUT NOT BECAUSE OF EVIDENCE THAT HE COMMITTED THE CRIMES

Noting that appellants Holmes and McClain each argued that the trial court erroneously admitted evidence of threats against witnesses and gang photographs, identification, and gang history testimony, which was exacerbated by the prosecutor's misconduct in examination and argument, respondent contends that the trial court properly admitted this gang-related evidence, and the prosecutor committed no misconduct. Should this Court find that error and/or misconduct occurred, respondent argues any such error or misconduct was harmless. (RB at pp. 231-252.) Appellant contends respondent is wrong. This is so because, particularly in appellant Holmes's case, evidence of Holmes's gang membership was weak and – given the

source of the evidence – highly unreliable. Thus, the trial court's admission of this cumulative and emotionally charged but irrelevant evidence substantially prejudiced appellant Holmes, and requires the reversal of his convictions.

A. Evidence of Threats

The prosecution called a number of witnesses who testified that threats had been made and of their fear to testify. The prosecutor committed misconduct in introducing this highly inflammatory and unreliable evidence; the trial court erred in permitting it to go to the jury.

DeSean Holmes told the jury he was uncomfortable testifying because his life had been threatened, and that he had asked for police protection because he was afraid Ernest Holly and Danny Cooks were trying to kill him. Over objection, DeSean Holmes testified to threats that had been relayed to him by others -- in other words – hearsay. DeSean Holmes was also permitted to testify that he had heard other witnesses had received threats. (17 RT 1679-1681; 18 RT 1733.) By contrast, the defense was precluded from questioning DeSean about his involvement in the carjacking of Majhdi Parrish, which it hoped to establish was actually the reason DeSean Holmes was afraid to testify and the reason why his life had been threatened. (18 RT 1699-1735.) (See Arg.

DeSean Holmes's testimony was fortified by a Sheriff Deputy Johnny Brown, who testified that DeSean needed protection because his life had been threatened and because "he had been asked to kill two witnesses that had been responsible for sending two of his friends to jail." (16 RT 1509-1510; 30 RT 3095, 3097-3098.) Brown added that DeSean had ceased being a cooperative witness after Newborn and DeSean's mother discouraged his testimony. (16 RT 1510-1511.)

Because the jury was aware that DeSean was related to appellant Holmes and had made a deal with the police not to testify against him, this hearsay testimony permitted the jury to speculate regarding DeSean's "knowledge" of appellant Holmes' involvement in the murders. Moreover, the jury could well have held the belief that appellant Holmes's attorney had attempted to dissuade DeSean from testifying – supposedly for the benefit of his client appellant Holmes. (17 RT 1535-1686; 18 RT 1710-1752.)

Derrick Tate testified that appellant Holmes told him that appellant Newborn and Ernest Holly committed the Halloween crimes. Tate explained that he did not contact law enforcement earlier because "look at what happened to the kids." (16 RT 1392.) Over objection, he also testified that his mother and girlfriend received threats, and that the presence of gang member Terranius Pitt's girlfriend in the courtroom made him

uncomfortable. Tate additionally testified that he heard that a witness who was involved in this case had been killed. Although it constituted multiple levels of hearsay, Tate testified that his family in Illinois informed him that Pitts had gone by his house and said that Tate had "better not show up in court and all the stuff like that." (16 RT 1392-1397.)

Over defense objections, the court allowed the prosecutor to play a tape in which Willie McFee told Detective Urube that he was receiving threats, had been on the run, and had to watch his back. McFee speculated the threats came from gang members. (24 RT 2475-2493.)

1. The witnesses' testimony regarding being threatened and fearing for their lives was inadmissible.

Respondent relies on the Court's decisions in *People v. Guerra* (2006) 37 Cal.4th 1067 and *People v. Burgener* (2003) 29 Cal.4th 833, 689, for the proposition that evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and therefore admissible. However, this Court's reasoning in those cases does not apply here.

In *Burgener*, the defense of lingering doubt included efforts to impeach a witness's detailed testimony at a *penalty retrial* with her inability to recall certain details during her testimony at the *guilt phase trial* which had taken place in 1981-- some seven years earlier. The witness explained

that she had been afraid to tell the truth in 1981 because of threats made against her and her children, but had also been afraid to lie because of the risk of perjury. She therefore decided to claim an inability to remember when asked a number of questions at the 1981 proceeding. (*Id.*, at p. 869, emphasis added.) The *Burgener* trial court instructed the jury that the evidence of threats communicated to the witness was not being offered for its truth but only "as communications that she heard and, as you may consider them in whatever way they may relate to credibility. Not for the truth of it." (*Ibid.*) This Court noted that in *Burgener*, the threats explained why the witness's testimony in 1981 differed in certain respects from her current testimony seven years later. (*Ibid.*)

Similarly in *Guerra*, the trial court permitted evidence that a witness feared retaliation for testifying against defendant. The prosecution argued that the evidence was offered for the nonhearsay purpose of explaining inconsistencies in portions of the witness's testimony, *including her equivocal responses when asked whether she feared retaliation.* This Court noted that the record suggested the witness exhibited hesitancy in responding to questions. For this reason, the jury was entitled to consider the explanations in evaluating credibility, and noted too the trial court instructed the jury accordingly and *importantly*, the trial court further

admonished the jurors that if they believed the statements were made, they must not attribute them to defendant. (*People v. Guerra, supra*, 37 Cal.4th at p. 1142, emphasis added.)

In the instant case, respondent cites to portions of the record where it asserts that "witnesses exhibited hesitancy in responding to questions and fully cooperating as witnesses." (RB at p. 235 citing 16 RT 1395-1398; 17 RT 1545; 23 RT 2374-2375; 17 RT 1681.) Review of the cited pages – a mere six pages of these three witnesses extensive testimony -- does not support respondent's position. (See, for example 16 RT 1395-1398, which contains appellant's objection, the district attorney's request to remove Pitts' girlfriend from the courtroom, the trial court's admonition, and predominately leading questions to Tate; 17 RT 1545 when the prosecutor ask DeSean whether he is fearful of testifying; 17 RT 1681 where DeSean explains why he waited so long to come forward; and 23 RT 2374-2375 where McFee discussed Newborn's visit.) Unlike the basis for admission of threats and fears in *Guerra* and *Burgener*, there were no inconsistencies or equivocal answers given here. The prosecutor's pretext for offering the testimony of threats and fears permitted the highly prejudicial and uncorroborated inference that appellant Holmes engaged in such behavior and perhaps even worse—that of the actual killing of a witness.

B. Gang Photographs, Identification and History

Over defense objection, Detective Derrick Carter discussed his contact with "admitted gang members," provided a history of P-9, identified several photographs of alleged P-9 members, and a photograph of Hodges with holes in his head as he appeared at the hospital. Carter testified that the focus of the investigation of the Hodges shooting was on Raymond Avenue Crips. (14 RT 1159-1169.) When asked by the prosecutor if he was familiar with a person by the name of Ishmael Offut, Carter responded "Ishmael was a P-9 nine gang member who is now dead." (14 RT 1167.) Carter testified further that if a P-9 was gunned down, and P-9 happened to suspect the Raymond Avenue Crips, that if P-9 was going to "ride" on someone, they were going to ride on Raymond Avenue Crips. (14 RT 1174.)

1. The gang photographs, identification and history evidence was inadmissible.

Respondent contends that gang expert testimony was relevant to establish the identity of the perpetrators of the charged offenses and to explain why the victims were targeted. (RB at pp. 238-239.)

However, as argued in appellant's opening brief, while arguably, evidence of Newborn and McClain's Association with P-9 and their connection to Fernando Hodges was strong, appellant Holmes's relationship to any P-9 member and to Hodges was weak – thus, its admission was far

more prejudicial than probative. (See Evid. Code section 352.)

In this case, there was no testimony as to appellant Holmes's gang-related activities in any context. There was no connection between appellant Holmes and any of the threats of harm to any person connected to the case. Outside of a single unreliable eye witness and the testimony of a convicted felon who stood to gain from manufacturing an admission by appellant, the prosecutor had no evidence tying appellant to the underlying capital offenses. Nevertheless, the prosecutor bootstrapped weak evidence of Holmes' alleged membership in the P-9 gang to the far stronger membership evidence of his codefendants. Because appellant's codefendants were uniquely connected to victim Hodges, the evidence of motive to retaliate for his killing trickled down to appellant Holmes. Association, speculation, and fear do not amount to constitutionally acceptable evidence of guilt.

C. Prosecutorial Misconduct

Respondent disagrees with appellant's contention that the error in admitting evidence of threats, fear of retaliation, and gang affiliation evidence was compounded by the prosecutor's misconduct in argument. (RB at pp. 239-249.) Appellant Holmes maintains that the prosecutor improperly asked the jury to solve social problems, treated witnesses as if they were in grave danger and appealed to the jurors' fears for their own

personal safety, improperly vouched for the truth of witnesses' grand jury testimony, and argued that appellant Holmes was guilty by association. (See AHOB at pp. 144-148.)

It is difficult to imagine a case in which the prosecutor could more successfully manufacture an atmosphere where jurors and witnesses alike were in fear for their very lives. As noted in appellant McClain's opening brief, during witness testimony the prosecutor made remarks designed to insinuate that witnesses were in danger and fearful of testifying and assured witnesses in front of the jury that no cameras were present, thus repeatedly and improperly stressing to jurors that the witnesses were in danger for and fearful about testify. (AMOB at p. 189.) The prosecutor argued that witnesses had been threatened and intimidated. He prevailed on the jury to protect society at large from the scourge of gang violence which he attributed — without evidence -- to appellant Holmes. (44 RT 4463-4464, 4627.)

The prosecutor argued that the testimony of witnesses at the grand jury was to be believed over their testimony at trial. Specifically, the prosecutor improperly informed trial jury that grand jury proceedings "provide sanctuary" and "safety." (44 RT 4630.)

> The grand jury does provide sanctuary. It does provide safety. It does provide a place where, free from the intimidating scowls of convicted

gang members.... (44 RT 4630.)

The prosecutor continued to explain away inconsistencies in witness testimony by arguing that witnesses such as Piña and Tate were afraid to tell the truth at trial – notwithstanding that the trial is the vehicle for jurors to hear the evidence, for cross-examination and confrontation, for assessment of the reliability and credibility of the evidence.

> Myers: And then the next thing you know there is this shooting and now you're witness to a triple murder, and you saw people. That could be you. And if it is you or if it were you, would any of you sit up here on the witness stand, would any of you take an oath to tell the truth, would any of you come to court knowing that there are gang members over there, would any of you knowing all these things come in here and say "I know these guys." (44 RT 4663.)

And

> Myers: Would any of you, given the opportunity – you know that these men, that the men that you are going to be identifying, are facing the death penalty, you would know that– would any of you come in here and say....(44 RT 4663.)

And

> Myers: See how long, how far these arms can stretch? These are real gangsters. These are people with pull. He was told not to return to Pasadena or "you're dead." His girlfriend and mother were called and threatened. He heard a witness in this case had already been killed. He is on Lorenzo's smash list. And Mr. Nishi was kind enough to call Mr. Tate at his girlfriend's house, which must have made Mr. Tate feel very secure that the defense knew where his girlfriend could be reached. (44 RT 4674.)

Contrary to respondent's contention that any prosecutorial misconduct or error in admitting evidence was harmless (RB 250-252),

appellant Holmes maintains reversal is required.

As this Court has cautioned, even if gang evidence is relevant, it may have a highly inflammatory impact on the jury (*People v. Williams* (1997) 16 Cal.4th 153, 193; see too, *People v. Champion* (1995) 9 Cal.4th 879, 922), and , "the highly inflammatory nature of gang evidence creates the risk that the jury will convict a defendant based on criminal disposition rather than on evidence of the crime charged. (*In re Wing Y* (1997) 67 Cal.App.3d 69, 79.)

In the instant case, the prosecutor conceded that there were as many as 30 people at the hospital, and not everybody who was at the hospital was involved in the killings. (44 RT 4629.) Although the record is completely lacking of any alleged activities of appellant Holmes at the hospital, other than arriving in a car and speaking to Blaylock, the prosecutor argued appellant's association with the P-9 gang and individuals such as Newborn and Bowen, who were also at the hospital, necessarily meant that appellant was one of the individuals who discussed retaliation for Hodges' death, and set into action the events of the night. This was pure speculation, of the most inflammatory kind. Worse yet, although there was no testimony that appellant Holmes was suspected of any involvement in any threats or any harm to any witnesses in the case, the prosecutor intentionally inflamed the

jury and instilled in them fear of all of the defendants, including appellant Holmes.

In a case such as this, where evidence of appellant Holmes' guilt was limited to unreliable eyewitness testimony bolstered only by appellant's alleged admission to a witness whose motives to testify were questionable, the prosecutor's reliance on irrelevant character assassination, implied threats to the jury, misstated evidence, and evidence of gang association was particularly inflammatory, and for those reasons his convictions must be reversed.

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XIII. APPLICABLE TO APPELLANT MCCLAIN

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XIV. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY GIVING CALJIC NO. 2.03

Relying on *People v. Richardson* (2008) 43 Cal.4th 959, 1091, and *People v. Kelly* (1992) 1 Cal.4th 495, 531-532, the state contends that the trial court properly instructed the jury under CALJIC No. 2.03, (RB at pp. 258-259.) Appellant disagrees for the reasons stated in his opening brief. (AHOB at pp. 199-203.)

This prosecution pinpoint instruction was improperly argumentative, and thus a violation of federal due process. (See *Reagan v. United States*

(1895) 157 U.S. 301, 310, 15 S.Ct. 610, 39 L.Ed. 709; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 475, 93 S.Ct. 2208, 37 L.Ed.2d 82.)

The instruction made it appear the jury could infer a general consciousness of guilt from any pre-trial statement. This Court has agreed this it is reasonably likely a jury will draw such an inference from the instruction. (See e.g., *People v. Cain* (1995) 10 Cal.4th 1, 33-34.)

The error cannot be dismissed as harmless. This is particularly true in the instant case, because as recognized by respondent, there is a factually insufficient basis to give CALJIC No. 2.03 as to appellant Holmes. (RB at p. 259.) Contrary to respondent's assertion of a strong case against appellant Holmes (RB at p. 259), appellant maintains that in light of the weak evidence of guilt, the instruction contributed to a fundamentally unfair trial in which the jury's ability to decide the close question of identity was repeatedly compromised.

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XV. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY GIVING CALJIC NO. 2.06 OVER APPELLANT'S OBJECTION

In spite of the fact that there was no evidence that appellant Holmes had attempted to suppress evidence against himself in any manner, the state summarily argues the trial court properly instructed the jury under unmodified CALJIC No. 2.06. (RB at pp. 259, 262-263.) Respondent is

wrong.

CALJIC No. 2.06 tells the jurors that they may consider evidence that the defendant concealed evidence as tending to prove consciousness of guilt and, hence, as tending to show that the defendant is in fact guilty. Therefore, CALJIC No. 2.06 is objectionable for the same reasons explained above with respect to CALJIC No. 2.03.

In *United States v. Castillo* (9th Cir. 1980) 615 F.2d 878, 885, the Ninth Circuit held that "[a]n attempt by a criminal defendant to suppress evidence is probative of consciousness of guilt and admissible on that basis." In *United States v. Wagner* (9th Cir. 1987) 834 F.2d 1474, 1484-1485, however, the court explained that it was improper for the trial court to give a "consciousness of guilt" instruction because the defendant's refusal to submit to a mental examination did not suppress evidence directly implicating the defendant in the underlying crime. The court explained that "the chain of inferences between a defendant's refusal to be examined and his guilt of the underlying crime is, at best, much too attenuated and speculative to support a "consciousness of guilt" instruction. (*Id.* at 1485.) Reviewing for plain error in light of counsel's failure to object, the court found beyond a reasonable doubt that the erroneous instruction did not affect the outcome of the jury's deliberations.

In contrast, in appellant's case, counsel did object. There was no evidence that appellant attempted to suppress evidence connecting him to the murders. As there was arguably evidence from upon which to instruct the jury under CALJIC No. 2.06 as to appellants McClain and Newborn *but not as to* appellant Holmes, it was error for the trial court to instruct the jury under an instruction that was not applicable to appellant Holmes. (See AHOB at pp. 204-206.)

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XVI. APPLICABLE TO APPELLANT MCCLAIN

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XVII. APPLICABLE TO APPELLANT MCCLAIN

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XVIII. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY INSTRUCTING THE JURY IN TERMS OF GUILT AND INNOCENCE UNDER CALJIC NOS. 1.00, 2.01, 2.51, AND 2.52

The prosecution relies on *People v. Snow* (2003) 30 Cal.4th 43, 97 -- which held that taking all instructions together the jurors would have understood that while the issue before them was defendant's guilt or innocence, a conviction may be returned only if the prosecution has proved defendant's guilt beyond a reasonable doubt -- and *People v. Kelly* (2007) 42 Cal.4th 763, 792 -- which held that in light of being "accompanied by the

usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof "each of the instructions objected to by appellant Holmes (among others) "is unobjectionable." (RB at p. 270.) Appellant requests this Court to reconsider. In appellant's case, the jury was repeatedly instructed under the concept of guilt and innocence, improperly suggesting that appellant needed to prove his innocence. The trial court violated appellant's federal due process rights by giving these instructions. (AHOB at pp. 196-198.) (See AHOB at Argument VII, incorporated herein.)

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XIX. APPLICABLE TO APPELLANTS MCCLAIN AND NEWBORN

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XX. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

The state summarily responds to appellant Holmes's argument that guilt phase errors prejudicially impacted the penalty verdict, that because the penalty phase was retried before another jury "any errors as to the admission of evidence or instructions could not possibly have affected the penalty jury which heard a different set of evidence and were given different instruction." (RB at p. 272.) This is nonsense. (See AHOB Arg. X.)

Appellant Holmes's primary defense at the penalty phase was lingering doubt. The penalty jury heard nearly the same prosecution evidence and was similarly instructed as the jury which returned the convictions. [10]

All of the evidence at the guilt phase, that was reintroduced at the penalty phase, would have supported appellant's defense that he did not commit the murders; this was critical to appellant's penalty phase defense. Thus, even if the guilt phase errors were harmless as to the guilt determination, the prejudice of those errors requires reversal of appellant's death sentence, particularly in light of the lengthy jury deliberations over three days. (See *In re Martin* (1987) 44 Cal.3d at 1, 51 [lengthy deliberations]; *Karis v. Calderon* (9th Cir., 2002) 283 F.3d 1117, 1140-1141 [three days of deliberations].)

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XXI. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR PENALTY TRIAL, AND A RELIABLE PENALTY DETERMINATION BY THE TRIAL COURT'S REFUSAL TO SEVER HIS PENALTY RETRIAL FOR THAT OF IN PRO PER CODEFENDANT MCCLAIN

Respondent contends that the trial court's refusal to sever appellant

[10] For example, witnesses A. Ayers, L. Ayers, Baker, Banuelos, Bergstrom, Boon, Bush, Carlyle, Carter, Chavira, Chinwah, Coats, Ireland, Korpal, Lopez, Nolden, Perez, Pina, Ramirez, Ribe, Robinson, Scholtz, Summerville, Uribe, and Van Horn testified at both the guilt phase and the circumstances of the offense as aggravation at the penalty retrial.

Holmes's penalty phase from that of McClain was proper. (RB 273.) Responding much the same as it did to appellant's arguments for severance at the guilt phase, respondent reasons this was a "classic situation in favor of a joint trial, given that appellants were charged with common crimes involving common events and victims." (RB at p. 277.) However, this request for severance was made at the penalty retrial following what trial counsel Nishi described as the inappropriate, inflammatory, and incriminating testimony of McClain at the guilt phase, the anticipated testimony of McClain – or at least reading of his prior testimony at the penalty retrial. Ultimately, McClain was granted pro per status for his retrial, which Nishi argued would result in the denial of appellant Holmes's Eighth Amendment right to an individualized sentencing hearing. (7 CT 1928-1942; 60 RT 5824, 65 RT 6323-6324.) For each of these reasons, the motion for severance should have been granted. (AHOB Arguments I, XIV.)

Ultimately, what Nishi feared, came to pass. During his opening statements to the penalty jury, codefendant McClain used profanity and expressed his disdain for the legal system.

> "whether those kids was nine years old or 57 years old, the shit was tragic", "no matter how much yelling and screaming and knocking shit over and yelling I do, it's like don't nobody believed me. It's like I'm being smothered. And I'm telling you people over and over I

didn't do the shit." "If I'd done it, I wouldn't have no problem telling you and say, "fuck it, I did do it" But because I'm a gang banger– basically I'm not going to waste your time on the rest of the shit, man." (65 RT 6398-6401.)

When examining witnesses, McClain demonstrated his knowledge of the inner workings of various street gangs (66 RT 6465-6468, 6476) and questioned surviving victims about their own gang membership (67 RT 6488, 6523-6524, 6538-6539, 6549-6550.)

During Pina's penalty phase testimony, codefendant McClain elicited an in-court identification of appellant Holmes. McClain elicited that Pina was intimidated by the defendants and called Pina a liar. (67 RT 6634, 71 RT 7122, 7127, 7134.)

Following Joseph Pettelle's testimony, the district attorney informed the court that as the witness was leaving the courtroom, codefendant McClain threatened to kill him. Pettelle was re-called to the stand and testified that McClain unequivocally said "I'll kill you." (69 RT 6902, 6904, 6923.)

Over defense objection, the court reporter read selected portions of codefendant McClain's guilt phase trial testimony, including McClain's former testimony that he was a gang member; that after he had heard Hodges had been shot by Crips he wanted to find some Crips in order to "smoke them, kill them;" that he had paged "Lorenzo" and others for this purpose;

and that he was armed with a .44 caliber weapon (69 RT 6929, 70 RT 7014, 7017 - 7026.)

Near the close of the defense penalty case, the courtroom deputies reported that McClain had made a threat of violence to them in a holding cell. Deputy Browning testified to the jury that McClain said to Browning, "if you do one of us, you'll have to do us all." Newborn repeated McClain's statement and added " if you push one button, then you better push all three, because you know what I'm going to do." At this last comment, Browning looked at Deputy Admire "as to say" "be careful because something is going to happen." Then McClain commented "don't get within two feet of me or I'll kill you, and we will have weapons this time." (73 RT 7336.)

The prosecutor seized on McClain's behavior and testimony to argue death was appropriate for appellant Holmes.

> Myers: That's what Herb McClain did with his homies, Lorenzo and Karl Holmes. They went out to smoke and kill Crips and you are here today as a result of that. (74 RT 7377.)

McClain's own argument exacerbated the problem. During his argument, McClain admitted his gang affiliation, prior convictions and past use of weapons. His argument was peppered with profanity. McClain admitted his intention on Halloween night was "to go out and kill." (74 RT 7418-7419, 7421, 7422, 7424, 7425.)

Even McClain recognize the damage that he had done to his codefendants.

> McClain: I am arguing lingering doubt because I didn't do that shit. And if the first jury – if I wouldn't have been so stupid, if I wouldn't have been so stupid to come up in here with that horse shit, you know, that hard-core gang membership, where I'm trying to prove that I'm hard to these people, if I came up in here and was using my head and would just explain it the way I'm trying to do it now, I would have been a lot better off. But instead I had animosity, man. I had animosity pent up, built up because of this case, because they're taking my life for nothing, man. So the way I came across to them, not only – not only really fucked me, but it made people see me how I am; and with my codefendants not saying nothing, it made them look at them, too. You know what I'm saying? I'm the reason that we all got found guilty. I'm the reason that were in here, because I got on the stand and said some stupid – it and they'd just rearranged it and fixed it up. It came from my mouth, true enough. Even if it wasn't said like that, it came from my mouth like that. (74 RT 7425-7426.)

Addressing his comments to someone in the prosecution side, perhaps even the prosecutor, McClain stated:

> McClain: But after talking to this dude right here – and this is a dirty dude. Even though I know people might like him and you might already dislike me, that's cool. But this is a dirty dude, man, because he's only going to paint the picture how he wants you want to see it and damn what I'm talking about. He feels that since justice is on his side and you all got his back, society, working-class people got his back, that he can basically fuck over me.

After this comment, the trial court admonished codefendant McClain not make personal attacks on lawyers, and threatened to revoke McClain *pro per* status.

Nevertheless McClain continued his downward spiral:

McClain: All right. So probably before I get finished with this they are probably going to take my status, right. Well, before I can finish telling you all how I feel about this, that's cool, that's cool, because I ain't giving a fuck.

After being told by the court to sit down, McClain continued:

McClain: And he can eat one up, to.... I said you and the jury, too, can eat one up.... You're washing up innocent people. You're washing up innocent people. That's bullshit. Their washing up innocent people, and they don't even care about the shit. They don't want the real people who did that shit. They just want some gang bangers. (74 RT 7427-7428.)

Ultimately, codefendant McClain appealed to the jury as follows:

McClain: I mean all you guys are all middle-class people, and I know I – I'm not from the slums or no shit like that, you know. I got a good mama who worked for a living. And my daddy worked for a living. I do what I can for my kid, you know. I try to spend time with her every time that I can, you know. I'm not saying we're the same type of people, but I'm not ashamed of being a gang member. But I love my homeboys and everything that we do ain't bad, you know. We don't go around killing people. You know, it ain't like no movies where gang people is bad and this and that. Man, it's not nothing like that really. But you're only going to see the bad parts. I don't know what else to say, you know. I wrote some shit to you on here, but I'm not even going to go through all that. Basically it's that I hope that you guys can be able to just read into what's presented. That's all I ask. If you see – if you see that it's something in there that makes me incriminated outside that I'm a gang member or some stupid shit that I said on the stand, then do me, don't show me no love. If you think I went around and killed innocent kids – because they're not innocent kids – get me. If you think I threatened people, talking about "I'm going to kill you" to the bailiff and to the other, I mean to me that's a lot of talk. If I was half of the gangster that this dude makes me, I wouldn't be doing all that talking, you know. I mean I don't see the point of warning nobody, you know, about what you're going to do so they got me mixed up with somebody else.... I never knew I was going to be found guilty for this, never. I never could have imagined

> in a million years that I'll ever be giving up my life for something that I didn't do, and I just can't sit here and be nice, man.... I mean what little life I did have it was mine come you know. I got to go and come as I pleased, basically do what I want. Now that's been taken away. Because I gang bang, because I'm from P-9 and my homeboy, Fernando Hodges, got killed on Halloween two hours before them kids got killed, automatically I had to be the person to do it because I've been arrested with guns, because I got a fucked up attitude....(74 RT 7436-7439.)

Respondent's reliance in *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, for the proposition that, as in Lewis and Oliver, Holmes's motion for severance should be denied on the basis of defendants "mandate[ing] severance through their own misconduct" (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 998; RB 276), is misplaced.

In *Lewis and Oliver*, Lewis moved to sever his trial from Oliver's immediately after Oliver was ejected from court for unruly behavior. Oliver moved to sever his trial from Lewis's because Lewis had flashed a thumbs-down sign to him, and because Oliver thought Lewis might turn "State's evidence" -- which he did not do. (*Id.*, at p. 998.) This court mentioned only in passing "[w]e question defendants' apparent assumption that they could mandate severance through their own misconduct. (*Ibid.*) The trial court's decision to refuse severance was reviewed for an abuse of discretion, and because *Lewis and Oliver* presented the classic situation in favor of a joint trial, given that defendants were charged with common crimes involving

common events and victims and incriminating confessions, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony were not present, the denial was upheld. (*Ibid.*)

Here, McClain infected the entire proceedings with prejudicial testimony and outrageous behavior, which incriminated appellant Holmes. There was no "gamesmanship" between McClain and Holmes in manipulating the proceedings to secure a severance. McClain was a run-away train who, even he acknowledged, took appellant Holmes to both a guilty verdict and a death sentence.

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XXII. APPELLANT WAS DEPRIVED OF HIS RIGHTS TO PRESENT A DEFENSE, DUE PROCESS, A FAIR PENALTY TRIAL, AND ARE RELIABLE PENALTY DETERMINATION WHEN THE TRIAL COURT FORCED APPELLANT TO WEAR A STUN BELT AND ALLOWED DISCLOSURE TO THE JURY THAT APPELLANT WAS ELECTRONICALLY RESTRAINED

Respondent contends no error occurred when appellant was forced, without cause, to wear a stun belt at the penalty retrial of his capital case. Respondent reasons the court "properly required appellants to wear stun belts" and that the trial court "did not improperly inform the jury." (RB at p. 281.) Respondent is wrong.

The trial court committed manifest error in belting appellant Holmes. (Aee AHOB Argument XII incorporated herein.) Neither his prior history nor his conduct in court warranted such treatment and the trial court made no findings to the contrary. In fact, out of the presence of the penalty retrial jury, the court specifically described appellant's outburst at the guilt verdict – to a different jury – as a use of "poor judgment" and not so "blatant" as described by counsel for Newborn.[11]

The jury learned that appellant Holmes was belted through the testimony of custodial officer Browning, who testified that every morning the deputies "put an electronic device on each one of the defendants" (73 RT 7331, 7332), which was followed by the court's explanation that "[t]he court makes a decision, based on things the court knows, whether or not to wear this device. It is a security device to assure tranquility in the court, security for everyone. It does not mean that they are guilty or not guilty" (73 RT 7332), and later in response to McClain's closing argument: "You are wearing a belt because you have acted up in this courtroom. Don't tell this jury without that belt what you might do". (74 RT 7420.) The trial court's words of explanation and caution to the jury signaled to the jury that

[11] Appellant Holmes takes issue with respondent's repetition of the unsupported comments of trial counsel for Newborn regarding additional comments made by Holmes. The record is devoid of such comments and the trial court did not acknowledge that they were made. (RB at p. 281.)

appellant was a dangerous person, and would be so to custodial officers in the future.

The court's error was certainly prejudicial to appellant Holmes. Holmes's prior record was nearly nonexistent and involved no violent acts. The underlying offenses were found to have been committed in the company of appellants Newborn and McClain – both of whom had extensive and violent records. Any chance appellant Holmes had of trying to distance himself from his joined defendants and demonstrate a basis for mercy was eliminated by the court's belting of him as an equally violent and dangerous defendant – without any showing of such – and then instructing the jury that appellant had been violent and the court had to belt him to assure the security and tranquility of the court was prejudicial under any standard employed.

Appellant Holmes was entitled to a reliable and individualized determination of the appropriate sentence for him, personally. The egregious conduct of a codefendant during the penalty phase – exacerbated because the codefendant was representing himself, and lacked the advice of counsel – prevented the jury from conducting the assessment of the appropriate penalty, as it was required to do. The trial court's refusal to sever the penalty retrials created a constitutionally intolerable set of

circumstances, and prevented appellant Holmes from receiving a penalty trial conducted within constitutional boundaries. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 [plurality opinion]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 108 S.Ct.1981, 100 L.Ed.2d 575.)

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XXIII. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL AND AN INDIVIDUALIZED AND RELIABLE PENALTY PHASE DETERMINATION BY THE ERRONEOUS ADMISSION OF A VIDEO TAPE OF HIS OUTBURST

Respondent contends that the trial court properly admitted the videotape of appellant Holmes's outburst after the guilty verdicts had been read. Respondent concedes the tape was inadmissible as a preemptive strike by the prosecutor for any defense evidence of remorse, and relies on the contents of the outburst as "circumstances of the crime" to justify the trial court's decision to admit it at the penalty phase. (RB at pp. 300-304.) Respondent is wrong and its reliance on this Court's decision in *People v. Blair* (2005) 36 Cal.4th 686, is misplaced.

In the instant case, the prosecutor noticed two grounds for the admissibility of the video tape. First, he argued that it was rebuttal to any evidence of remorse and second, that it evidenced a "claim" by appellant

Holmes of his membership in the P-9 gang. (65 RT 6328-6329.) Once the trial court granted the prosecutor's motion to admit the video tape, the prosecutor played the tape and read its contents to the jury. The prosecutor replayed the tape during his penalty argument, and argued the tape evidenced appellant's threats against the first jury, and demonstrated the future dangerousness of all three appellants if given life sentences. (65 RT 6411, 74 RT 7377-7378; Exh. 117.)

Respondent relies on this Court's discussion in *People v. Blair, supra,* 36 Cal.4th at p. 749, and concludes appellant's comment "P-9 rules" was admissible because the evidence "came within the set of facts that materially, morally, or logically surrounded the crime." (RB at 303.) Not so. In *Blair*, the prosecutor noticed his intention to admit evidence that the defendant had conducted chemistry experiments with cyanide "shortly before" the murder victim was poisoned with cyanide. This Court noted that the evidence was not introduced solely to reinforce the jury's conclusion that defendant was guilty of murder and that the alleged special circumstance was true. This Court reasoned the evidence "established not only defendant's ability to handle cyanide and his awareness of its hazardous nature, but also demonstrated that defendant had misused his educational opportunities for the nefarious purpose of poisoning [the victim]. Accordingly, the evidence

was relevant not only to defendant's guilt, but also to the reprehensibility of his conduct, a "circumstance of the offense" under factor (a) of section 190.3." (*People v. Blair, supra,* 36 Cal.4th at p. 748-749.)

In the instant case, the prosecutor presented ample evidence of appellant's association with P-9, and argued that association amounted to an intent by members, including appellant Holmes, to retaliate against the killing of a fellow gang member which had gone wrong. (See AHOB at pp. 215-216.) Appellant's comment "P-9 rules" can not properly be considered a circumstance of the crime which had occurred years earlier. Similar to the facts of those cases this Court acknowledges such evidence is inadmissible, appellant's emotional outburst at being found guilty of crimes he maintains he did not commit can not be considered a "reliable" indication of evidence of his guilt. (See *People v. Blair, supra*, 36 Cal.4th at p. 750.)

Moreover, the prosecutor here did not use the "outburst" as a circumstance of the crime, but argued it evidenced appellant's future dangerousness if given a life sentence. As argued in appellant's opening brief, the evidence had the primarily prejudicial effect of depicting appellant as a dangerous and angry black male spewing profanity at the first jury. (See AHOB at p. 216.) Couple with the other evidence of gang affiliation and the graffiti from a holding cell wall (See Arg. XXIV below), "it is reasonably

probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) (See AHOB Argument XI incorporated herein.)

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XXIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE OF HOLDING CELL GRAFFITI

Respondent contends the trial court properly admitted, over appellants' objections, holding cell graffiti as a factor in aggravation. (RB at pp. 305-306.) Not so. Foremost, the author of the graffiti at issue could not be identified. There was absolutely no evidence that the graffiti was authored or endorsed by appellant Holmes, Newborn or McClain—thus there was insufficient evidence that its intent or meaning, if any, was the intent or meaning of any appellant. Moreover, the graffiti did not constitute a statutory factor in aggravation – and for that reason too, was otherwise inadmissible.

As argued in appellant Newborn's opening brief, and joined by appellant Holmes (ANOB at pp. 280-290; AHOB at p. 75), according to the prosecutor's gang expert there was no evidence from which he could conclude who authored the graffiti. (66 RT 6471-6472.) The gang expert opined a "clue" to who may have authored it was contained in the nicknames

that other evidence attributed to appellants Holmes, Newborn and McClain. (66 RT 6475.) This evidence certainly can not be sufficient to establish beyond a reasonable doubt whether any of these appellants – much less appellant Holmes individually – authored the graffiti.

Additionally, the graffiti, which contained the crossed out words of police and sheriff does not constitute a crime of violence or implied threat to commit a crime of violence, and was not relevant to the circumstances of the crime. In combination with all of the other inadmissible evidence of gang affiliation and improper evidence in aggravation, reversal of the penalty sentence is required. (See argument XXIII above.)

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

Respondent argues that the trial court properly excluded the dispositions of codefendant's Bailey and Bowen. (RB pp. 309-312.) According to respondent, because there was no evidence that Bailey and Bowen were equally culpable or deserving of the death penalty, exclusion of the evidence was within the trial court's discretion. Further, any error was harmless. This is not so. As there was abundant evidence which was relied

on by the prosecutor at appellants' trial which supports appellant Holmes's contention that Bailey and Bowen were equally or more culpable than he, it was a violation of appellant's right to due process and a fair penalty trial to exclude the evidence from the jury.

As argued in appellant's opening brief (see AHOB Arg. XIII) appellant's federal right to due process in capital sentencing was violated when the trial court refused to allow appellant to inform the jury making his penalty determination of a negotiated dispositions given to two of his codefendants. (*Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735.) Moreover, Eighth Amendment principles eschewing the arbitrary or disproportionate imposition of the death penalty were violated because appellant was sentenced to death and codefendants whose culpability was alleged to be greater than or equal to appellant's were given favorable negotiated dispositions. (*Furman v. Georgia (1972) 408 U.S. 238*; *Enmund v. Florida (1982) 458 U.S. 782.*) This is so because, in the instant case, defendants Bailey and Bowen – whose trials had been severed and whose proceedings were trailed until after the appellants' trial *at the prosecutor's request* (4 CT 1124), – were alleged by the prosecutor *to have been equally or even more culpable than appellant Holmes.*

Bailey and Bowen were charged with the same murders and attempted

murders as appellant Holmes. (3 CT 631-642.) Bailey was alleged to have personally used a firearm. (3 CT 631-639) The jury found true an overt act alleging that Bowen had fired a 9-millimeter gun. (6 CT 1695.) Testimony placed Bowen at the hospital and present at the shootings. (18 RT 1822) In contrast, numerous allegations -- including that appellant (1) was armed, (2) discussed retaliation for the murder of Fernando Hodges, (3) was in the presence of a conspirator who stated " let's go get the guns," (4) was among those making a decision to target Crip gang members, (5) caravanned to the intersection of Emerson Street and Wilson, (6) parked [a] car in order to ambush individuals believed to be Crips, (7) positioned himself in bushes with the intent to ambush, and (8) executed and/or the victims -- *were all found to be not true.* (CT 1611-1621, 1696-1702, CT 1590-1610, 1683-1695.)

Respondent relies on a number of disingenuous arguments. For example, it is ludicrous to assert that there was nothing in the record to indicate Bailey and Bowen were given "favorable" dispositions. (RB at p. 311.) Are we to believe they pled guilty and agreed to a sentence of death? Also, having been equally charged, it is unreasonable to assert that Bailey and Bowen may not have been in the eyes of the prosecution, "equally deserving of the death penalty." (RB at p. 311.) Moreover, it may be that

Bailey and/or Bowen received only probation for their crimes. (RB 6340-6342.)

The error in exposing to the jury to the gamesmanship of the prosecutor in picking and choosing which defendants he deemed -- among those he had alleged to be, at the very least, equally culpable –worthy of death was compounded by his argument. To secure a death sentence against appellant Holmes, the prosecutor argued:

> I'm asking you to give [the death penalty] and most of all on behalf of yourselves, because if you look into your heart these are the worst of the worst. Their crimes are the worst of the worst, and they killed some of the best of the best. And only death can make it fair; only death will make it just. (75 RT 7415.)

However, in granting pleas bargains to Bailey and Bowen – and hiding those facts form the sentencing jury -- while seeking death against appellant Holmes, Newborn and McClain, the jury was intentionally left unaware that the prosecutor had embraced two incompatible positions. (See generally *In re Sakarias* (2005) 35 Cal.4th 140, 165.) Exclusion of the evidence of the favorable dispositions of Bailey and Bowen was a violation of appellant's due process rights and a fair penalty trial.

The duplicitous methods employed by the prosecutor here which resulted in a death sentence for appellant Holmes was not harmless. Surely in deciding appellant Holmes's fate, one or more of the jurors would have

considered the fact that two of the five individuals alleged to have committed these horrible murders were deemed worthy of and received a sentence of something less than death.

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XXVI. THE TRIAL COURT'S EXCLUSION OF APPELLANT'S PROPOSED LINGERING DOUBT EVIDENCE, THE PROSECUTOR'S MISCONDUCT IN ARGUING LINGERING DOUBT, AND THE ERRONEOUS JURY INSTRUCTIONS ON LINGERING DOUBT VIOLATED APPELLANT'S FEDERAL AND STATE LAW RIGHTS

Respondent contends the trial court acted within its discretion when it limited the introduction of evidence of lingering doubt offered by the defendants at the retrial of the penalty phase. (RB 312.) Appellant Holmes disagrees. The trial court's denial of appellant Holmes's right to present a complete defense at the penalty phase deprived appellant of compulsory process, of a fair and reliable penalty determination, of equal protection under the law, and his right to due process. (See AHOB XV.)

Respondent's primary response to appellant Holmes' argument that the trial court erred in excluding evidence of lingering doubt is that appellant failed to identify any evidence which he sought to admit but was excluded and failed to assert that the trial court excluded any evidence that he sought to admit. (RB at p. 312.) Respondent applies this identical response to appellant Newborn. (*Ibid.*) As demonstrated by the dialogue between the

trial court and counsel discussed below, respondent is clearly mistaken. The parties advised the court – as best as they were able – of what evidence they intended to offer.

At the outset of the penalty retrial, counsel for appellant Holmes informed the trial court that he intended to present evidence of lingering doubt. The prosecution acknowledged that lingering doubt was a viable defense at the penalty phase, and that to establish such a defense defendants would be required to call the necessary witnesses. Codefendants McClain and Newborn similarly informed the court that they would present evidence of lingering doubt. (64 RT 6314-6316; 65 RT 6377.)

During opening statements to the jury, when defendant Newborn's announced his intention to present evidence "directed to the concept of lingering doubt," the trial court interrupted, ordered the jury removed and, had preliminary discussions about the parameters of lingering doubt at a penalty retrial. Newborn explained the area appropriate for the introduction of evidence was that area between beyond reasonable doubt -- which is sufficient for a conviction -- and doubt or proof beyond that which is sufficient for execution. (65 RT 6378.) When counsel for appellant Holmes explained that he wanted to concentrate on the inadequacies of Pina's identification, the trial court interrupted counsel mid-thought to ask for the

district attorney's opinion on the matter. (65 RT 6380-6381.) Predictably, and contrary to his earlier position, the prosecutor argued evidence of lingering doubt was not admissible and would tend to confuse the jury. (*Ibid.*) The trial court would not permit defendants to make a record of what evidence they intended to introduce on the issue, expressed surprise the issue even came up, did not seem to understand Newborn's confusion regarding the court's conflicting rulings and comments, and directed all parties to file briefs. (65 RT6377-6388.) [12]

Thus, appellant Holmes advised the trial court, to the degree he was permitted, that he intended to dispute the accuracy of Pina's identification. Of course this strategy was in hopes that one juror might believe the guilty verdict, while valid, may have rested in part on faulty evidence – weighing in favor of a verdict for life.

Oddly, without making a final ruling on the admissibility of lingering doubt evidence, the trial court permitted opening statements to resume. The prosecution presented extensive guilt phase evidence including transcripts of McClain's guilt phase testimony, the testimony of three medical examiners, testimony of a fire arms examiner, a paramedic, the testimony of law

[12] The prosecution filed a trial brief on October 2, 1996. Appellant Holmes filed a trial brief on October 7, 1996. (8 CT 2134, 2141.)

enforcement personnel who responded to the Hodges's crime scene, testimony of the child whose party the victims attended, testimony of a security guard at Huntington Memorial Hospital, testimony of Gabriel Pina, who repeated his identification of McClain and Holmes at the crime scene, testimony of people who lived near the crime scene, "gang expert," testimony, and the testimony of children who attended and left the party with the victims, and numerous photographs of the deceased victims. (66 RT 6415-6490; 67 RT 6511-6558, 6581-6583, 6592-6645; 68 RT 6733-6766; 69 RT 6865-6889, 6909-6921, 6966-7156.) Holmes was permitted to call Pina and some law enforcement personnel to testify regarding Pina's identification. (71 RT 7064, 7136, 7157, 7162Thus, extensive prosecution guilt phase evidence was permitted and some small amount of lingering doubt evidence was before the jury, all without the trial court having made a ruling on the admissibility of or parameters of lingering doubt evidence.

When defendant McClain sought to present expert eyewitness evidence and call severed codefendants Bailey and Bowen, the trial court demonstrated his continued lack of understanding of the admissibility of lingering doubt evidence. His comments highlight the resulting unfairness of his exclusion of defense evidence when compared to the wide latitude given the prosecution to admit extensive and prejudicial guilt phase

evidence.

> Court: I don't find in this case that identity is an issue at this time in a case where you have been found guilty of three counts of murder, special circumstances were true, five counts of attempted murder. We are in the penalty phase and the court is not even sure about lingering doubt. The court has read the cases that counsel have given me. I'm not even sure that the prosecution has to put much forward on that. Since you opened the door a little bit and I told Mr. Jones in his opening statement I would allow some, I am hung out to dry here. Same thing with you Mr. Nishi... I don't find identity is an issue in this. I am not going to do it. (69 RT 6852-6853.)
>
> And later,
>
> Court: It goes again to lingering doubt, which this court has repeatedly said I have not made a decision. (71 RT 7101-7102; 72 RT 7191.)

In his opening brief, appellant set out the extensive case law which stands for the proposition that this Court has long recognized the relevance of lingering doubt as mitigating evidence. (AHOB at pp. 267-271; see for example *People v. Blair* (2005) 36 Cal.4th 686, 750-751; *People v. Davenport* (1995) 11 Cal.4th 1171, 1193; *People v. Cox, supra*, 53 Cal.3d 618, 677; *People v. Fierro* (1991) 1 Cal.4th 173, 241-147; *People v. Terry* (1964) 61 Cal.2d 137, 145-147, overruled on other grounds.)

"Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible." (*People v. Terry, supra*, 61 Cal.2d at p. 141) Because doubt is an inherent part of the system, a penalty "jury should have before it

not only the prosecution's unilateral account of the offense but the defense's version as well; the jury should be afforded the opportunity to see the whole picture..." (*Ibid.*) This is particularly true in the case where a different jury from that which determined guilt determines penalty. (See for example *People v. Terry, supra*, 61 Cal.2d at p. 146 [If the same jury determines both guilt and penalty, the introduction of evidence as to defendant's asserted innocence is unnecessary in the penalty phase because the jury will have heard that evidence in the guilt phase. If, however such evidence is excluded from the penalty phase, the second jury necessarily will deliberate in some ignorance of the total issue."].)

Even respondent recognizes that lingering doubt evidence is admissible at a penalty retrial as relevant to the circumstances of the crime under Penal Code section 190.3. (RB at p. 319 citing *People v. Gay* (2008) 42 Cal.4th 1195, 1221.)

In the instant case, the prosecution's case against appellant Holmes rested on a single unreliable eyewitness's testimony and the statement of a witness with less a than clean background and an incentive to lie. And while the prosecutor was permitted to pick and choose among the guilt phase evidence and present what ever it wanted, the defense was permitted to present only the testimony of Pina and Korpal. The court's error in denying

codefendant McClain's right to present expert eyewitness testimony prejudiced appellant Holmes. Appellant had called Kathy Pezdek, Ph.D., at the guilt phase as an expert in memory and eyewitness identification to help the jury assess the credibility of prosecution eyewitnesses –particularly Gabriel Pina. (34 RT 3648-3661.) At every telling of the story, eyewitness testimony continued to evolve and become more elaborate, more detailed, and more unbelievable and ultimately included testimony that appellant Holmes was seen holding a gun. This was the **only** evidence that could have led to a true finding of personal use of a weapon, a fact -- highlighted by the court in its comments that the jury should consider the verdicts as proof of guilt – which was undoubtedly was considered by the penalty jury to be an important factor in weighing whether appellant should receive a death sentence.

The trial court's denial of the defendants' right to present eyewitness identification evidence is particularly confusing in light of the fact that it permitted some defense challenge to Pina's identification. As noted above, the trial court was clearly confused as to the parameters of evidence of lingering doubt which was admissible. It arbitrarily permitted some, as in to directing cross examination of Pina, but not other evidence which would have assisted the jury in evaluating Pina's identification testimony. Then,

having put the defense in the impossible position of presenting only a portion of the lingering doubt defense, it compounded the error by erroneously commenting **and** then instructing the jury that there was other evidence besides Pina's testimony of appellant's guilt.

A jury must be instructed on mercy in every capital case irrespective of the evidence presented in aggravation or mitigation. Mercy can be granted based on "any other consideration whatever." (*Winston v. United States* (1899) 172 U.S. 303, 313.) A jury may grant mercy because it has a - lingering" or "whimsical" doubt as to the defendant's guilt. It is a recognized concept that a jury's genuine doubt of guilt, even though it is not a reasonable doubt, is sufficient reason to reject a death sentence. (*People v. Terry* (1964) 61 Cal.2d 137, 145-146.)

In the instant case, the trial court did just the opposite. Over the objection of the defense, the trial court instructed the jury:

> Court: On the issue of lingering doubt, the court stated at the time of opening statements that I would be commenting on that concept. You will get a jury instruction on that. There are numerous comments about Mr. Pina's identification in this case. The court stated yesterday that is only part of the evidence in the guilt phase. There is direct and circumstantial evidence and there were guilty verdicts. Therefore, you should not speculate as to what evidence the jury and the guilt phase based its verdicts on. For the purposes of your duties in his trial must accept the fact that there was evidence presented beyond a reasonable doubt to convict the defendants of the charges against them. (75 RT 7498-7499.)

Although the trial court also read jury instructions, which provided in part "[r]easonable doubt is not at issue in the penalty phase; the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt... Lingering doubts as to guilt may be considered as a factor in mitigation. A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the juror a reasonable doubt..." (8 CT 2171-2172; 75 RT 7503-7505), the damage was done. Whatever "lingering doubt" resulting from Pina's "eyewitness" identification appellant Holmes hoped the jury would consider in deciding the appropriate penalty was negated by the court's instruction that the evidence against appellant Holmes was vast.

Predictably, the prosecutor seized on the disparate treatment by the trial court on the admission of lingering doubt, and argued the lack of evidence presented by the defendants was a basis for imposition of the death penalty. Although it was the trial court who curtailed defense presentation of lingering doubt evidence, the prosecutor argued:

> Myers: And you may hear an argument about lingering doubt.... But ultimately has there been any evidence to indicate that these defendants were anywhere but here on Halloween night? Has there been anything to cause a doubt that lingers? Has there been anything to say somewhere, somehow there is some other evidence that the most heinous crime in the history of Pasadena was misinvestigated, was bungled, that there was no delay in reaching a judgment in this case, that the prior jury had convicted these defendants did so in an

> unfair fashion? There is only one thing ever that has been proven beyond a lingering doubt in any courtroom, and in this case that one thing is that these kids aren't going to be trick-or-treating this Halloween. They are not coming back. That has been proven beyond a lingering doubt. We have given them the opportunity to present evidence to show that they weren't there, but no such evidence has been presented. (74 RT 7371 emphasis added.)

As appellant Holmes argued in his opening brief, this argument constituted prosecutorial misconduct. (AHOB at pp. 271-273.) The court misled the jury about how it was to consider lingering doubt evidence, and restricted the presentation of such evidence; and then the prosecutor misled the jury by arguing that no such evidence was presented because it did not exist.

Finally, the errors were not harmless. Each of the errors pertaining to appellant Holmes's lingering doubt defense prejudiced him. Moreover, each error compounded the impact of the others. The penalty jury had questions regarding testimony at the prior trial, which dealt directly with identification. (75 RT 7545.) Jury deliberations were lengthy. (75 RT 7552-7555.) Reversal of the penalty verdict is required.

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XXVII. APPLICABLE TO APPELLANT NEWBORN

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XXVIII. APPLICABLE TO APPELLANT NEWBORN

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XXIX. APPLICABLE TO APPELLANT NEWBORN

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XXX. APPLICABLE TO APPELLANT MCCLAIN

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XXXI. APPLICABLE TO APPELLANT MCCLAIN

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XXXII. APPLICABLE TO APPELLANT MCCLAIN

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XXXIII. THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The penalty determination should be reversed because CALJIC No. 8.88, which formed the centerpiece of the trial court's instruction on the sentencing process, is constitutionally flawed. (AMOB at pp. 440-452; AHOB at p. 76.) Relying solely on prior case law of this Court, respondent contends that no error occurred. (RB 363.) Appellant has already addressed in the opening brief why that case law should be reconsidered; therefore, no further reply is necessary.

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XXXIV. THE TRIAL COURT ERRONEOUSLY FAILED TO DEFINE THE PENALTY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant's death sentence should be reversed because the trial court erroneously failed to define the penalty of life without the possibility of parole. (AMOB at pp. 452-458; AHOB at p. 76.) Relying solely on prior case law of this Court and without any real explication of that law, respondent asserts that no error occurred. (RB at pp. 363-364.) In the opening brief, appellant has discussed why that prior case law should be reconsidered. Accordingly, no further reply is necessary.

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XXXV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTREPRETED BY THIS COURT, VIOLATES THE UNITED STATES CONSITITUION AND INTERNATIONAL LAW

Appellant's death sentence should be reversed because application of the death sentence violates international law and evolving standards of decency. (AMOB at pp. 458-523; AHOB at pp. 76, 280-294.) Relying solely on prior case law of this Court and without any real explication of that law, respondent asserts that no constitutional violation or violation of international norms have occurred. (RB at pp. 364-366.) In the opening brief, appellant has discussed why that prior case law should be reconsidered. Accordingly, no further reply is necessary.

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XXXVI. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE LAW RIGHTS IN PERMITTING HIS JUVENILE ADJUDICATION FOR WEAPON POSSESSION TO BE OFFERED IN AGGRAVATION

Respondent contends that the trial court properly admitted appellant's juvenile adjudication for weapons possession as a factor in aggravation constituting an implied threat of violence. (RB at pp. 366-370.) Respondent is wrong.

As argued in his opening brief (AHOB ARG. XVI), this Court has established that not all cases of weapons possession rise to the level of an implied threat of violence unless an examination of the circumstances of the individual case warrants such a finding. This Court has repeatedly recognized possession while in custody does in fact meet that threshold. (See for example *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589, *People v. Ramirez* (1990) 50 Cal.3d1158, 1186-1187; *People v. Lucky* (1988) 45 Cal.3d 259, 291-292; and *People v. Harris* (1981) 28 Cal.3d 935, 962-963; AHOB at pp. 275-279.) At the time of his weapon's possession, appellant was a juvenile and he was not in custody.

Respondent recognizes this, and argues that because this Court has held that a jury could infer an implied threat of violence from weapons possession in certain non-custodial scenarios, admission of the juvenile adjudication was correct here. (RB at pp. 268-369.) It was not.

Each of the cases cited by respondent involves crucial facts which can not be found in this case. In *People v. Dykes* (2009) 46 Cal.4th 731, 775-777 the defendant possessed a cocked, loaded, and secreted weapon which he did not disclose to the arresting officer. In *People v. Smithey* (1999) 20 Cal.4th 936, 992 the defendant had his hand on a hidden loaded weapon while attempting to resist arrest. In *People v. Quartermain* (1997) 16 Cal.4th 600, 631, and *People v. Michaels* (2002) 28 Cal.4th 486, 535-536, the defendants possessed numerous illegal weapons, which had no other purpose but to harm humans. In both *People v. Jackson* (1996) 13 Cal.4th 1164, 1235, and *People v. Clair* (1992) 2 Cal.4th 629, 676, while in the commission of other criminal activity the defendant armed himself, supposedly to assist in his escape or other criminal enterprise.

Perhaps the holdings in *Smithey* and *Dykes* are most instructive on why there was error here. The incident offered as aggravation against appellant Holmes occurred when appellant was 15 years old -- some five years before the capital murders. Had appellant's weapon been hidden and had he attempted to continue to secrete it while avoiding or challenging the authority of the police, one might infer an implied threat of violence. But those were not the facts of this case. The testimony was clear that the weapon was in plain view; it was seized without incident, and the intention

of possession was self-protection. (68 RT 6797-6798; 53 RT 5285-5263.)

The error was prejudicial. Having found appellant guilty of personal gun use, knowing he had possessed weapons as a youngster, the jury was unlikely to be persuaded by evidence offered in mitigation intending to cast a sympathetic light on his youth. Moreover, the prosecutor argued the incident rose to the level of a "conviction" (74 RT 7386), thus amplifying its negative import.

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XXXVII. IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS, CALIFORNIA GIVES INDIVIDUAL PROSECUTORS UNBOUNDED DISCRETION TO DECIDE IN WHICH SPECIAL-CIRCUMSTANCE MURDER CASES THE DEATH PENALTY WILL BE SOUGHT

Appellant's death sentence should be reversed because California gives individual prosecutors unbounded discretion to decide in which special circumstance murder cases the death penalty will be sought. (AHOB at pp. 295-296.) Relying solely on prior case law of this Court and without any real explication of that law, respondent asserts that no constitutional violation or violation of international norms have occurred. (RB at p. 370.) In the opening brief, appellant has discussed why that prior case law should be reconsidered. Accordingly, no further reply is necessary.

****

XXXVIII. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICTS AND THE JUDGMENT OF DEATH AND DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND PENALTY PHASE

Respondent contends that there were no errors and, to the extent error was committed, appellant has failed to demonstrate prejudice. (RB at p. 370.) Of course appellant disagrees. As argued in his opening brief, in the instant case, relief must be granted because the cumulative effect of all of the constitutional and nonconstitutional errors in this case clearly had a substantial and injurious effect or influence in determining the jury's verdicts in both phases of appellant Holmes's trial. (AHOB at pp. 297-301.)

This was in fact a close case. The evidence was entirely circumstantial. The prosecutor relied on improperly admitted evidence and improperly given instructions. Further, there was a combination of constitutional and other errors in this case. Therefore, all errors should be reviewed cumulatively and under a *Chapman* standard. Appellant has previously established that, in the absence of error, a juror in this case reasonably could have found appellant not guilty or that a life without parole was the appropriate sentence in this case. In light of that fact, and in light of the nature and seriousness of the errors noted above, it is both reasonably possible (*Chapman v. California, supra*, 386 U.S. at 24) and reasonably

probable (*Strickland v. Washington, supra*, 466 U.S. at 693-695) that any combination of those errors adversely influenced the guilt verdicts and the penalty determination of at least one juror. It certainly cannot be found that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at 341.) The judgment of death must be reversed.

XXXIX. JOINDER IN CO-APPELLANTS' ARGUMENTS

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

CONCLUSION

Based on the arguments in this reply and appellant's opening brief, appellant respectfully requests this Court to reverse the judgment below and grant him a new trial, or, at a minimum, reverse the judgment of death and remand for a new penalty hearing.

Dated: 3/15/10

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Karl Holmes
By Appointment of the Supreme Court

PROOF OF SERVICE

I am a citizen of the United States and am employed in Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

APPELLANT HOLMES'S REPLY BRIEF

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Modesto, CA addressed as follows:

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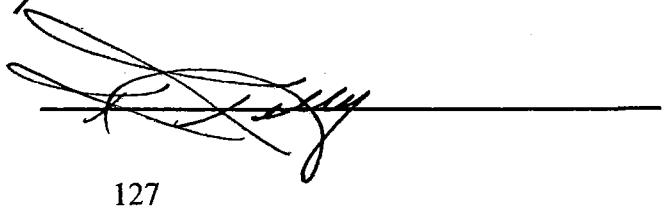
I, K. Kelly, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 3/18/10 at Modesto, California.



IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent

vs.

KARL HOLMES, HERBERT McCLAIN

and LORENZO NEWBORN
Defendants and Appellants

/

No. S058734

Los Angeles
County
Court no.
BA092268

APPELLANT KARL HOLMES'S CERTIFICATE OF REPLY BRIEF WORD COUNT

Karen Kelly
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CERTIFICATE OF REPLY BRIEF WORD COUNT

I certify that Appellant Holmes's Reply Brief consists of 28, 585 words.

Dated:

_____

Karen Kelly

PROOF OF SERVICE

I am a citizen of the United States and am employed in Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

APPELLANT HOLMES'S CERTIFICATION OF REPLY BRIEF WORD COUNT

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Modesto, CA addressed as follows:

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

Executed on 3/24/10 at Modesto, California.

_____