# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**FLOYD LAVENDER, et al.,**

**Defendant and Appellant.**

Case No. S209975



Fourth Appellate District, Division One, Case Nos. D057655; D057686
Imperial County Superior Court, Case Nos. JCF21566; JCF21567
Honorable Donal Donnelly, Judge

## RESPONDENT'S REPLY BRIEF ON THE MERITS

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## INTRODUCTION

After examining conflicting declarations concerning the nature and scope of the misconduct that was committed by one or more jurors in this case, the Court of Appeal chose to credit the defense declarations, reverse the judgment, and remand the matter for a new trial instead of an evidentiary hearing. By finding a substantial likelihood that one or more jurors were actually biased against appellants in the absence of a full hearing, the Court of Appeal presumed greater misconduct than the evidence showed (see *In re Carpenter* (1995) 9 Cal.4th 634, 657 (*Carpenter*)) and skipped an essential step in the inquiry. It also begged the central question that is presented by this record. Though it is true that "even one improperly influenced juror is enough to overturn the verdict," this Court has also held that "the exact nature of the misconduct is highly relevant to the initial determination of bias[.]" (*Ibid.*) That initial determination is properly made by the trial court, which is the only court that is in a position to take testimony from the jurors, assess their credibility, and make the crucial historical findings of fact in the first instance. Accordingly, the Court of Appeal erred when it declined to remand the matter so that a limited hearing could be held under *People v. Hedgecock* (1990) 51 Cal.3d 395 (*Hedgecock*).

### A. The Conflicting Juror Declarations Create A Disputed Issue Of Material Fact That Can Only Be Resolved By Remanding The Matter To The Trial Court For A *Hedgecock* Hearing

Appellant Gaines concedes, "if the question presented on appeal requires a credibility determination, a remand hearing would be appropriate," but in the same breath he makes the claim that his case "does not present any credibility issues." (GABM at p. 20.) Appellant Lavender similarly asserts that, "There simply was no conflict in the evidence as to

whether the jurors discussed adverse inferences to be drawn from the defendants' failure to testify." (LABM at p. 34.) Appellants' contentions are belied by the record in this case.

In *Hedgecock*, Jurors Bohensky and Saxton-Calderwood submitted declarations wherein they attributed several remarks to their bailiffs, Allen Burroughs and Holly Murlin. Bohensky averred Burroughs had stated "that sequestration was expensive, that the jurors did not 'have to be treated as nice as this,' and that they should reach a quick verdict." Bohensky also alleged that Burroughs told him to "take notes 'on what any unreasonable jurors' were saying." Bohensky further alleged that both bailiffs talked to him "about their experiences with other juries and their ability to tell how the jurors would ultimately vote," and offered their opinions regarding the relative difficulties that other jurors on the panel would have in reaching a verdict. Finally, Saxton-Calderwood claimed she had overheard Burroughs having a discussion with another juror about "who was holding up deliberations." (*Id.* at pp. 411-412.) Burroughs and Murlin submitted counter-affidavits which generally denied that the purported conversations took place. (*Id.* at pp. 412-413.)

In concluding that the trial court had the discretion to conduct an evidentiary hearing in which jurors could be compelled to testify, this Court noted, "The affidavits presented material factual conflicts; cross-examination could have assisted the trial court in resolving the disputed evidence." Significantly, after further noting that, "The alleged misconduct was of a serious nature," this Court observed, "*If* Bailiff Burroughs *did make the remarks* that Jurors Bohensky and Saxton-Calderwood attributed to him, those remarks were presumptively prejudicial [Citation] and of a character 'likely to have influenced the verdict improperly' [Citations]." (*Hedgecock*, *supra*, 51 Cal.3d at p. 419 [emphasis added].) This Court specifically declined to do what the Court of Appeal did in this case, which

was to assume that the declarations presented by the defense were accurate and credible. This Court took that course because it recognized that, "when compared to the use of affidavits, a hearing at which witnesses testify and are subject to cross-examination is a more reliable means of determining whether misconduct occurred." *(Hedgecock, supra*, 51 Cal.3d at p. 417.)

Seeking to avoid the conclusion dictated by this Court's opinion in *Hedgecock*, appellants assert that the evidence in this case is undisputed. (GABM at p. 18 ["Here, the prosecution failed to file any affidavits contradicting the defense claim that at least one juror who discussed the defendants' failure to testify specifically discussed tying that failure to inferences of guilt"]; (LABM at p. 33 ["The Court of Appeal's evaluation of the issue was based upon uncontroverted portions of the declarations submitted by the defense establishing that one or more jurors had discussed the defendants' failure to testify and the adverse inferences to be drawn from this fact"]. They are incorrect. All of the jurors who provided declarations to the prosecution said only that one or more jurors had "mentioned" the fact that appellants did not testify. Those declarations do not reveal that any juror expressly linked an inference of guilt to that fact. (4 GCT 899-905.) The only point of agreement in the declarations submitted by the prosecution and the defense was that appellants' decision not to take the stand was mentioned. In *People v. Leonard* (2007) 40 Cal.4th 1370, 1425 (*Leonard*), and *People v. Loker* (2008) 44 Cal.4th 691, 749 (*Loker*), this Court held that though it is misconduct for a juror to comment on a defendant's failure to testify, it is not prejudicial if the jury has declined to draw any adverse inferences from that fact.

It is no answer to say that the defense declarations establish that the jurors committed prejudicial misconduct. (GABM 18-19; LABM at p. 33.) If that were the case, this Court had all of the information it needed to resolve the evidentiary dispute in *Hedgecock*, since the defense declarations

attributed statements to Bailiff Burroughs that not only constituted misconduct but were also "likely to have influenced the verdict improperly." (*Hedgecock*, *supra*, 51 Cal.3d at p. 419.) Had this Court determined the evidentiary conflict could be resolved, and the potential prejudice assessed based on an examination of the defense declarations alone, there was no need to remand the matter. Indeed, it would have been an exercise in futility, because a reversal and a new trial would have been a foregone conclusion in light of the statements the defense declarations contained. In declining to assume that Bailiff Burroughs made the alleged remarks (*Hedgecock*, *supra*, 51 Cal.3d at p. 419), this Court impliedly found that the contradictory nature of those declarations created a credibility dispute that could only be resolved by the trial court, and that it could not make a determination regarding prejudice until the necessary factual findings had been made.

Here, only the declarations presented by the defense from Juror No. 4 (4 GCT 851 ["We discussed the fact that if the defendant[s] were innocent then they should've testified"]) and from Juror No. 10 (4 GCT 853 ["There was no testimony from the defendants and we discussed this fact during the deliberations and openly talked about why they did not testify and that this fact made them appear guilty to us"]) provided evidence that one or more members of the jury may have explicitly linked the fact that appellants did not testify to a prohibited inference of their guilt. "If [any jurors] did make the remarks that Jurors [No. 4] and [No. 10] attributed to [them], those remarks were presumptively prejudicial . . . and of a character 'likely to have influenced the verdict improperly[.]' " (*Hedgecock*, *supra*, 51 Cal.3d at p. 419.) If the juror or jurors in question merely mentioned the fact that appellants did not testify, were immediately admonished, and agreed to follow the court's instructions, then there was no prejudice. (*Leonard*, *supra*, 40 Cal.4th at p. 1425; *Loker*, *supra*, 44 Cal.4th at p. 749.)

Therefore, what the jurors actually said is the issue upon which the proper disposition of this case turns. They either verbalized a belief that appellants were guilty because they failed to testify, or they did not. In light of the fact that the declarations submitted by the prosecution and the defense were in complete disagreement on that point, including the declarations that were submitted by both sides from the same two jurors (3 GCT 849; 4 GCT 851, 899, 901), a reviewing court will not be in a position to make its assessment of prejudice and conclude whether there was a substantial likelihood that one or more jurors were actually biased against appellants until the trial court has resolved that disputed issue of fact by making the necessary credibility determinations. (*People v. Nessler* (1997) 16 Cal.4th 561, 583 (*Nessler*) ["We look to the entire record to resolve this issue, keeping in mind that the trial court has found the relevant historical facts and resolved the conflicting evidence, but that the question of prejudice is for our independent determination"]; *Carpenter*, *supra*, 9 Cal.4th at p. 659 ["Because there is now a full factual record regarding the misconduct with all conflicts in the evidence resolved and with the relevant historical facts found, little would be gained by a remand"].)

### B. No Fact Is More Material Than What The Jurors Actually Said, And The Trial Court's Inquiry Would Not Be Barred By Evidence Code Section 1150

Appellant Lavender also asserts a remand for an evidentiary hearing would "serve no legitimate purpose in this case," either because "the only factual disputes mentioned by respondent are immaterial to resolution of the question of whether prejudicial jury misconduct occurred" (LABM at p. 35), or because " 'whether the juror or jurors who mentioned appellants' failure to testify drew the prohibited inference at all, by expressly linking appellants' silence to the question of their guilt or innocence,' " is "not subject to proof at an evidentiary hearing in light of the prohibition of

inquiry into the thought processes of jurors." (LABM at p. 37.) Appellant Gaines also makes the latter contention, but he confines it to the question of what the jurors "thought about the failure to testify" or whether they "actually considered the failure to testify as evidence of guilt." (GABM at pp. 19, 35.)

As previously discussed, whether one or more jurors actually made an explicit link between the fact that appellants did not testify and the inference they were therefore guilty is the central dispute presented by the evidence. For purposes of determining the proper remedy, no fact could be more material. And while evidence implicating the subjective reasoning processes of any particular juror would be prohibited by Evidence Code section 1150 (See, e.g., *Nessler*, *supra*, 16 Cal.4th at p. 584), evidence pertaining to any explicit remarks the jurors might have made touching on appellants' failure to testify would be admissible, because they would be open to the senses and thus subject to corroboration. (*Hedgecock*, *supra*, 51 Cal.3d at p. 419; *in re Stankewitz* (1985) 40 Cal.3d 391, 398.)

### C. *Krouse* Counsels A Remand For An Evidentiary Hearing Where Juror Declarations Are Inconclusive Regarding The Nature And Extent Of Any Open Discussion Or Agreement Among The Jurors Pertaining To A Prohibited Topic

Appellant Gaines also urges this Court to reject respondent's interpretation of *Krouse v. Graham* (1977) 19 Cal.3d 59 (*Krouse*), not on the merits, but because the argument that respondent made based upon it is "beyond the scope of the question presented," forfeited "because it has never been raised before," and "barred because respondent has previously conceded the record established misconduct." (GABM at pp. 37-38.) Appellant Gaines adds that, "To the extent respondent is arguing that any of the juror statements actually considered by the trial court are not 'overt acts' rather than evidence of the jurors' subjective mental processes, it

forfeited that argument by failing to make it in the Court of Appeal." (GABM at p. 38.) Appellant Lavender also declares *Krouse* "inapposite" on grounds that "in the present case the declarations were clearly describing statements made by the jurors during deliberations, in *Krouse* it was unclear whether the declarations were describing what the jurors said or what the jurors thought." (LABM at p. 38.)

Far from being "beyond the scope of the question presented," this Court's opinion in *Krouse* illustrates exactly why the Court of Appeal erred by reaching the question of prejudice before the precise nature of the misconduct could be determined through an evidentiary hearing, and by concluding there was a substantial likelihood of actual bias based solely on an examination of conflicting declarations. This Court in *Krouse* found the juror declarations were "inconclusive" and "could be construed as conduct reflecting only the mental processes of the declarant jurors, for they assert that certain unnamed jurors 'commented' on the subject of attorneys' fees, and that the jurors 'considered' the matter in determining the 'final compromise award.' " (*Krouse*, *supra*, 19 Cal.3d at p. 81.) This Court in *Krouse* concluded that the declarations before it were "inconclusive regarding the nature and extent of any open discussion or agreement between the jurors regarding the subject of attorney's fees," but that "taken together" they raised "an issue of sufficient moment that, in fairness, the declarations should have been admitted and considered by the court in its ruling upon defendant's motion for new trial." (*Id.* at pp. 81-82.)

Notably, this Court in *Krouse* held, "Rather than set aside the Mladinov verdict, thereby necessitating a new trial, however, it is appropriate simply to vacate the order denying new trial and to direct the trial court to admit the declarations and, weighing them in conjunction with all other relevant matters, to reconsider the motion." (*Krouse*, *supra*, 19 Cal.3d at p. 82.) Here, the prosecution's declarations indicated appellants'

failure to take the stand was merely "mentioned" (4 GCT 899, 901, 903) or not mentioned at all. (4 GCT 905.) While it is true that those portions of the declarations found admissible by the Court of Appeal indicate the jurors "discussed" the prohibited topic (3 GCT 849; 4 GCT 851, 853), that does not alter the fact that the declarations in this case, like the declarations in *Krouse*, were "inconclusive regarding the nature and extent of any open discussion or agreement between the jurors regarding the subject of" appellants' decision not to take the stand and whether they would follow the court's instructions. (*Krouse*, *supra*, 19 Cal.3d at p. 81.)

While appellant Gaines is correct (GABM at pp. 37-38) that respondent acknowledged one or more jurors committed misconduct by discussing appellants' failure to testify (Respondent's Brief at p. 15), respondent did not concede that appellants were "prejudiced by the juror comments on [their] failure to testify" (*Leonard*, *supra*, 40 Cal.4th at p. 1425), that any discussion that took place "played [a] role" in the jury's deliberations (*Loker*, *supra*, 44 Cal.4th at p. 749), or that any member of the jury rendered a decision on any basis other than a consideration of the evidence presented at trial. (*Nessler*, *supra*, 16 Cal.4th at p. 589.) Those determinations must still be made by the finder of fact, following an evidentiary hearing at which the trial court may weigh the credibility of the declarants and determine the nature and extent of those discussions. It is then, and only then, that an appellate court will be in a position to conduct an independent review concerning the question of prejudice. (*Krouse*, *supra*, 19 Cal.3d at p. 82; *Nessler*, *supra*, 16 Cal.4th at p. 583.) Appellant Gaines's contention that this argument is forfeited because it was "never raised before" is inaccurate. Respondent raised that very issue in the Petition for Rehearing that it filed in the Court of Appeal. (Pet. for Rhrg. at pp. 1-5.) In light of the inconclusive nature of those conflicting declarations, this Court should also find it appropriate that the matter be

remanded for an evidentiary hearing under *Hedgecock*, after which the trial court may reconsider its ruling on the new trial motion. (*Krouse*, *supra*, 19 Cal.3d at pp. 81-82.)

### D. *Von Villas*, *Bryant* and *Perez* Stand For The Proposition That A Remand For An Evidentiary Hearing Is Appropriate Whenever The Validity Of A Conviction Depends Solely On An Unresolved Or Improperly Resolved Factual Issue, In Accordance With This Court's Opinion In *Moore*

Appellant Gaines also seeks to distinguish the three cases cited by this Court in its original Order transferring the matter to the Court of Appeal for reconsideration of its decision. He asserts that in contrast to the circumstances presented by *People v. Von Villas* (1992) 11 Cal.App.4th at p. 175 (*Von Villas*), here "the defense submitted declarations signed under penalty of perjury stating that three jurors heard discussions linking the defendants' failure to testify to evidence of their guilt, as well as a sworn declaration from a defense investigator impeaching later statements from two of the jurors who tried to explain portions of their defense declarations." (GABM at p. 22.) Appellant Gaines contends his case is "different" from *People v. Bryant* (2011) 191 Cal.App.4th 1457 (*Bryant*), because "The defense here submitted sworn, admissible declarations establishing misconduct occurred and that the prejudice was not rebutted." (GABM at p. 23.) Finally, appellant Gaines contrasts his case with *People v. Perez* (1992) 4 Cal.App.4th at p. 893 (*Perez*), on grounds that there, "the appellate court was faced with serious jury misconduct allegations unsupported by sworn affidavits and addressed through an entirely deficient trial court hearing and without any admissible evidence before it." (GABM at p. 24.)

From those three cases, appellant Gaines distills the rule that remand for an evidentiary hearing is only warranted under circumstances where

"judicial error has thwarted the fact-finding process." (GABM at pp. 24-25.) Appellant Gaines concludes that his case escapes application of that rule because, "although the trial court incorrectly excluded from its consideration relevant portions of several declarations, it understood its role as fact-finder, it understood the law of juror misconduct, and it agreed with the prosecutor that the declarations before it did not present any material disputed facts." (GABM at p. 25.) Appellant Gaines fails to explain how it is that the judicial error in this case did not also thwart the fact-finding process.

The rule that appellant Gaines seeks to fashion was stated more broadly by this Court in *People v. Moore* (2006) 39 Cal.4th 168 (*Moore*). There the trial court had denied the defendant's suppression motion, based on its determination that at the time the defendant was subject to a valid parole search condition. The defendant's case proceeded to trial and he was convicted. During the pendency of the defendant's appeal, this Court decided *People v. Sanders* (2003) 31 Cal.4th 318 (*Sanders*), which held that police officers must know of a defendant's parole search condition to justify a warrantless search under that exception. The Court of Appeal reversed after noting that the prosecution did not present any evidence during the suppression hearing that police officers knew the defendant was on parole when they searched him, and that it was unable to determine from the facts presented at the hearing whether the defendant had been searched pursuant to a lawful arrest. (*Id.* at p. 172.)

This Court held that the Court of Appeal erred by reversing the matter outright instead of remanding the matter for a further hearing. (*Id.* at p. 174.) In reaching its conclusion this Court observed, "Because the suppression hearing occurred before we decided [*Sanders*], the trial court and the parties acted with the understanding that they were not required to present evidence whether the officers knew of defendant's parole search

condition. In that situation, where the parties understandably did not present arguments and evidence relating to search issues, a reviewing court should remand to the trial court to consider any alternate grounds for or against suppression." (*Ibid.*) This Court further noted that, "Based on the trial court's ruling, the prosecution did not present evidence of the officers' knowledge regarding defendant's search condition, although the prosecution's opposition to the motion and the police report suggested at least one of the officers knew about the condition." (*Id.* at p. 176.) In reaching its conclusion this Court observed:

> "[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand." [Citation] In other words, "when the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made."

(*Moore*, *supra*, 39 Cal.4th at pp. 176-177.)

Thus, a remand is appropriate whenever "the validity of a conviction depends solely on an unresolved or improperly resolved factual issue." (*Id.* at p. 176.) *Von Villas*, *Bryant* and *Perez* are in accord with this same principle. (*Von Villas*, *supra*, 11 Cal.App.4th at p. 258 ["The concern then, is whether [defendant]'s judgment of conviction should be reversed in toto on this record, or whether the judgment should be vacated and the matter remanded to the trial judge with instructions to allow examination of the jurors themselves as to what really occurred during deliberations that might have constituted juror misconduct"]; *Bryant*, *supra*, 191 Cal.App.4th at p. 1471["It is difficult to imagine how the presumption of prejudice could be

rebutted in the absence of evidence as to what definition of reasonable doubt was accessed by the jury during deliberations"]; *Perez, supra,* 4 Cal.App.4th at p. 909 ["On remand we wish to emphasize the trial court should not assume 12 jurors actually discussed [defendant]'s failure to testify"].)

### E. Appellants Fail To Distinguish *Moore* And *Johnson* From Their Case; Therefore, This Court Should Reject Their Forfeiture Arguments

Appellant Gaines acknowledges that, "The fact-finding process in the trial court may be inappropriately skewed when the relevant law changes after the trial court rules and new or different facts become relevant to the ruling at hand." (GABM at p. 26.) However, he maintains that unlike the circumstances presented in *Moore*, no unanticipated intervening change in the law occurred which might have "prevented the prosecution from presenting all the evidence it could gather in the trial court in support of its position." (GABM at pp. 26-27.) Appellant Lavender also alleges that "whatever contradictions exist in the declarations were apparent at the time the new trial motion was heard," the prosecutor was afforded a fair opportunity to rebut the presumption of prejudice during the original prima facie hearing, and thus the issue respondent seeks to address "in a belated evidentiary hearing" is the same one that was originally before the trial court. (LABM at p. 39.)

In this case, the Court of Appeal's intervening ruling had the effect of altering both the evidentiary mix and the legal analysis. Given those portions of the declarations that the trial court had previously found to be admissible, there was no dispute regarding what the jurors had said during deliberations. At most one or more jurors had mentioned the fact that appellants had not testified, the foreman immediately admonished them that they were not to consider that fact, and that was the end of the matter.

Though what occurred was misconduct, it would not have been prejudicial under this Court's holdings in *Leonard* and *Loker*.

Based on the evidence that was actually before the parties during the new trial motion, there was no reason for the prosecutor to argue that a *Hedgecock* hearing should have been held. Nor was there any reason for respondent to make that argument in its briefing for the Court of Appeal. The Court of Appeal's subsequent opinion had the effect of admitting the previously excluded portions of the juror declarations. Thus, its ruling created an unresolved conflict regarding the nature and extent of the jurors' misconduct where none had existed before. Since the trial court did not consider those portions of the declarations, it did not have the opportunity to resolve a factual dispute which is central to the validity of the convictions in this case.

In *Moore*, the defendant also pointed out that he had made "several claims challenging the warrantless search in his suppression motion," and that since "the prosecution chose to argue only the parole search justification below . . . it was not he 'who limited the scope of the suppression hearing, it was the People, and it is the People who must bear the consequences of a woefully deficient presentation.' " (*Moore*, *supra*, 39 Cal.4th at p. 177.) This Court disagreed, adding, "The trial court denied defendant's suppression motion based on defendant's parole search condition, rendering any additional argument from the prosecution unnecessary." (*Ibid.*)

Like the defendant in *Moore*, appellant Gaines argues that respondent's contention an evidentiary hearing is the appropriate remedy under the circumstances presented here is forfeited because "the prosecution did not just acquiesce in the trial court's decision not to hold a hearing – it affirmatively opposed a hearing." (GABM at p. 29.) Seeking to distinguish this Court's opinion in *People v. Johnson* (2006) 38 Cal.4th

1096 (*Johnson*), appellant Lavender asserts that there, "The question to be addressed on remand . . . had never been addressed in the trial court[,]" whereas in the instant case, "the prosecution was afforded every opportunity to present evidence relating to the question of prejudice at the time the motion was heard[.]" (LABM at p. 40.)

This Court should reject appellants' contentions for the same reason it rejected the defendant's claim in *Moore*. Since the trial court denied appellants' motion to hold a *Hedgecock* hearing, there was no reason for the prosecutor to argue that it should hold a hearing rather than grant appellants a new trial. The posture of this case does not differ in the least from *Johnson*, where this Court remanded the matter for a further hearing following the Supreme Court's opinion in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129], which held that the trial court had applied an erroneous standard when it determined that the defendant had failed to establish a prima facie case under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (*Johnson, supra*, 38 Cal.4th at pp. 1098-1101.)

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

the opportunity to do so on remand now that we know the trial court erred in failing to find a prima facie case." (*Ibid.*)

### F. Because Respondent Has Not Made Inconsistent Arguments, This Court Should Also Decline To Apply The Principle Of Judicial Estoppel

In a related argument, appellant Gaines also asks this Court to find that respondent's position is foreclosed by principles of judicial estoppel. Appellant Gaines summarizes his claim as follows: "Here, the prosecution took the position below that no hearing was necessary because there was no conflict in the evidence. Now the prosecution claims there is an irreconcilable conflict that can only be resolved at a hearing. These two positions, taken during judicial proceedings, are totally inconsistent." (GABM at p. 32.) As previously discussed, respondent has not taken inconsistent positions based upon the same facts. The Court of Appeal's opinion had the effect of injecting newly admissible evidence, which in turn created disputed factual issues where none had previously existed. In light of the changed circumstances it is not inconsistent, much less "totally inconsistent," for respondent to argue that a remand for an evidentiary hearing is the appropriate remedy. (See *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.)

### G. Remanding The Matter For An Evidentiary Hearing Will Not Prejudice Appellants

Both appellants also argue that remanding the matter for an evidentiary hearing would prejudice them. Appellant Gaines contends that "by opposing a hearing in the trial court, the prosecution delayed any possible hearing by at least two years, substantially reducing the likelihood that any hearing could be helpful or reliable." (GABM at p. 32.) Appellant Lavender asserts that "granting an evidentiary hearing at this stage of the proceedings would be unfair to appellants," and to the concerns raised by

the Court of Appeal in its opinion – including the prospect of fading memories, coloring of memories due to publicity, and the difficulties involved in reassembling the jury – he adds his own concern that his trial attorney is now deceased. (LABM at p. 41.)

The defendant in *Moore* also complained that a remand would violate his due process rights because, since the search had occurred in 1999, "it would be difficult to locate witnesses who would likely remember events relating to the search." (*Moore*, *supra*, 39 Cal.4th at p. 177.) This Court noted it had "already rejected such a claim" and added:

> "We are not persuaded that relitigation should have been denied because of delay. Delays that are the product of the normal appellate process do not implicate due process concerns. The difficulty in locating witnesses, and the possibility of fading recollection, are no different with respect to the hearing on the admissibility of [evidence] than with respect to the trial itself."

(*Moore*, *supra*, 39 Cal.4th at pp. 177-178, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 852.)

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

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

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

Though it is unfortunate that trial counsel for appellant Lavender has passed away, that fact poses no greater obstacle than the absence of the trial judge from the proceedings, which was one of the grounds on which the defendant in *Johnson* alleged that he would be prejudiced by a remand for an evidentiary hearing. (*Johnson*, *supra*, 38 Cal.4th at p. 1102.)

### H. Prejudice Cannot Be Assessed Until The Trial Court Has Resolved The Evidentiary Conflicts And Made Its Findings Of Fact In The First Instance; Thus, This Court Should Reject The Remaining Claims Made By Appellants

Next, appellant Gaines asserts the Court of Appeal correctly determined no further evidentiary hearing is warranted (1) because the prosecution's declarations, which were submitted to clarify the declarations that the same jurors had submitted to the defense, "failed to explain the discrepancies between them;" (2) because one or more jurors had expressly linked appellants' failure to testify to an adverse inference of guilt, and so the foreman's admonition would be unlikely to " 'have any curative effect on a jury that has already evinced a willingness to disregard the court's instructions;' " (3) because given the state of the evidence in this case "it would be difficult for the prosecution to rebut the presumption of prejudice;" and (4) because the defense has already proved the trial was unfair once and it should not be required to make the same showing again. (GABM at pp. 32-33.) After analyzing the evidence of his guilt, appellant Gaines concludes: "In sum, the fact that the defendants were convicted based on such flimsy and contradictory evidence raises a distinct possibility that at least one juror took their failure to testify into consideration as substantive evidence of guilt." He adds, "The admissible evidence presented at the motion for new trial confirms this." (GABM at p. 35.)

Like the Court of Appeal, appellant Gaines assumes the defense declarations have already proved the trial was "unfair" and that "one or more jurors had expressly linked appellants' failure to testify to an adverse inference of guilt." Like the Court of Appeal, appellant Gaines thereby begs the central question posed by his case. Like the Court of Appeal, appellant Gaines also puts the cart before the horse by declaring the presumption of prejudice is unrebutted. There is no basis upon which to

reach those conclusions in light of the contradictory declarations that were submitted by the prosecution, and it is premature to reach them before the trial court has determined the nature and scope of the misconduct that occurred. That point will not have arrived until there is "a full factual record regarding the misconduct with all conflicts in the evidence resolved and with the relevant historical facts found[.]" (*Carpenter*, *supra*, 9 Cal.4th at p. 659.)

Any assessment of the strength of the evidence in this case is outside the scope of this Court's grant of review. Further, the evidence in this case was not "flimsy and contradictory," as appellant Gaines makes it out to be. The witnesses all agreed that both appellants were present at Vereen's apartment, that they were angry because they believed one or more of the witnesses had stolen checks that belonged to them, that they spent nine hours torturing the witnesses in order to elicit a confession, and that once Tory accepted responsibility they took her away, never to be seen again. (5 LRT 327-330, 334; 6 LRT 636-637, 649, 702; 7 LRT 809-810; 8 LRT 986-987, 999-1004, 1027, 1051-1052, 1098-1100; 9 LRT 1149-1151, 1156-1157, 1181, 1203-1204, 1207, 1263.) Before appellants left with Tory they had burned her with silverware, slapped her, punched her, pulled her hair, and shaved her hair, all while saying, "You're going to die, bitch, you're going to die." (6 LRT 652-656, 711; 8 LRT 1003-1004, 1054-1055, 1095-1096; 9 LRT 1156, 1185-1186, 1197-1198.) Appellant Lavender had rubbed scissors along Tory's body, and had threatened "to put the scissors up [her]." (9 LRT 1151-1153.) Either Gaines or Lavender threatened the girls at some point that they would take them out to the desert and "make [them] dig [their] own hole." (9 LRT 1259-1260.) The following morning, appellant Gaines told Vereen that, "The girl is in the canal with a bag over her head barely breathing." (5 LRT 348-349, 387.)

In a final series of claims, appellant Gaines alleges that respondent has failed: to acknowledge that a determination whether the prosecution has rebutted the presumption of prejudice "requires an examination of the entire record of the trial, not just juror declarations and testimony"; to provide this Court "with a proffer of the facts it would attempt to prove at a remand hearing;" to acknowledge that "the presence of even one biased juror on the panel . . . requires a new trial for the defendants;" and to acknowledge that "the trial prosecutor actually invited the misconduct committed in this case by commenting on the defendants' failure to testify during closing argument." (GABM at pp. 36-37.)

As to his first point, appellant Gaines is correct, but again he raises the issue prematurely. As to his fourth point, assuming appellants' claim that the prosecutor committed *Griffin* (*Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]) error was not forfeited below (Respondent's Brief at p. 67), whether the *prosecutor* committed misconduct is beyond the scope of this Court's grant of review, which concerns the issue of *jury* misconduct. As to appellant Gaines's second contention, respondent is not seeking an evidentiary hearing so that it can prove new facts, but rather to afford the trial court the opportunity to resolve the conflicts in the evidence concerning the nature and the scope of the jury's misconduct.

Finally, appellant Gaines notes in his third contention that "the presence of even one biased juror on the panel . . . requires a new trial for the defendants[.]" (GABM at p. 36.) "This is correct once bias is established, but the exact nature of the misconduct is highly relevant to the initial determination of bias, which is based on all the surrounding circumstances." (*Carpenter*, *supra*, 9 Cal.4th at p. 657.) The proper disposition of this case turns on the exact nature of the misconduct which was committed by appellants' jurors. (*Ibid.* ["We will not presume greater

misconduct than the evidence shows"].) Since it will be unclear whether a new trial is warranted until the record is fully developed, this Court should remand the matter for a further evidentiary hearing.

## CONCLUSION

The decision of the Court of Appeal should be reversed and the matter remanded for an evidentiary hearing under *Hedgecock*.

Dated: November 14, 2013

Respectfully submitted,

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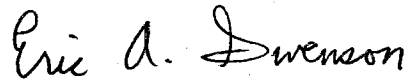

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Reply Brief on the Merits uses a 13 point Times New Roman font and contains 6,176 words.

Dated: November 14, 2013

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

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

I declare:

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

On **November 15, 2013**, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on November 15, 2013 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 15, 2013**, at San Diego, California.

Cathey Pryor
Declarant

Signature

SD2013805749