IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KARL HOLMES, HERBERT McCLAIN, AND LORENZO NEWBORN, Defendants and Appellants.	AUTOMATIC APPEAL Supreme Ct. No. S058734 Los Angeles County Superior Ct. No. BA 092268

APPELLANT McCLAIN'S REPLY BRIEF

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

Hon J.D. Smith, Presiding

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McClain replies to respondent's contentions below. For continuity, McClain addresses respondent's arguments in the same order as presented in Appellant McClain's Opening Brief.

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I. CLAIMS JOINED FROM APPELLANT NEWBORN'S OPENING BRIEF

In his opening brief, pursuant to California Rules of Court, rules 8.630(a) and 8.200(a)(5), McClain joined the following claims raised in Appellant Newborn's Opening Brief:

A. Guilt Phase

1. Appellant Was Deprived of Due Process, Equal Protection, and a Representative Jury in Violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by the Trial Court's Error in Refusing to Remedy the Prosecutor's Improper Exercise of Peremptory Challenges Based on Race and Sex.

(Newborn's Opening Brief at pp. 96-119 & Appendix A.)

2. Appellant Was Deprived of Due Process and a Representative Jury by the Erroneous Excusal of Juror #126 for Cause.

(Newborn's Opening Brief at pp. 119-134.)

3. Appellant Was Deprived of Due Process, a Fair Trial, and His Right of Confrontation in Violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by the Trial Court's Excessive Restrictions on Cross-examination of DeSean Holmes.

(Newborn's Opening Brief at pp. 135-155.)

4. Appellant Was Deprived of Due Process and a Fair Trial in Violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution by Prosecutorial Misconduct in the Form of Flagrant Appeals to the Jury's Passion and Prejudice During Closing Argument.

(Newborn's Opening Brief at pp. 195-206.)

B. Penalty Phase

1. **Appellant Was Deprived of Due Process and a Fair Trial in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution by the Trial Court's Error in Admitting Evidence of Holding Cell Graffiti in the Absence of Any Proof of Appellant's Authorship or Endorsement of the Writing.**

(Newborn's Opening Brief at pp. 280-290.)

McClain therefore joins in the arguments raised by Newborn in his reply brief with respect to these claims, as well as any arguments presented by appellants Newborn and Holmes in so far as they relate to the arguments presented by McClain on this appeal.

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS GABRIEL PINA'S UNRELIABLE EYEWITNESS TESTIMONY WHICH RESULTED FROM HIGHLY SUGGESTIVE PRE-TRIAL PROCEDURES.

Respondent argues that the trial court did not err in failing to suppress Gabriel Pina's trial testimony. (RB 204-218.) Respondent's argument is incorrect, and misstates both the facts and applicable law.

Respondent first suggests, erroneously, that Pina was not shown a single photograph of McClain from the newspaper, but instead argues that "the detective showed photographs out of a newspaper" to Pina. (RB 207.) This is misleading. After Pina failed to conclusively identify McClain from the six-pack of photos, Detective Korpal showed him only a single photograph from the newspaper. When Pina was asked: "Okay, so you saw pictures from a newspaper?" Pina replied "Just one picture" and testified that it was McClain. (26 RT 2697.)[1] In combination with the fact

[1] Although Pina said in his grand jury testimony, when asked, that there were other photographs in the newspaper (2 CT 464) he consistently

testified that Detective Korpal only showed him a single photograph. Pina further testified as follows at 26 RT 2699-2700:

17 Q. AND YOU DID NOT PUT YOUR PICTURE -- YOU DID

18 NOT PUT YOUR INITIALS ON THE BACK OF THIS PHOTOGRAPH ON

19 17-B OF MR. MC CLAIN UNTIL YOU HAD SEEN A SINGLE

20 PHOTOGRAPH OF MR. MC CLAIN; ISN'T THAT CORRECT?

21 A. YES.

22 Q. THANK YOU.

23 NOW, YOU WERE SHOWN A SINGLE PHOTOGRAPH FROM

24 A NEWSPAPER; IS THAT CORRECT?

25 A. THAT'S TRUE.

And again at 26 RT 2719:

9 Q. DID YOU EVER SEE ANY PHOTOGRAPHS IN THE

10 NEWSPAPER?

11 A. ONLY THE ONE I WAS SHOWN.

12 Q. AND WHEN YOU WERE SHOWN THAT PHOTOGRAPH FROM

13 THE NEWSPAPER, YOU WERE SHOWN A SINGLE PHOTOGRAPH; IS THAT

14 CORRECT?

15 A. YES. HE HAD THE PAPER FOLDED.

that Pina had already seen a television program which had McClain's image on it, this identification is highly suggestive. (2 CT 461-462.) Respondent's attempt to obfuscate this suggestive and prejudicial identification by misstating the facts should be ignored.

Respondent next suggests that Pina's subsequent testimony after the trial court ruled to allow him to testify is "irrelevant" for whether his identification was unduly suggestive. (RB 211.) Of course, the trial court could only have ruled upon the facts before it, but respondent is simply wrong in arguing that this court cannot consider his testimony in considering the five factors under *Neil v. Biggers* or whether the trial court's error was harmless. Indeed, in *Neil v. Biggers* (1972) 409 U.S. 188, 193-196, the Supreme Court specifically looked at the witness's trial testimony and her habeas corpus testimony when it determined which factors a trial court must consider before allowing an eyewitness to testify.

Respondent, in arguing that this case is similar to *People v. Ochoa* (1998) 19 Cal.4th 353, 411-413, repeats his factual misstatement, asserting that "Unlike *Ochoa*, this was not a case of a single photograph being shown. Rather, there were other photographs in the newspaper." (RB 213.) Pina was shown only a single photograph, and testified that Detective Korpal folded the paper over so he would only focus on the single photograph of McClain instead of the other pictures in the paper. (26 RT 2719.) Moreover, as stated above, Pina had already seen McClain's picture on television in a program asking for a reward for information about him, thus making his identification of McClain much more suggestive than the eyewitness in *Ochoa*.

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16 Q. AND WHO WAS THAT?

17 A. I THINK IT WAS KORPAL

Respondent next contends that the five *Biggers* factors all weigh in favor of allowing Pina to testify. Respondent argues that Pina had an opportunity to view the driver, whom he identified as McClain, because there was sufficient street lighting and because he made "eye to eye" contact with him. (RB 214.) Respondent, however, fails to consider that Pina's identification was made two months after he purportedly saw the driver. (2 CT 461-462.) Moreover, the car that Pina allegedly saw McClain driving had tinted windows. (25 RT 2647; 36 RT 3920.) Finally, Pina testified "looking face to face I have not really seen him that good." (2 CT 463; 26 RT 2697-2698.) Under these circumstances, Pina did not have sufficient opportunity to make a reliable identification.

Respondent argues that Pina had a high degree of attention at the time he made his identification of McClain because he was concerned about his safety. (RB 214.) Of course, this fact could also cut against Pina's ability to focus attention on the driver of the car. More importantly, Pina himself stated repeatedly that he did not pay attention to the driver of the car. (25 RT 2649; 26 RT 2712-2713; 35 RT 3747.)

Respondent does not argue that Pina's prior identification of McClain was accurate, because, in fact, he cannot. Instead, respondent cites to McClain's motion to suppress where McClain stated that he was unaware of any substantial discrepancy in description. (RB 214-215.) Of course there was no discrepancy, because there was no prior identification of McClain at the time of the motion to suppress. But when Pina was first asked if he could identify anyone at the scene, Pina said he could not because he did not pay attention. (26 RT 2712-2712; 35 RT 3747.) It was only after he saw the television program and then was shown a single photographs of McClain was he able to make an identification, not when it was freshest in his mind. This factor militates against allowing Pina to testify.

Respondent concedes that Pina was uncertain about his identification of McClain. (RB 215.) Indeed, Pina was initially unable to make an in court identification of McClain even after the suggestive procedures used by Detective Korpal of showing him a single picture of McClain from the newspaper. (25 RT 2649, 2651.) This factor clearly weighs in favor of suppressing Pina's identification.

Finally, respondent argues that "a month or two" after the offenses is not a "substantial" lapse of time to make an identification, but cites no authority for this argument. (RB 215.) Pina did not attempt to identify a suspect until fully 59 days after the homicides. (26 RT 2696.) This is too long a delay to allow for a reliable identification, and as stated above, Pina was unable to identify McClain when it was freshest in his mind. (See, e.g, *United States. v. Field* (9th Cir. 1980) 625 F.2d 862, 870 [witness's identification of questionable reliability where the first "sure" identification occurred approximately two months after the robbery]; *Dickerson v. Fogg* (2nd Cir. 1982) 692 F.2d 238, 247 [while 40 hours was not long enough to entirely obscure the witness's memory, the time of sharpest memory had passed].)

For these reasons, the five *Biggers* factors clearly weigh in favor of suppressing Pina's highly unreliable and suggestive identification. The trial court therefore erred in allowing Pina to testify.

Respondent claims that any error was harmless to McClain because of purportedly inculpatory statements he made as well as his activity after the offenses which, according to respondent, suggest a consciousness of guilt. (RB 216-218.) What respondent fails to mention is that Pina was the only witness to identify McClain as being near the scene of the Halloween crimes, and, of all the other witnesses against McClain, Pina was the only one who had not been arrested for a crime. Moreover, during the jurors' lengthy 12-day guilt phase deliberations, the jury requested readback of

Pina's testimony from the time he first saw the four cars until the time he saw suspects return to waiting cars. (6 CT 1467-1468; 45 RT 4720.) Clearly, the jurors placed a great deal of importance on Pina's unreliable testimony. In a close case such as this, a substantial error may require reversal and any doubts as to prejudice should be resolved in favor of appellant. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

Respondent claims that there was no Eighth Amendment violation by arguing that McClain has failed to show how applicable Supreme Court case law, which requires heightened reliability in capital cases, applies to a conviction obtained by an unreliable eyewitness identification. (RB 218.) Whether the facts of *Woodson v. North Carolina* or *Lockett v. Ohio* are identical to the present case is not the issue, but their underlying holdings that the Eighth Amendment requires more reliable procedures when a jury is considering a death sentence are clearly applicable here.

Because this prejudicial error violated McClain's rights to a fair trial, reliable guilt and penalty determinations, and due process, this Court must apply *Chapman v. California* (1967) 386 U.S. 18, 24 and reverse McClain's convictions in the Halloween killings.

III. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT McCLAIN'S CONVICTIONS OF CONSPIRACY, FIRST DEGREE MURDER, AND ATTEMPTED MURDER.

Respondent argues that there was sufficient evidence to support McClain's convictions for conspiracy, murder and attempted murder. (RB 150-167.) First, respondent contends that the evidence was sufficient to sustain McClain's conviction for attempted murder of Robert Price by arguing that the law cited by McClain is inapplicable because Price was the victim, not an informant. (RB 152.) This is a gross mischaracterization of McClain's principal argument: that Price's testimony was so completely

inconsistent that it is insufficient to sustain the conviction. As discussed more fully in the opening brief (AMOB 122-124), Price was a member of a rival gang, initially told hospital workers when he was first shot that it was in a drive by shooting, failed to tell police detectives who shot him, was paid $200 for his grand jury testimony, and only at trial testified that McClain uttered the words "thank you, Blood" when McClain allegedly shot him. The references to cases involving informants merely set out factors this court should consider when evaluating the reliability of testimony, many of which Price meets. His testimony falls well below the heightened reliability standards required by the Eighth and Fourteenth Amendments to the federal constitution. (*Woodson v. North Carolina*, (1976) 428 U.S 280, 305.)

Next, Respondent argues that there was sufficient evidence to support McClain's conspiracy conviction by attempting to distinguish *United States v. Garcia*, claiming that the case is inapposite. (RB 153-158.) Respondent, however, misstates the holding of *Garcia*. In that case, the Ninth Circuit found that even if there was evidence to show a general conspiracy to assault rival gang members, there was no evidence to support a conspiracy to assault the victims in the case. (*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1247.) It is without question that the prosecutor failed to show that there was a conspiracy to kill the victims in the present case. Respondent's further suggestion that overt act number 3 of the conspiracy, the shooting at Pasadena and Blake streets, may have occurred prior to the Halloween shootings is completely unpersuasive. There was no credible evidence, certainly no sufficient evidence, to demonstrate that this shooting occurred prior to the Halloween shooting, and no indication that McClain himself took part in the shooting.

Respondent next asserts that there was sufficient evidence to convict McClain of first degree murder and attempted murder for the Wilson street

homicides. (RB 159-163.) Not surprisingly, Respondent's argument focuses primarily on the identification made by Gabriel Pina because, absent that, there is no other evidence that places McClain at the crime scene. As explained in the opening brief (AMOB 117-121), Pina's testimony, even if it were legally admissible, was inconsistent and contradicted by his girlfriend, Lilian Gonzales, whom he was with at the time of the shooting. Additionally, the testimony of jailhouse informants Marion Stevens, James Carpenter, Troy Welcome and Derrick Tate, while legally admissible, is completely suspect and insufficient to support the conviction for first degree murder, as explained more fully in the opening brief. (AMOB 102-117.) Taken as a whole, there is insufficient evidence to support the first degree murder conviction and this Court must reverse McClain's conviction. [2]

IV. THE ADMISSION OF EVIDENCE OF McCLAIN'S UNADJUDICATED ARREST WITH SEVERED CODEFENDANT BOWEN FOR GUN POSSESSION, THE PROSECUTOR'S MISCONDUCT IN ARGUING UNCHARGED CONDUCT, AND THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS IMPERMISSIBLY PREJUDICED McCLAIN.

Respondent argues that the trial court did not err in admitting evidence of McClain's arrest with Solomon Bowen for gun possession. (RB 252-258.) Respondent first contends that the evidence was admissible under Evidence Code section 1101(b) to prove intent to enter into the conspiracy to commit the Halloween killings. (RB 254-255.) While Respondent is correct in arguing that the similarity between the two crimes is not as important when used to show intent as it is to demonstrate identity or common design or plan under *People v. Ewoldt*, (1994) 7 Cal.4th 380,

[2] The issue of insufficiency of the evidence supporting the special circumstance finding will be addressed in Claim XII, *infra*.

402, Respondent does not make any argument to demonstrate how the fact that McClain and Bowen were arrested for each possessing a gun 13 months prior to the Halloween killings, neither of which were used in the killings, somehow shows an intent to enter into a conspiracy to commit murder. As explained more fully in the opening brief (AMOB 134-37), the prosecution's theory that two people who individually and unlawfully possessed guns at the same time and place is somehow relevant to show an intent to prove a conspiracy over a year later is preposterous. Moreover, *Ewoldt* is distinguishable because the uncharged crimes in that case were in fact quite similar to the charged ones, involving the defendant's stepdaughters. (*People v. Ewoldt*, *supra*, 7 Cal.4th at 403.) Respondent does not argue, nor can he reasonably do so, that the gun possession charges bear any similarity at all to the Halloween homicides.

Respondent further argues that the prosecution did not merely seek to introduce this crime to show identity, but also to "prove the conspiracy." (RB 255.) Respondent does not elaborate on this point, so it is unclear what he means when he says "prove the conspiracy." In any event, *Ewoldt* still requires similarity between the crimes in order for the uncharged offense to be admissible to demonstrate a common plan or scheme as well. Respondent makes no argument to demonstrate the similarity between the two crimes which would allow the uncharged offense to be admissible.

Respondent further argues that the trial court properly applied the balancing test under Evidence Code Section 352, but does not discuss or cite to any portion of the record to argue how, in fact, the trial court conducted its weighing of the probative or prejudicial value of the uncharged conduct. (RB 254-56.) The trial court, in fact, did not engage in any balancing test as required by Section 352, and certainly did not engage in the "extremely careful analysis" this Court requires before admitting such conduct. (*People v. Ewoldt*, *supra*, 7 Cal.4th at 404.) The evidence of

gun possession was barely probative to the prosecution's case to show that McClain knew one of the alleged co-conspirators, and certainly did not have "substantial probative value" (*Id.*) Furthermore, because the uncharged acts did not result in criminal convictions, there is a substantial likelihood that the jury used McClain's arrest to fill in the holes in the prosecution's case. Because the trial court did not engage in the careful analysis required by this Court, McClain's conviction must be reversed. (*People v. Bigelow* (1984) 37 Cal.3d 731, 743.)

Finally, respondent argues that the error was harmless, but by incorrectly construing United States Supreme Court cases cited by McClain erroneously suggests that McClain's Eighth and Fourteenth Amendment rights were not violated. (RB 257-58.) As explained more fully in the opening brief (AMOB 143-154), the admission of the uncharged conduct violated McClain's right to due process. (*See McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-84) (holding that trial court's admission of uncharged knife possession violated due process.) Because the improper admission of the uncharged conduct violated McClain's due process rights to liberty and a fair trial, as well as injecting unreliability into his capital trial and sentencing, this Court must determine whether the state can demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p.24.) Respondent also fails to address McClain's argument that the prosecutor committed misconduct by misstating the evidence of the uncharged act, and by suggesting that McClain committed acts of violence with Bowen in the past. (AMOB 145-150.) Under these circumstances, this Court must reverse McClain's convictions because respondent cannot demonstrate that the errors were harmless beyond a reasonable doubt.

V. THE TRIAL COURT VIOLATED McCLAIN'S RIGHT TO CONFRONT WITNESSES, DUE PROCESS, AND A FAIR TRIAL WHEN IT PREVENTED HIM FROM TESTING ON CROSS-EXAMINATION THE VERACITY OF PRICE'S CLAIMED MOTIVE FOR TESTIFYING

Respondent contends that the trial court properly excluded evidence of Robert Price's arrest for lewd and lascivious conduct and engaged in the required analysis under Evidence Code Section 352. (RB 185-188.) Respondent, however, misstates the record.

Respondent argues that the trial court weighed the probative value against the prejudicial effect of the arrest and stated that McClain "agreed" that the arrest itself had no probative value. (RB 187.) Respondent is only able to make this argument by ignoring the complete record. McClain's counsel agreed that the arrest, by itself, was not probative to impeach; but this was before Price stated he agreed to testify against McClain because of he was "touched" by the fact that he knew one of the children who was killed. (31 RT 3198.) At that point, McClain's counsel explained that she had stopped examining Price about the arrest before the latter testified about how he felt about children, and that she believed that the arrest was probative after such testimony. (31 RT 3199.) The only thing the trial court stated, beyond agreeing that the prosecution went too far into asking about other reasons for testifying, was to say that it did not think the arrest was sufficient and that "I am not going to talk about it anymore. Just leave it alone." (31 RT 3199-3200.) This minimal discussion hardly constitutes the deliberative weighing process required by Evidence Code Section 352 and constitutes an abuse of discretion. (*People v. Ford* (1964) 60 Cal.2d 772, 801.) Moreover, respondent does not address the contention that the trial court treated McClain differently from Price by allowing his arrest with Bowen to be admitted against him, creating an unfair disparity

between McClain and the prosecution. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; See Claim IV, *ante*.)

Finally, respondent makes no effort to rebut McClain's argument that the trial court violated McClain's Sixth Amendment right to confront witnesses against him by denying him an opportunity to challenge Price's assertion that he was testifying against McClain because of his concern for one of the child victims. As noted much more extensively in the opening brief (AMOB 161-167), McClain's claim is quite similar to *Davis v. Alaska* (1974) 415 U.S. 308, 315-316, where the Supreme Court held that the defendant's confrontation clause rights were violated when the trial court refused to allow the defendant to cross-examine a witness with evidence of his juvenile record. As in Davis, McClain had a specific purpose in attempting to impeach Price with his arrest, and Price was the only witness against McClain for the attempted murder. Here, the trial court actually went further than the court in *Davis* by overruling defense counsel's objection to the prosecution's question of Price which elicited the testimony that McClain sought to impeach. Under these circumstances, the prosecution cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) This court must therefore reverse McClain's conviction of attempted murder.

VI. AS A RESULT OF THE TRIAL COURT'S ERRORS AND THE PROSECUTORS' MISCONDUCT, McCLAIN WAS CONVICTED BECAUSE HE WAS A GANG MEMBER, NOT BECAUSE HE COMMITTED THE CHARGED CRIMES

Respondent argues that the trial court properly admitted evidence of McClain's gang membership and that as a result, McClain was not convicted because he was a gang member. (RB 231-252.)

Respondent first argues that the trial court properly admitted the testimony of DeSean Holmes, Derrick Tate, and Willie McFee regarding the threats they received because it would assist in explaining to the jury the inconsistencies in their testimony. (RB 234-35.) The fatal flaw in respondent's argument, however, is that the testimony of these three witnesses was remarkably consistent and unwavering. For example, in the pages cited by Respondent pertaining to Derrick Tate's testimony (16 RT 1395-1398) there is no indication that he hesitated or provided inconsistent answers. He repeatedly stated that he heard from Karl Holmes that McClain was *not* involved in the Halloween shootings, although he in fact identified McClain during a lineup because he saw McClain at some point and McClain said he was thinking of turning himself in. (AMOB 173-174; 16 RT 1424-1431.) The evidence of the threats he received did not in any way identify McClain and were not needed to clarify any hesitancy or inconsistency to the jury. (16 RT 1392-1396.). And while there was some inconsistency in DeSean Holmes' testimony, and the trial court admitted the threat to explain DeSean's "demeanor", there is no evidence that the threat he received had anything to do with this case. In fact, Officer Johnny Brown confirmed that DeSean's fears stemmed from another case. (16 RT 1509-1510.) The pages Respondent cites regarding McFee's testimony do not in any way suggest that the threat he received, which was *only* admitted against Newborn, was because of any inconsistency in his prior statements or his demeanor. (23 RT 2374-2375.)

Respondent contends that Detective Carter's gang testimony was relevant to establish the identity of the perpetrators of the charged offenses. (RB 239.) This is a surprising argument, given that Detective Carter's testimony did nothing to connect McClain or the codefendants to the Halloween crimes (14 RT 1169-1173.) Moreover, McClain himself admitted he was a P-9 gang member. (36 RT 3962-4080.) McClain's gang

membership was never in dispute. Detective Carter's testimony was not only cumulative, but highly prejudicial, and therefore inadmissible. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904.)

Respondent argues that McClain waived his right to object on appeal to the prosecution's closing argument on the grounds that it played into the passion and prejudice of the jury and exacerbated the inadmissible evidence of the threats received by witnesses. (RB 241.) It appears clear from the record, however, that all three counsel were giving different reasons for objecting to the prosecutor's closing argument, and the trial court clearly understood the motion for mistrial to be made on the grounds that the prosecutor's argument was misconduct. (44 RT 4713-4716.) The argument is therefore properly preserved for appeal.[3]

Respondent next claims, piece by piece, the various objectionable statements made by the prosecutor were either taken out of context or not misconduct. Respondent does not address McClain's claim that when taken as a whole, the prosecutor's closing argument was egregious misconduct. Specifically, respondent suggests that McClain's argument that the prosecutor's statement that McCLain and the other co-defendants "have the juice to get you" was taken out of context because the prosecutor also stated that "Maybe that was an unwise choice of words". (RB 244.) However, immediately following that suggestion, the prosecutor continued: "These people have the power and the connections to get you, to make you

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[3] Respondent repeatedly states that every legal claim McClain raised resulting from the prosecutor's closing argument is waived, citing to *People v. Brown* (2003) 31 Cal.4th 518, 553. Counsel clearly stated their reasons for objecting to the closing argument and offering the trial court an opportunity to remedy the situation by declaring a mistrial. Nothing in *Brown* suggests that defense counsel, during closing argument, must articulate every single legal theory upon which the prosecutor's statement is misconduct at the time of making the objection.

pay for lying on them. So why choose to lie on them." (44 RT 4698.) Moreover, earlier in the closing argument, he made the following remark:

> And 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.)

These statements in fact support McClain's claim that the prosecutor committed misconduct by arguing that the co-defendants were capable of retaliating against witnesses who testified against them and that everyone in the court, including the jury, was at risk because of their threats. Again, respondent makes no attempt to discuss the most important part of McClain's argument—that none of the witnesses testified that he made any of the threats, and McClain was clearly prejudiced by the statements made by co-defendant Holmes.

McClain, in his opening brief, presents compelling reasons why the prosecutor's closing argument was improper, and coupled with the trial court's improper admission of the evidence of witness threats, was error. (AMOB 193-205.) The facts of this case are quite similar to those in *People v. Hill* (1998) 17 Cal.4th 800, where this court reversed a conviction because, taken cumulatively and combined with other trial court errors, the prosecutor committed prejudicial misconduct. This court must therefore reverse McClain's conviction due to the prejudicial nature of the improperly admitted evidence and the prosecutor's misconduct.

VII. THE TRIAL COURT'S FAILURE TO SEVER THE PRICE AND HALLOWEEN COUNTS VIOLATED McCLAIN'S RIGHT TO DUE PROCESS OF LAW.

Respondent contends that the trial court did not abuse its discretion in failing to sever the Price count from the Halloween counts, but in doing

so, misstates the law applicable to severance in capital cases. (RB 122-129.)

While respondent is correct that the trial court's decision is reviewed for an abuse of discretion, respondent fails to address the requirement that this Court "must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 454.) Respondent also fails to address McClain's claim that, because the prejudicial effect of joining these counts denied him of a fair trial, severance is "constitutionally required." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-44.)

Furthermore, respondent, by selectively quoting the record, blatantly misstates the record in arguing that McClain did not renew his motion to sever the Price count.. (RB 123.) While McClain did in fact say "I had filed a severance motion and notice. If it was in fact denied, I simply did not note it" it is quite clear that McClain renewed his motion to sever the Price count. (8 RT 232.)[4]

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[4] The entire discussion regarding the severance of the Price count is as follows:

1 I HAD FILED A SEVERANCE MOTION AND A NOTICE

2 OF SEVERANCE OF COUNTS. I CONSIDERED THEM IN THE

3 ALTERNATIVE, THAT IS, IF MR. MC CLAIN WAS NOT TO BE TRIED

4 ALONE, THEN I WOULD MOVE -- REQUEST THE COURT CONSIDER

5 TAKING OUT COUNT 10 OF THE INDICTMENT.

6 THE COURT: WHICH IS?

MS. HARRIS: AN ATTEMPTED MURDER ON OCTOBER 28TH.

MR. MYERS: I THOUGHT THAT MOTION WAS HEARD ON JULY

8TH OF '94 AND DENIED.

THE COURT: I WILL CHECK THE FILE.

MS. HARRIS: IF IT WAS, I DIDN'T NOTE IT.

THE COURT: I WILL CHECK THE RECORD.

MS. HARRIS: WELL, MY POINT, YOUR HONOR, IS THAT IT

SEEMS THAT THERE HAS BEEN THIS ALMOST CASUAL, FOREGONE

CONCLUSION THAT THREE OF THE DEFENDANTS WILL BE TRIED

TOGETHER, MY CLIENT BEING ONE OF THOSE THREE.

MY CLIENT HAS A SEPARATE AND UNRELATED CHARGE

OF AN ATTEMPTED MURDER. IF THAT COUNT IS TO STAY IN, THEN

I REQUEST THAT HE BE TRIED INDIVIDUALLY.

THE COURT: THANK YOU.

AND YOU HAVE PAPERS?

MS. HARRIS: YES, THERE ARE MOVING PAPERS.

THE COURT: WHAT IS THE DATE?

Respondent further argues that the trial court did not abuse its discretion because the Price count was cross-admissible to the Halloween case to show McClain's hostility toward the Crips. (RB 125-26.) However, there is absolutely no evidentiary connection between the Price count and the Halloween counts as required by *Williams v. Superior Court, supra,* 36 Cal.3d 441. Moreover, as McClain was a member of a rival gang to the Crips, respondent's suggestion that the Price count was somehow necessary to establish this fact is incorrect. Finally, as stated more fully in the opening brief (AMOB 223-224), motive was never an issue in this case.

Respondent further argues that even if the counts were not cross-admissible, there was no prejudice. (RB 127-128.) Respondent, however, simply ignores McClain's argument that his case is nearly identical to *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-87, where the Ninth Circuit reversed the appellant's conviction because of the trial court's failure to sever. McClain fully discusses the prejudice he suffered in his opening brief (AMOB 231-237), but to summarize here, as in *Bean*, the trial court in McClain's case gave aider/abettor and conspiracy instructions that only applied to the Halloween case but failed to inform the jury of this; the prosecution encouraged the jury to conflate the two charges; the trial court failed to admonish the jury that it could not consider the evidence of the Price and Halloween crimes as evidence of each other; the trial court

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MS. HARRIS: IF IT WAS, IN FACT, DENIED, I SIMPLY DID NOT NOTE IT. IT WAS JUNE 28TH, 1994.

THE COURT: THANK YOU. THAT SOUNDS FAMILIAR TO ME.

I WILL TAKE A LOOK AT IT AND REVIEW THE REPORTER'S NOTES.

only instructed the jury about the separate counts "in the waning moments of the trial" (*Bean v. Calderon, supra*, 163 F.3d at 1084 (internal citation omitted), thus diminishing their impact; there was a disparity of evidence between the Price shooting and the even weaker evidence against McClain for the Halloween shootings, allowing the jury to consider the Price shooting for the impermissible purpose of showing that McClain had a callous character; the jury convicted McClain of all the charges so there was no affirmative evidence of the jury's ability to consider the charges separately; and finally, the trial court's argument that joinder was more convenient because "the building is bankrupt; the County is bankrupt" (8 RT 248-249) is fallacious, because if that were to be a deciding factor, joinder would never be improper.

Finally, respondent does not address the issue that the trial court never weighed the prejudice that joinder would have upon McClain when it denied the motion to sever the counts, as required. (*Williams, supra*, 36 Cal.3d at p. 451-52.) The benefits of joinder were nearly non-existent, and the prejudice McClain suffered denied him a right to a fair trial. Therefore, this Court must reverse McClain's convictions and sentence.

VIII. THE TRIAL COURT'S FAILURE TO SEVER McCLAIN FROM DEFENDANTS NEWBORN AND HOLMES DEPRIVED HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Respondent contends that the trial court properly joined all three defendants and properly admitted statements by appellants. (RB 90-122.) Respondent is incorrect.

Respondent first argues that the trial court properly admitted redacted statements against McClain because the trial court did so prior to *Gray v. Maryland* (1998) 523 U.S. 185, where the Supreme Court held that

a redacted statement which obviously applied to the defendant violated the *Bruton* joinder rule and reversed Gray's conviction. Of course, this is a complete misstatement of applicable law. The trial court's decision cannot be reviewed for an abuse of discretion because it implicates a federal constitutional right, and because this matter is pending on direct appeal, *Gray* must be applied to McClain. (*People v. Lewis* (2008) 43 Cal.4th 415, 455.) Moreover, McClain's argument is that the redaction to DeSean Holmes' testimony was even more prejudicial than the one in *Gray* because DeSean *never* stated that Newborn told him that McClain was with him at the shooting at Willie McFee's house. (AMOB 243-245.) By redacting the names of the co-defendants and substituting the word "others", this left the impression with the jury that Newborn named McClain as one of the participants, when in fact he did not. This court, under *People v. Fletcher* (1996) 13 Cal.4th 451, must therefore reverse McClain's conviction.

Respondent's further argument, that this error was harmless beyond a reasonable doubt because McClain elicited testimony on Derrick Tate's cross-examination that Holmes said McClain was not involved does little to contradict DeSean's testimony that *Newborn* and "others" were involved. (RB 102-103.) Moreover, the jury may have discredited Tate's testimony given his multiple felony convictions. (15 RT 1359-1360, 1366.)

Respondent's further argument that McClain did not argue that DeSean Holmes's testimony included any incriminating statements about him (RB 108) is quite perplexing, given that the entirety of McClain's opening brief argument was predicated on the prejudicial nature of DeSean Holmes's testimony (AMOB 237-248.)

Respondent next claims that severance was properly denied by narrowly construing McClain's argument to complaining solely about the prosecutor's closing statement. Respondent does not address DeSean Holmes' testimony itself (RB 117.) DeSean Holmes's extremely

prejudicial testimony insinuated that McClain and his co-defendants may have shot Majhdi Parish, when in fact DeSean himself was likely a participant in Parish's shooting (RB 117.) As stated in the opening brief, McClain's argument was that the trial court improperly allowed DeSean to testify about the Parish shooting without allowing McClain to cross-examine him about his possible involvement. This was exacerbated by the prosecutor's closing argument. (AMOB 240-242, 248.)

Respondent concedes that this court cannot simply review the trial court's decision to jointly try the three co-defendants when consolidation may have resulted in "gross unfairness". (*People v. Ervin* (2000) 22 Cal.4th 48. 69; RB 113.) It is quite apparent that McClain's trial resulted in extreme unfairness to him and violated his rights to due process because, absent the joint trial, none of the incriminating statements made by his co-defendants could have been presented against him through other witnesses. The combination of the restrictions the trial court upheld concerning DeSean's cross-examination with the fact that his testimony of DeSean Holmes was based upon hearsay, deprived McClain of the right to confront a witness against him in violation of the Sixth Amendment. This Court must therefore reverse his convictions because respondent has not demonstrated that the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p.24.)

IX. THE TRIAL COURT DEPRIVED McCLAIN OF HIS RIGHT TO PRESENT A DEFENSE, DUE PROCESS OF LAW, CONFRONTATION, AND A FAIR TRIAL BY FAILING TO TAILOR CALJIC 2.06 TO THE EVIDENCE IN THIS CASE.

Respondent contends that the trial court properly instructed the jury when it gave, over McClain's objection, CALJIC 2.06. (RB 259-263.) Respondent is incorrect.

Respondent first argues that McClain waived his argument that the instruction should not have been given because he did not request a modification to the standard instruction. (RB 260.) Respondent's citation to *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142-1143 is inapposite. In *Rodrigues*, the defendant conceded that the standard instruction was proper. Here, McClain objected to CALJIC 2.06 at trial, and maintains that the evidence of cutting his hair is not "suppression" of evidence, even if it does point toward consciousness of guilt. Moreover, respondent does not address McClain's main contention, which is that there was no evidence to support the portion of CALJIC 2.06 which included the examples of "intimidation of a witness, by an offer to compensate a witness, by destroying evidence, by concealing evidence..." (42 RT 4337; 6 CT 1494.) Because there was no evidence in the record of McClain's attempt to do any of these things, the trial court should not have instructed on CALJIC 2.06. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.)

Respondent, relying solely on *People v. Nakahara* (2003) 30 Cal.4th 705, 713, argues that the instruction was properly given. (RB 262.) However, Respondent does not address McClain's contention that, in cases where a defendant has proposed similar instructions, this Court has rejected the proposed instruction as argumentative. (*See People v. Mincey* (1992) 2 Cal.4th 408, 437 (instructions are inadmissible as argumentative when they "invite the jury to draw inferences favorable to one of the parties from specified items of evidence.")) There can be little doubt that, given the examples used in CALJIC 2.06 as given by the trial court, the instruction allowed the jury to draw inferences regarding guilt solely based upon the prosecution's theory of the case. Therefore the trial court erred in giving the instruction.

McClain submits that the jury could not draw a rational inference from the fact that he cut his hair days or weeks after the charged crimes that

he expressed a consciousness of guilt. (AMOB 257-259; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *People v. Castro* (1985) 38 Cal.3d 301, 313.) Moreover, the giving of the instruction, particularly in combination with the other errors at trial, allowed the jury to convict McClain based upon extremely weak evidence pertaining to the Halloween murders. There is a reasonable probability that, absent this instruction, the jury would not have convicted McClain. This court must therefore reverse his conviction.

X. THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS REGARDING OTHER CRIMES REQUIRE REVERSAL.

Respondent contends that the trial court properly instructed the jury when it gave, over McClain's objection, CALJIC 2.50 (RB 263-267.) Respondent is incorrect.

Respondent first argues that the case relied upon by McClain for demonstrating that the instructions did in fact lessen the burden of proof, *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, was overruled by *Byrd v. Lewis* (9th Cir. 2009) 544 F.3d 855. Respondent's argument is disingenuous and misleading. The court in *Byrd* only overruled *Gibson* to the extent that the *Gibson* court applied structural analysis, as opposed to harmless error analysis, in reversing Gibson's conviction. The instructional issue in *Byrd* was completely different than the one in McClain's trial, which involved CALJIC 2.50.1 and instructed the jury that it could find by the defendant guilty of an uncharged crime by a preponderance of the evidence and subsequently use that evidence to convict him of the conspiracy charge. *Gibson* is still valid law for the thrust of McClain's argument—that the combination of instructions given at his trial pursuant to CALJIC 2.50, 2.50.1, and 2.50.2 improperly lessened the burden of proof needed to convict him of the conspiracy charge. Under the holding of

Gibson respondent is still required to prove, beyond a reasonable doubt, that the error was harmless to McClain under *Chapman v. California* and has failed to do so.[5]

Respondent states that McClain waived his right to argue that the instructions were confusing because they did not specify how the uncharged crimes evidence could be used to prove conspiracy. (RB 265.) Respondent mischaracterizes McClain's argument. In the opening brief, McClain did not argue that the trial court should have modified CALJIC 2.50, but provided another legal theory as to why the instruction was improper. (AMOB 268-273.) Under these circumstances, because McClain objected to the instructions, he has properly preserved the claim for appeal.

Respondent also mischaracterizes McClain's argument that the instruction was confusing by simply stating that McClain's argument was only that the jury would use his prior convictions as evidence to convict him. (RB 266.) While McClain maintains that there was a risk that the jury did this, his argument is that the trial court created this risk by giving CALJIC 2.50, 2.50.1 and 2.50.2 over his objection and did not specify how prior convictions or uncharged offenses could be used. Moreover, as stated more fully in the opening brief, the trial court never specified which

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[5] This court's opinion in *People v. Lindberg* (2008) 45 Cal.4th 1, 33-36, while on point, certainly cannot be reconciled with *Gibson*. The reasoning of the *Lindberg* court, stating that the revision to CALJIC 2.50.1 which reminded the jury that they must find the defendant committed the charged crime beyond a reasonable doubt, did not suggest that the absence of such language held the prior instruction infirm, seems tenuous at best. The revision to CALJIC 2.50.1 added the cautionary language which, as the *Gibson* court suggested, harmonized the burden of proof standards for both the charged and uncharged crimes. McClain maintains that despite *Lindberg*, the instructions in his case unconstitutionally lessened the prosecution's burden of proof against him on the conspiracy to commit murder charge.

uncharged crimes could be used against McClain, given that there was significant evidence of McClain's use and sale of illicit substances as well as his possession of weapons. (AMOB 270-271.) In light of this evidence, McClain maintains that under *People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6, the trial court should have given a cautionary instruction once it overruled McClain's objection to CALJIC 2.50.

While this court is not required to hold that the trial court's error was structural error, there is simply no way for this court to determine that the jury did not improperly use evidence of McClain's prior uncharged criminal conduct, which it was instructed it could find by a preponderance of the evidence, to lessen the prosecutor's burden of establishing McClain's guilt beyond a reasonable doubt. As explained more fully in the opening brief (AMOB 273-277) the trial court's error not only applies to the conspiracy charge, but infected the convictions for the Halloween homicides and the Price attempted murder charge because the prosecution relied heavily on the facts underlying the conspiracy to prove these charges. When considered cumulatively with the other errors at trial, this error cannot be considered harmless under any standard. McClain's convictions must be reversed.

XI. THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE.

Respondent argues that it is "settled law" that CALJIC 2.51 properly states the law. (RB 267-268.) But given the circumstances of this particular trial, McClain argues that it is not "settled" that CALJIC 2.51 did not allow the jury to convict McClain based upon motive alone and lessen the prosecution's burden of proof for the charged crimes.

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the court reversed the defendant's conviction because the trial court gave CALJIC 2.51 which

the court held conflicted with the instruction defining the elements for the charged crime. In so doing, the court stated "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.)

As explained more fully in the opening brief (AMOB 277-284) McClain conceded he had a motive to avenge the death of Fernando Hodges, but disputed that he killed, or had the intent to kill, the victims in the Halloween case. CALJIC 2.51 therefore invited the jury to use the evidence of McClain's motive to in fact find him guilty of both conspiracy as well as the murder and attempted murder with regard to the Halloween crimes. Because McClain did not dispute his motive, it was prejudicial error to give CALJIC 2.51 to an issue he did not dispute. (*People v. Martinez* (1984) 157 Cal.App.3rd 660, 669-670.) Coupled with the prosecutor's argument that McClain "admitted to you" that he wanted to retaliate for Hodges' death and that "retaliation is motive", the jury likely did precisely what the court in *Maurer* held to be reversible error. (44 RT 4628.) This court must therefore reverse McClain's convictions because the erroneous instruction cannot be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

XII. McCLAIN WAS DEPRIVED OF DUE PROCESS AND A FAIRTRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, ANDFOURTEENTH AMENDMENTS OF THE UNITED STATESCONSTITUTION BY THE ERRONEOUS JURY INSTRUCTIONSAND INSUFFICIENCY OF EVIDENCE AS TO THE SPECIALCIRCUMSTANCE FINDINGS.

Respondent contends that the trial court's instruction under CALJIC No.8.80.1 was proper despite its failure to instruct the jury, under *Tison v. Arizona* (1987) 481 U.S. 137, that it must find that McClain was a major

participant in the homicidal conduct, or that he acted with reckless indifference to human life towards the victims. (RB 270-72.) What respondent does not address, however, is the jury's verdict in this case, which found the firearm use allegations *not true* for McClain. In light of these findings, the jury's verdict is legally inconsistent with the words of CALJIC No.8.80.1 which state that the jury cannot find the multiple murder or lying-in-wait special circumstances unless satisfied beyond a reasonable doubt that the defendant acted with the intent to kill or aided and abetted in the first degree murder. As stated in the opening brief (AMOB 285-289), because the jury did not find true the overt act that McClain had caravanned to the crime scene, it may in fact have determined that McClain was never present at the scene when the homicides occurred. It is apparent that the jury convicted McClain of the substantive counts of murder and attempted murder after finding him guilty on the conspiracy charges, but without being instructed to specifically find that he was a "major participant" in the homicidal conduct, the special circumstance findings cannot stand under *Tison*. (*See also Enmund v. Florida* (1982) 458 U.S. 782.) Respondent's argument that the jury need only find that McClain was a major participant if this were a crime of felony murder is incorrect. (*United States v. Johnson* (8th Cir. 2007) 495 F.3d 951 (applying *Tison* to non-felony murder capital prosecution.))

Respondent contends that there was sufficient evidence to sustain the special circumstance findings, but simply does not address the constitutional argument that Eighth Amendment requires a heightened standard of reliability in determining whether there is sufficient evidence to impose a death sentence. (RB 165-66.) As stated in the opening brief (AMOB 288-89), because there is no credible evidence to show that McClain was present at the Wilson street shootings, there is insufficient evidence to support these findings under *Tison*. Accordingly, this Court

must reverse and dismiss the special circumstance findings against McClain.

XIII. THE TRIAL DEPRIVED McCLAIN OF THE RIGHT TO COUNSEL AT HIS PENALTY RETRIAL.

Respondent contends that the trial court properly relieved McClain's counsel, as opposed to granting the requested 60-day continuance, and that the court correctly construed McClain's written motion. Respondent is incorrect in both respects.

Respondent first argues that the trial court properly discharged McClain's trial attorney, Hattie Harris, stating that the factual situation was similar to *People v. Mungia* (2008) 44 Cal.4th 1101, 1124. (RB 344-347). As Respondent notes, however, the defendant in *Mungia*, whose trial attorney had suffered a heart attack, made numerous statements indicating that it was unlikely that the attorney would ever be able to try the case no matter how long the trial court continued the case. The trial court in *Mungia*, unlike in McClain's trial, did not immediately relieve the attorney, but trailed the case until it became clear that he would not return to court. Under these circumstances, the court held that Mungia could not show error. *People v. Mungia*, *supra*, 44 Cal.4th at 1119.

In contrast, Ms. Harris never made any representation to the court that she would not be able to try the case after her requested 60-day continuance was granted. Her statement to the court "I can't try this case judge, I literally cannot do it." (60 RT 5779) was clearly referring to her request for an additional 60 days and nothing more. Ms. Harris's physician's statement, that she "immediately discontinue trial practice" (7 CT 1913-15) was again made in support of a 60-day continuance, not a request to be relieved as counsel. (7 CT 1920.) In fact, there is no mention on the record by either Ms. Harris or McClain that Ms. Harris was

requesting to be relieved. Under these circumstances, the trial court's decision to relieve Ms. Harris as counsel, after noting that she had a remarkably successful record in capital cases (60 RT 5783) constitutes an abuse of discretion. *Morris v. Slappy* (1983) 461 U.S. 1, 11-12.

Respondent next argues that the trial court did not err in failing to hold a *Marsden* hearing because "appellant McClain made clear that he wanted to represent himself" (RB 348-49.) This statement is incorrect.

McClain's request was in fact made in the alternative: either to represent himself or to appoint new counsel, and he cited *Marsden* in his motion, specifically requesting the court to hear his showing of inadequacy and conflict with his newly appointed counsel, Richard Leonard. (7 CT 1943-45.) His motion was filed only AFTER the trial court erroneously informed McClain that his only options were to accept Mr. Leonard as his counsel or for McClain to represent himself. (60 RT 5784.) Respondent's assertion that McClain "had no cause to believe Mr. Leonard, who had just been appointed, was incompetent" (RB 349) is exactly why the trial court erred in denying a hearing: a trial court cannot properly exercise its discretion without listening to a defendant's request, in camera, for a change of counsel. *People v. Marsden* (1970) 2 Cal.3d 118, 123-124. Under these circumstances, the trial court abused its discretion in refusing to even address McClain's properly filed *Marsden* motion.

Finally, respondent argues that the trial court adequately advised McClain of the dangers in representing himself. (RB 349-352.) While the trial court certainly showed its displeasure in McClain's motion to represent himself, it did not consider at all such factors as McClain's lack of education, the complexity of the present case due to multiple defendants as well as the specialized nature of death penalty litigation. (*Iowa v. Trovar* (2004) 541 U.S. 77, 88.) Moreover, as stated above, the trial court erroneously told McClain that his only options were to accept Mr. Leonard

as counsel or to represent himself, without affording him an opportunity to be heard in camera. Given these circumstances, McClain's waiver of the right to counsel is not knowing, voluntary and intelligent.

The result of the trial court's numerous errors deprived McClain of the right to counsel, and no showing of prejudice is required. (*United States v. Cronic* (1984) 466 U.S. 648, 659.) Even assuming that some sort of harmless error showing is required, McClain has clearly demonstrated that he was prejudiced by depriving him of counsel. (AOB 309-311.) This court must therefore reverse McClain's death sentence.

XIV. THE TRIAL COURT VIOLATED McCLAIN'S RIGHTS TO PRESENT A DEFENSE, DUE PROCESS, A FAIR PENALTY TRIAL, AND A RELIABLE PENALTY DETERMINATION WHEN IT FORCED McCLAIN TO WEAR A STUN BELT AND ALLOWED DISCLOSURE TO THE JURY THAT McCLAIN WAS ELECTRONICALLY RESTRAINED.

Respondent contends that the trial court properly required McClain to wear a stun belt, and did not err by informing the jury that McClain was electronically restrained. (RB 281-300.) Respondent makes this argument by misstating the facts as well as misinterpreting this Court's decision in *People v. Mar* (2002) 28 Cal.4th 1201. This Court must reverse McClain's death sentence because his case is indistinguishable from *Mar*.

Respondent argues, astonishingly, that McClain's failure to sign the form requiring the stun belt, informing the court that he understood the form but "I don't agree with those terms", and stating that the court's decision to require stun belts was a "slap in the face," was not sufficient to put the court on notice that McClain objected to the use of the stun belt. (RB 287.) This is not only an absurd argument, but incorrect as a matter of law. After McClain made these statements, the trial court informed McClain that the decision to use the stun belts was solely a matter for the

Sheriff's office, and not the court. (46 RT 4799.) The trial court's abdication of its responsibility made any objection to its decision futile, and the court's delegation of the decision to place the stun belt upon McClain is reversible error. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) In any event, McClain's statements clearly were specific enough to put the court on notice that he was objecting to the use of stun belts to restrain him, particularly after the court praised McClain on his conduct throughout the guilt phase. (45 RT 4788-4789.)

Next, respondent makes a half-hearted attempt to distinguish this case from *Mar*, after conceding that "the trial court did not have the benefit of this Court's decision..." (RB 290-293.) Respondent concedes that the trial court ordered the stun belts to be placed upon McClain because of verbal outbursts, which is prohibited by *Mar*, but argues that there was a need to restrain him based upon prior criminal activity and that McClain had possessed a shank. (RB 290-291.) The trial court, however, failed to hold a hearing before ordering the restraints, and there is no record that the court considered any of the evidence that Respondent suggests were factors[6]. Moreover, these additional factors still do not warrant the trial court's decision to place a stun belt upon McClain. As discussed more fully in McClain's opening brief (AMOB 319-323), the defendant in *Mar* was on trial for assaulting a prison guard, had a previous assault on a peace officer, had recently threatened two corrections officers, and had a previous escape conviction; yet this Court found that the trial court had erred. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1213, 1220.)

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[6] The trial court's failure to consider the *Mar* factors in making its decision to place the stun belt upon McClain and the other appellants is best exemplified by the trial court's statement that the belts were "for their benefit...They know the belt are on; I know the belts are on. It's a tempering thing. It's a philosophy of getting along. There is a reason why that belt is on." (73 RT 7314-7315.)

Respondent next argues that *Mar* is inapplicable because McClain did not demonstrate that he was prejudiced. (RB at 291-292.) This argument is misplaced, as this Court in *Mar* noted "From the cold record before us, it is, of course, impossible to determine with any degree of precision what effect the presence of the stun belt had...". (*People v. Mar*, *supra*, 28 Cal.4th at p, 1224.) Although McClain did not testify, he was acting as his own counsel, and specifically stated at trial that the belt was affecting his closing argument. (74 RT 7420.) Respondent's argument that McClain himself stated that the stun belt had no impairment is simply factually wrong—nothing in the portion of the record quoted by Respondent (RB at 292) makes any mention of the stun belt, and was clearly directed at the court's decision to limit McClain's closing argument on the ground that he was testifying without being under oath (74 RT 7428-7432.)

Finally, respondent makes no mention of *Deck v. Missouri* (2005) 544 U.S. 622, 632, which clearly prohibits the use of restraints where, as here, the trial court fails to take into account the "circumstances of the particular case." Both *Deck* and *Mar* compel this Court to reverse McClain's death sentence.

Respondent next makes the absurd claim that McClain waived his right to argue that the trial court improperly informed the jury that McClain was wearing a stun belt, and in any event, "it was not readily apparent that the trial court disclosed to the jury that appellants were wearing stun belts." (RB 297.) The evidence that McClain was wearing a stun belt came in through the testimony of Deputy Browning spontaneously and was beyond the scope of the 402 hearing concerning his testimony. (73 RT 7296-98; 73 RT 7332.) Appellant Holmes asked the trial court to instruct the jury not to use the evidence that the defendants were wearing stun belt against all the defendants. (73 RT 7332.) Instead, the trial court instructed the jury that

the belt was to "assure tranquility in the court." (*Id.*). Under these circumstances, not only was a proper objection made, but even if it were not, the harm could not have been cured by any objection. (*People v. Price* (1991) 1 Cal.4th 324, 447.) Respondent's claim that there was no suggestion made to the jury that the defendants were dangerous is belied by the very words the trial court used, telling the jury that "based upon what the court knows" McClain was wearing a security device to assure "tranquility" and "security for everyone". (73 RT 7332.) This disclosure was improper, highly prejudicial, and requires this Court to reverse McClain's sentence. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 632.)

Finally, respondent suggests that the error was harmless, again mistakenly stating that the jury never saw the stun belts and was never "expressly told" that McClain wore a belt. (RB 299.) Whether the jury saw the belt or not is irrelevant under *Mar*, and as argued above, the jury was in fact told that McClain was wearing an electronic "security device". McClain, in his opening brief (AMOB 329-342) explained in great detail the prejudicial effect that placing the stun belt had upon him, and further disclosing this to the jury. These factors, include among others, that the trial court erroneously forced McClain's witness Clarence Jones to wear shackles when testifying (AMOB 355-368); the prosecutor argued that McClain was a present danger in the courtroom (74 RT 7397); the trial court, with the jury present, told McClain "you are wearing a belt because you have acted up in this courtroom. So don't tell this jury without that belt what you might do" (74 RT 7420); and the trial court's erroneous instruction regarding the use of the belts. The cumulative effects of these errors require this Court to reverse McClain's death sentence.

XV. THE TRIAL COURT PREJUDICIALLY ASSUMED THE ROLE OF PROSECUTOR WHEN IT INTRODUCED SUA SPONTE AFTER THE CLOSE OF PENALTY PRESENTATIONS AGGRAVATING EVIDENCE FOR WHICH THERE WAS AN INSUFFICIENT FACTUAL BASIS AND WHICH VIOLATED McCLAIN's RIGHT TO CONFRONT WITNESSES.

Respondent contends that the trial court properly admitted the evidence that McClain threatened Deputy Browning, making numerous arguments that are incorrect factually and legally. (RB 293-296.)

First, respondent, asserting that McClain contends that the prosecution did not give him timely notice, argues that McClain forfeited this claim by not objecting. (RB 293.) McClain, however, did not argue in his opening brief that the prosecution did not give proper notice of its intended use of this incident as an aggravating factor because, in fact, the prosecutor **NEVER** gave any notice that it intended to introduce this evidence in aggravation. McClain's argument was that the trial court did not give him proper notice and time to prepare a defense because, on its own motion, the trial court held a hearing under Evidence Code Section 402 to determine whether to introduce this evidence as an aggravating circumstance, and held the hearing on the same day. (AMOB 350-352.)

Respondent next asserts that McClain's argument that the prosecution did not make a motion to introduce the evidence of the threat made to Deputy Browning is "unsupported by the record." (RB 294.) Respondent, however, does not cite to the record at all to demonstrate that the prosecution made a motion. The reason for this is quite simple: there is no record that the prosecutor made a motion to introduce this evidence in aggravation. Respondent's attempt to mislead this Court by arguing that McClain's argument is "unsupported by the record", of course, is belied by the record which clearly shows that the trial court, sua sponte, held a

hearing on this evidence and introduced it on its own motion. (73 RT 7296-7329.)

Respondent finally argues that the trial court properly admitted the evidence under Penal Code Section 422 because Deputy Browning could reasonably have believed that he was in fear of his life, and that even if he was not, the evidence is still admissible. (RB 294-296.) Respondent is incorrect in several respects.

First, Deputy Browning never testified that he reasonably feared for his safety at the time the alleged threat was made, as is required by the language of Section 422. Second, Deputies Tranberg and Admire, who were with Deputy Browning and one of whom was only 3 feet away from Browning, did not hear the threat. (73 RT 7342-7347.) Perhaps most importantly, however, the trial court itself did not believe that Browning reasonably feared for his safety when the threat was made. As discussed more fully in the opening brief (AMOB 344-347), the trial court, in allowing the evidence to be admitted, stated that Browning "came to me. He was gravely concerned, *but not about safety.* They get threatened by people every day....That's not the concern. *The concern is an attitude*, what you are doing, what you said, how it affects this trial". (73 RT 7316 emphasis added.) Respondent's argument that the evidence of the threat is admissible as an attempted use of force or violence regardless of whether Browning feared for his safety, citing to *People v. Toledo*, (2001) 26 Cal.4th 221, 230-31 is incorrect in several respects. First. *Toledo* applies only to the crime of "attempted" criminal threat, and supports McClain's argument that if the person receiving the threat did not reasonably sustain fear for his safety, a crime has not been committed under Section 422. Nothing in Penal Code Section 190.2 or 190.3 allows for the introduction of an attempted criminal threat as aggravating evidence, and Section 190.3(b) only allows for the introduction of a criminal threat or attempted use of

force or violence. To the extent that Respondent is arguing that McClain's statement, while unarmed and wearing a stun belt, "Don't' get within two feet of me or I'll kill you. We'll all have weapons this time" is an attempted use of force or violence, Respondent is wrong as a matter of law. (*Cf. People v. Cowan* (2010) 50 Cal.4th 401, 497 (attempted burglary admissible under 190.3(b) as attempted use of force where defendant used a gun to commit a robbery after entering the home, even though he did not enter the home violently).

Respondent does not make mention of the other errors the trial court made in allowing this evidence to be admitted against McClain, which include allowing Newborn's statement that "if you do one of us, you'll do us all" while forbidding McClain from calling Newborn as a witness; admitting this evidence in rebuttal even though it bore no relationship to the evidence that McClain introduced in mitigation; and allowing Browning to testify that McClain was wearing a stun belt. These errors are discussed more fully at AMOB 348-352. These errors were extremely prejudicial to McClain, particularly in light of the prosecutor's extensive argument about this incident at the close of the penalty phase. (74 RT 7378; 74 RT 7382; 74 RT 7385-86; 74 RT 7396-97; 74 RT 7400-01.) Even if this Court does not find judicial bias, the state must prove that this error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386.U.S. 18, 23-24.) Respondent has not made any attempt to show that these errors did not contribute in any way to the jury's verdict. This Court must therefore reverse McClain's death sentence.

XVI. THE TRIAL COURT PREJUDICIALLY INTERFERED WITH McCLAIN'S DEFENSE WHEN IT ELICITED CHARACTER EVIDENCE FROM WITNESS CLARENCE JONES AND RULED THAT ITS OWN QUESTIONS OPENED THE DOOR TO INFLAMMATORY AND IMPROPER CROSS-EXAMINATION IN VIOLATOIN OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Respondent contends that the trial court did not err in questioning Clarence Jones and failing to uphold McClain's objections to the prosecutor's improper cross-examination of him. RB at 357-360.) Respondent is incorrect in several respects.

First, although respondent argues that the trial court's question of Jones was "apparently prompted by the witness's reaction to appellant McClain's statement" (RB at 358), the record itself belies this contention. McClain had clearly stated "no further questions" after trying to rehabilitate Jones after he was impeached with prior convictions, yet the court, for reasons which are unclear, asked Jones "Do you want to say anything back?" (73 RT 7279-7280.) At that point, and only in response to the court's question, Jones provided character evidence for McClain. When McClain properly objected to further cross-examination by the prosecutor regarding Jones's prior conviction, the trial court stated "you brought him in here. He is giving a character reference for you. The court let him answer your questions." (73 RT 7280.) But none of McClain's questions were about either his own character or Jones's; all of his questions pertained to the possession of the shank incident that the prosecutor brought in against McClain in aggravation. The court clearly erred in allowing the prosecutor to ask further questions when it was the court, and not McClain, that opened the door to this kind of cross-examination.

By further allowing the prosecutor to question Jones about his appearance in shackles, the trial court compounded its error. As more fully

explained in the opening brief (AMOB pp. 364-67), the trial court's error was compounded by the fact that the trial court never held a hearing to determine whether a manifest need required Jones to appear in shackles. (*People v. Allen* (1986) 42 Cal.3d 1222, 1261.) Notably, the prosecution's incarcerated witness, Darius Jones, testified in a suit and tie. (17 RT 1527.) There was simply no way for McClain to properly object to Jones's appearance in shackles because, once he was brought into the courtroom before the jury, any objection would have been futile. (*People v. Chatman* (2006) 37 Cal.4th 344, 380.)

Respondent, citing to *People v. Hamilton* (RB 361), argues that the error was harmless because McClain would not have received a better result. This is the incorrect legal standard. The trial court's errors violated McClain's constitutional rights to confront witnesses and a fair trial, so this court must determine whether the state can show beyond a reasonable doubt that the error was harmless. (*Chapman v. California* , *supra*, 386 U.S. 18.) Taken cumulatively, the trial court's multiple errors cannot be shown to be harmless beyond a reasonable doubt. This court must therefore reverse McClain's death sentence.

XVII. THE TRIAL COURT'S EXCLUSION OF McClain's PROPOSED LINGERING DOUBT EVIDENCE, THE PROSECUTOR'S MISCONDUCT IN ARGUING LINGERING DOUBT, AND THE ERRONEOUS JURY INSTRUCTIONS ON LINGERING DOUBT VIOLATED McCLAIN'S FEDERAL CONSTITUTIONAL AND STATE LAW RIGHTS.

Respondent, through misrepresentation of law and fact, contends that McClain was not deprived of his state and federal constitutional right to present the mitigating evidence of lingering doubt at the penalty phase of his capital trial. Respondent's argument is incorrect.

Respondent first argues that there is no federal constitutional argument to present the type of evidence McClain attempted to introduce at a penalty re-trial, particularly where the prosecution presented extensive evidence previously introduced at the guilt phase of the first trial. McClain has a right under the Eighth and Fourteenth Amendment to present this evidence, as it pertains directly to the circumstances of the offense. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (constitution requires defendant to be able to present evidence that she played a minor role in the crime); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114; cf. *Oregon v. Guzek*, (2006) 546 U.S. 517, 523-24 (rejecting claim to present *new* evidence of lingering doubt when it was available at guilt phase of trial and citing *Lockett* and *Eddings* for holding that evidence of lack of culpability is relevant mitigating evidence.)) Moreover, because McClain was unable to rebut the evidence presented by the prosecution regarding his involvement in the crime, his sentence violates the Fourteenth Amendment because his "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." (*Gardner v. Florida* (1977) 430 U.S. 349, 362.)

Respondent next attempts to distinguish this Court's decision in *People v. Gay* (2008) 42 Cal. 4th 1195, 1221 from what occurred at McClain's trial. (RB 318-19.) Respondent's argument strains credibility because what occurred at McClain's trial is nearly identical to what happened in *Gay*. In both cases, the trial court excluded evidence of available eyewitnesses, including the exact same proffered eyewitness expert, Kathy Pezdek[7]. (*People v. Gay*, *supra*, 42 Cal. 4th at 1214-1215; 8 CT 2050-55; 69 RT 6852-53.) The rationale for excluding such evidence

[7] Gay was allowed to present witnesses who testified at his first trial. The trial court in McClain excluded Pezdek, who testified at the guilt phase of the first trial. (34 RT 3655 et. seq.)

by the trial court in *Gay*, which was criticized by this Court in its opinion reversing Gay's sentence, was nearly identical to what the trial court stated in *McClain*.[8]

Respondent's attempt to distinguish the trial court's denial of McClain's request to have Aurelius Bailey and Solomon Bowen testify about their guilty pleas from the statements of Gay's co-defendant is also misplaced. Respondent argues that McClain "made it clear" that he was speculating about their testimony without offering any support for this argument. (RB 320.) Moreover, the trial court did not rule that McClain's proffer was speculative, but simply that, under California Evidence Code § 352, McClain was not entitled to present evidence of lingering doubt and was "not timely". (AMOB 372; 72 RT 7192; 7254-55.) Indeed, McClain's offer of proof was not at all speculative in light of the fact that the prosecution stated on the record that Bowen was one of the shooters. (6 RT 178.) Furthermore, to the extent that the trial court ruled that McClain's request was being denied as not timely, both Bailey and Bowen were unavailable to testify at the guilt phase of McClain's first trial as they had not yet pled guilty at the conclusion of the guilt phase. (AMOB 387.)

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[8] Compare "that a defendant in a penalty phase retrial is entitled to present evidence to the jury that would establish some residual doubt, what you call lingering doubt. But that's an abstract concept. [¶] I think what you have to look at are the particular facts of a case. [¶] In this case, the only theory upon which the jury could have found defendant Gay guilty was on a theory that he, personally using a firearm, shot the officer.... [¶] There is just no way to reconcile the *1215 proffered evidence that Gay is not the shooter with the jury's factual finding and guilt finding of Gay in the first trial. There is just no way to do it." *People v. Gay*, *supra*, 42 Cal.4th at 1214 with "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, all the special circumstances were true, five counts of attempt 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 am not even sure that the prosecution has to put much forward on that." (69 RT 6853.)

Therefore, McClain's first opportunity to present this new evidence was at the penalty retrial. (AMOB 388-389.) Finally, the trial court's denial under Section 352, as stated more fully in the opening brief (AMOB 390-392), was constitutionally erroneous as it applied Section 352 mechanistically and without doing any proper analysis regarding either the probative value to McClain or the prejudice to the prosecution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530.)

Respondent, erroneously, argues that it was appellant Holmes, and not the prosecution, that called Gabriel Pina to testify regarding the identification of McClain at the crime scene. (RB 321.) The prosecution in fact called Pina at the penalty phase, and he testified extensively about the events he witnessed that night. (67 RT 6604-6629.) Appellant Holmes also called Pina to testify, but it was actually the prosecution, and not Holmes, who questioned Pina about his identification of McClain and had Pina make an in-court identification of McClain. (71 RT 7117-7120.) Under these circumstances, the trial court's refusal to allow expert eyewitness testimony is reversible error under *Gay*.

Respondent again attempts to distinguish *Gay* from the present case by arguing that the trial court's instruction to the jury was not improper because it did not use the language "conclusively proven" used by the *Gay* trial court. (RB 326.) As was made clear in *Gay*, however, the instructional error was to suggest that the jury could consider lingering doubt but, while preventing the jury from hearing the lingering doubt evidence, also instructed the jury that they must accept the prior guilt findings as beyond a reasonable doubt. (*People v. Gay, supra*, 42 Cal.4th at p. 1225. *Cf. People v. Streeter* (2012) 54 Cal.4th 205, 265-266 (trial court properly instructed jury that guilt was "conclusively proven" because it allowed defendant to present all requested evidence of lingering doubt.)

It is without question that *Gay* must control the outcome of McClain's case and this Court must reverse his death sentence. In both *Gay* and the present case, relevant mitigating evidence regarding the defendant's innocence was excluded by the trial court. In both cases, the court gave instructions that confused the jury, and both the jury in *Gay* and the McClain jury sent notes to the court expressing their confusion. If anything, McClain was more clearly deprived of his right to present relevant evidence of lingering doubt because, unlike Gay, who was allowed to present the testimony of four eyewitnesses who testified at the guilt phase, McClain was not allowed to present *any* of his requested relevant mitigating evidence. And, unlike Gay, the prosecution in McClain's trial compounded the error by telling the jury that McClain had an opportunity to present evidence of lingering doubt but McClain but chose not to. (74 RT 7371.) There is no doubt that there is a reasonable possibility that the jury would have returned a sentence other than death had it heard the evidence McClain sought to introduce. Moreover, because this Court in *Gay* held that there exists a statutory right in California to present lingering doubt evidence at the penalty phase as evidence of the circumstances of the crime, the trial court's denial of McClain's right to present this evidence violated his rights under the Sixth and Fourteenth Amendments of the constitution to present a defense at the penalty phase. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-91.)

Respondent argues that McClain waived his argument that the trial court erred in denying the jury's request to review other guilt phase evidence. (RB 322)[9]. However, the trial court's ruling was done in

[9] Respondent further argues that the claim was not adequately raised on appeal without giving any explanation why the argument is inadequately presented, particularly given that McClain presented multiple pages of argument as to why the trial court improperly rejected McClain's request to

McClain's absence. (75 RT 7545). Although the court notified McClain and, presumably, standby counsel an hour before the court proceedings, this notification proceeding was not placed on the record. Given that the jury was requesting to see evidence that McClain himself had requested but was denied an opportunity to introduce, this Court must presume that McClain preserved his right to appeal this error. (*People v. Champion* (1995) 9 Cal.4th 879, 908 n.6 (citing numerous cases where this Court has assumed defendant preserved motion amidst an ambiguous record.)) Moreover, it appears that the defendant's objection is not required as it is the jury's right under Cal. Penal Code § 1138 to have testimony reread. *People v. Ainsworth* (1988) 45 Cal.3d 984, 1020 ("the trial court must satisfy requests by the jury for the rereading of testimony."). Furthermore, the court's denial of the jury's right to hear evidence of the prior trial is not only error itself, but further contributed to the prejudice McClain suffered when the trial court erroneously denied his proffered lingering doubt evidence.

Respondent next argues that the prosecutor did not commit misconduct when it argued to the jury that McClain did not present any evidence of lingering doubt, citing to 74 RT 7371. Respondent's argument borders on the absurd, suggesting that the prosecutor "could properly argue that no lingering doubt evidence had been presented because the evidence that had been presented, the contradictory accounts by Pina and the absence of call to the police at the time of the Blake Street shooting, was weak." But the prosecution did not, as respondent suggest, argue that the evidence was weak, but instead argued "has there been any evidence that these defendants were anywhere but here on Halloween night? Has there been anything that cause a doubt that lingers?" (74 RT 7371.) When McClain sought to introduce this very evidence through the testimony of Pezdek,

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present the testimony of Dr. Pezdek, who testified at the guilt phase. (AOB 382-385.)

Bowen and Bailey, the prosecution objected strongly and the trial court upheld the objection. For the prosecution to then argue that this evidence could have been presented to the jury, but was not allowed, constitutes "material misrepresentations designed to mislead the jury." (*Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1216.) This alone is sufficient to require reversal of McClain's sentence, and clearly establishes further prejudice resulting from the trial court's unconstitutional denial of McClain's proffered mitigating evidence.

Respondent next asserts that McClain failed to adequately raise the claim that the trial court's instructions to the jury regarding lingering doubt evidence were unconstitutionally vague under *Boyde v. California* (1990) 494 U.S. 370, 380. (RB 325.) McClain has properly raised this claim with full support in his opening brief. (AOB 401-403). There can be no question that the trial court, by instructing the jury to consider lingering doubt evidence but refusing to let the jury hear the evidence, clearly created a reasonable likelihood that the jury prevented consideration of constitutionally relevant mitigating evidence.

Respondent finally argues that any error in excluding the relevant mitigating was harmless. (RB 325-327.). What respondent fails to mention, however, is that it is the prosecution's burden to demonstrate that the unconstitutional refusal to allow the jury to hear relevant mitigating evidence is only harmless if the state can demonstrate beyond a reasonable doubt that the multiple errors did not contribute to the jury's death verdict against McClain. (*Chapman v. California, supra* 386 U.S. at p. 26.)

To summarize the prejudice McClain suffered more fully discussed in his opening brief (AOB 403-407)

1. McClain's first jury deliberated for 12 days before finding him guilty and then hung at the penalty phase.

2. The penalty retrial jury deliberated for three days before returning a death judgment against McClain, only after asking the court to hear evidence from the guilt phase, which the court improperly refused.
3. The testimony of Bowen and Bailey could have demonstrated that McClain did not take part in the homicides.
4. Only a single eyewitness, Gabriel Pina, was able to place McClain at the scene of the homicide, and this was by no means unequivocal.
5. Dr. Pezdek's testimony would have demonstrated that it was unlikely that Pina was able to make a reliable eyewitness identification.
6. The prosecutor mislead the jury to believe that McClain did not have any evidence to present regarding lingering doubt.
7. The trial court's confusing instructions led the jury to believe that it could only consider the evidence of the prosecution's version of the circumstances of the crime.

> Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession.

(*Chapman v. California*, *supra*, 386 U.S. at 26.) This court must therefore reverse McClain's death sentence.

XVIII. McCLAIN WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS EXCLUSION OF EVIDENCE OF FAVORABLE DISPOSITIONS GRANTED TO CODEFENDANTS BOWEN AND BAILEY, AND BY UNFAIR PROSECUTORIAL MISCONDUCT IN EXPLOITING THE EXCLUSIONARY RULING; McCLAIN'S DEATH SENTENCE VIOLATES EIGHTH AMENDMENT PRINCIPLES.

Respondent contends that the trial court properly excluded evidence of the dispositions of codefendants Bowen and Bailey. (RB 309-312.) Respondent is wrong.

Respondent cites to *People v. Bemore* (2000) 22 Cal.4th 809, 857 to argue that the sentence received by an accomplice is not a relevant factor in mitigation. (RB 310.) Respondent, however, does not address McClain's argument that, based upon the concurring opinion in *Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735, fundamental fairness and due process requires the jury to hear about the dispositions of equally culpable perpetrators to a crime in which the death penalty is sought. (AMOB 410-411.) This is particularly so in McClain's case where he sought to, but was prevented from, introducing evidence of lingering doubt.

Respondent's argument that there was no evidence that Bowen and Bailey were equally culpable with McClain is ridiculous. (RB 311.) First, the prosecutor conceded that Bowen and Bailey were equally, if not more culpable than McClain. (4 CT 1124.) Bailey was alleged to have personally used a firearm in the events leading to the death of the victims. (3 CT 631-639.) The jury found true, at the guilt phase, that Bowen had fired a 9-millimeter gun at or near the residence of a person he believed to be a Crip. (6 CT 1695.) In contrast, the prosecutor conceded on the record

that McClain was not a shooter. (3 CT 631-639; 6 RT 178.) Moreover, as the jury did not find true the overt act that McClain caravanned to the scene, it is unclear whether they believed McClain drove a car to and from the scene of the Halloween homicides. (42 RT 4365' 6 CT 1695.)

Under these circumstances, by excluding evidence of the favorable dispositions of Bowen and Bailey, the prosecutor was allowed to argue inconsistent theories to obtain a death sentence against McClain, in violation of *In re Sakarias* (2005) 35 Cal.4th 140, 165. The prosecutor further exploited this discrepancy by arguing that the jury should give McClain a death sentence because he was the "worst of the worst" and "only death can make it fair; only death will make it just." (75 RT 7415,)

Furthermore, because the jury was not provided accurate information regarding the circumstances of Bowen and Bailey's negotiated pleas, this case is analogous to *Simmons v. South Carolina* (1994) 512 U.S. 154, 165, where the Supreme Court reversed the death sentence because the jury was not provided with accurate information about the meaning of a life sentence. The resulting errors violated McClain's Eighth Amendment right to be free from a disproportionate death sentence as compared to his more culpable co-defendants. (*Furman v. Georgia* (1972) 408 U.S. 238; *Enmund v. Florida*, *supra*, 458 U.S. 782.) This court must therefore reverse McClain's sentence, as it cannot be said that the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIX. McCLAIN WAS DEPRIVED OF DUE PROCESS A FAIR TRIAL, AND AN INDIVIDUALIZED AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE ERRONEOUS ADMISSION OF A VIDEOTAPE OF CODEFENDANT HOLMES' PROFANE OUTBURST.

Respondent contends that the trial court properly admitted evidence of Holmes' outburst as a circumstance of the crime under California Penal Code § 190.3(a). (RB 300-305.) Respondent is incorrect.

First, respondent makes the curious argument that the trial court did not admit the videotape based upon Holmes' lack of remorse. (RB 304.) At trial, however, the only stated reason that the prosecutor gave for admitting the expletive in Holmes' statement was to rebut lack of remorse. (65 RT 6328-6329.) The trial court admitted this portion of the statement, and because it is clearly not a circumstance of the offense, did so purportedly on the prosecution's argument to demonstrate a lack of remorse by Holmes. Respondent does not address the fact that Holmes did not present any evidence of remorse in mitigation. Therefore, the expletive uttered by Holmes at the close of the guilt phase should not have been admitted because he did not "put the question of his remorse in issue". (*People v. Heishman* (1988) 45 Cal.3d 147, 197.)

Respondent argues that *People v. Blair* (2005) 36 Cal.4th 686 is "indistinguishable" from the present case, even though the facts of *Blair* involve conduct by the defendant which occurred prior to the crime, unlike Holmes' court outburst. (RB 303.) Here, there was ample evidence that McClain and his co-defendants were all members of the P-9 gang, and Respondent makes no attempt to demonstrate how Holmes' statement is in any way tied to the circumstances of the crime.

Moreover, respondent makes no attempt to address the most salient argument as to why the trial court erred in admitting this evidence: although the trial court clearly stated that the evidence was to be admitted only against Holmes, it gave no limiting instruction to the jury prior to the playing of the tape. (65 RT 6411-6412.) As explained more fully in McClain's opening brief (AMOB 417-422) the prosecutor argued that this statement could be applied to all three defendants, not just Holmes, just after showing the jury the tape again at closing argument. (74 RT 7377-7378.) Moreover, the jury ended up seeing the video three times—at the prosecutor's opening statement, closing argument, and when the jury requested to see it again during deliberations. (75 RT 7550.) Under these circumstances, McClain was deprived of due process and a reliable penalty determination. Respondent's argument that *Woodson v. North Carolina* does not apply because it invalidated a mandatory death penalty is incorrect as a matter of law, and fails to consider McClain's argument that under *Lockett v. Ohio*, *supra*, 438 U.S. at 603-605 and subsequent Supreme Court cases, it is without question that the Eighth Amendment requires an individualized and reliable penalty determination, which was not afforded to McClain when the trial court admitted aggravating evidence of Holmes' outburst and allowed the jury to use it to sentence McClain to death. Respondent has not demonstrated that this error was harmless beyond a reasonable doubt, so this court must reverse McClain's death sentence. (*Chapman v. California*, *supra*, 386 U.S. 18.)

XX. McCLAIN WAS DEPRIVED OF DUE PROCESS A FAIR TRIAL, AND A RELIABLE PENALTY BECAUSE HIS DEATH SENTENCE RESTED ON HIS UNRELIABLE CONVICTION FOR THE ATTEMPTED MURDER OF ROBERT PRICE.

Respondent contends that the attempted murder conviction of Robert Price was reliable, and therefore properly admitted at the penalty phase, and even if it were not, the error was not harmless. (RB 362-363.) Respondent is incorrect.

As explained more fully in the opening brief (AMOB 422-424) and the related opening brief Argument III., V., and VII., McClain was deprived of his right to cross-examine Price about his motive's for testifying, and the charge was improperly joined with the other charges. Respondent does not address McClain's contention that, under *Johnson v. Mississippi*, (1988) 486 U.S. 578, 590, McClain's death sentence should be reversed without applying harmless error analysis because "the jury was allowed to hear evidence that [had] been revealed to be materially inaccurate."

Even if this court were to decide that harmless error should apply, Respondent has not shown that the error of admitting the Price conviction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) The prosecutor relied heavily on the Price conviction at penalty because it was the only evidence in aggravation presented to show that McClain had actually shot or harmed another person. Given that the jury took three days to deliberate at McClain's penalty phase and approached the trial court with lingering questions about McClain's culpability in the Halloween crimes (75 RT 7545, 7552-7555), the jury would not have returned a death sentence against McClain had it not heard about the Price conviction. McClain's prior convictions by themselves,

while serious, did not involve any action in which he shot or attempted to shoot any individual. Under these circumstances, this court must reverse McClain's death sentence.

XXI. THE TRIAL COURT'S REFUSAL TO SEVER McCLAIN FROM HIS CODEFENDANTS AT HIS PENALTY RETRIAL DEPRIVED HIM OF DUE PROCESS, INDIVIDUALIZED SENTENCING, AND A RELIABLE PENALTY DETERMINATION.

Respondent argues that the trial court properly denied the request to sever the codefendants for the penalty retrial. (RB 273-281.) Respondent is wrong.

Respondent's primary argument is that McClain forfeited his claim on appeal because he did not make a motion to sever at the penalty retrial. (RB 278-279.) Respondent, however, ignores the fact that McClain made two motions at the first penalty re-trial for severance (45 RT 4787-4788; 53 RT 5236) and that, at the penalty phase, both Newborn and Holmes requested severance. (60 RT 5831-5832.) The trial court ruled at both the guilt phase and the penalty retrial that any defense objection would be deemed joined by all defendants unless stated otherwise. (32 RT 3317; 65 RT 6342.) Under these circumstances, McClain properly preserved his argument and put the trial court on notice that he, too, was objecting to being tried jointly at the penalty retrial. Respondent's citation to *People v. Ervin*, *supra*, 22 Cal.4th 48, 68 is inapposite because *Ervin* merely stands for the proposition that a defendant cannot request severance based upon facts that occurred after an initial severance motion without making a renewed motion to the trial court. Here, McClain is not claiming any basis for severance that he did not initially present to the trial court in his motion to sever at the first penalty trial.

Respondent's arguments that McClain was not prejudiced by the joint penalty trial are unpersuasive. (RB 279-281.) Respondent simply brushes aside the fact that the jury deliberated for 3 days at penalty when arguing that the evidence of Newborn's violence against women was "relatively tame." (RB 281.) As the jury was obviously aware of the crimes for which McClain was convicted, the fact that it heard evidence that Newborn injured a woman who was pregnant with his child, another woman who was hold a two week old baby, and a third who was the mother of his children, by hitting, dragging, spraying them in the face with Lysol and Raid, and other violent means, is extremely prejudicial. (AMOB 428; *See United States v. Hands* (11th Cir. 1999) 184 F.3d 1322 [citations omitted], 1328 (stating that domestic abuse is the kind of evidence "'likely to incite a jury to an irrational decision.'")

Respondent similarly asserts that the evidence of the gang graffiti was "extremely minor". (RB 281.) This evidence was not "minor" as Deputy Carlos Lopez testified that the nicknames pertained to Holmes and Newborn, but NOT McClain. Nevertheless, Newborn attempted to shift the blame for writing the graffiti onto McClain (66 RT 6472; 74 RT 7466) which in itself requires reversal. (*See United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082 (reversing conviction where trial court joined defendants and one of them acted as a second prosecutor against the other.)

Finally, Respondent does not address many of McClain's arguments at all—for example, that the arguments of Holmes' counsel at closing attempted to lump McClain and Newborn together as a reason for why the jury should return a life verdict for his client, or that the jury may have considered the lack of mental health mitigation presented by McClain in comparison to that presented by Newborn and Holmes as evidence in aggravation, or the videotape of Holmes' profane outburst. These reasons were detailed extensively in the opening brief. (AMOB 433-440.) In light

of the inflammatory aggravating evidence that would not have been presented had McClain been tried alone, this court must reverse McClain's death sentence.

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

Respondent summarily argues that the jury was properly instructed under CALJIC 8.88 essentially because this court has rejected similar claims in the past. (RB 363.) Respondent is incorrect.

Although McClain will not repeat here the extensive argument challenging CALJIC 8.88 that was made in the opening brief (AMOB 440-452), respondent simply does not address many portions of McClain's challenge. Amongst other infirmities with CALJIC 8.88, McClain strongly urges this Court to reconsider its holding in *People v. Duncan* (1991) 53 Cal.3d 955, 978, which approved of CALJIC 8.88 even though the instruction fails to inform the jury pursuant to Penal Code section 190.3 that the jury "shall impose" a sentence of death if it finds that the mitigating circumstances outweigh the aggravating circumstances. By only instructing the jury on how it may impose a sentence of death, the failure to instruct the jury on how it may return a sentence of life without parole violates due process, fails to conform to the specific mandate of Penal Code section 190.3, and conflicts with this Court's decision in *People v. Moore* (1954) 43 Cal.2d 517, 526-527, which stated:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing

> lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(internal quotation marks omitted.)

Moreover, because CALJIC 8.88 is impermissibly vague by using the term "so substantial", failed to inform the jury that the central determination is whether death is the appropriate punishment, and failed to inform the jury that McClain was not required to persuade them that the death penalty was inappropriate, the instruction violates McClain's rights under the Eighth and Fourteenth amendments. This Court should reverse McClain's death sentence.

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

Respondent argues that the trial court was not obligated to define the meaning of life without the possibility of parole and to do so would be erroneous because of the possibility of commutation of the sentence, citing *People v. Watson* (2008) 43 Cal.4th 652, 699-700. (RB 363-364.)

Respondent, however, does not address McClain's argument, stated more completely in the opening brief (AMOB 452-458) that jurors in California do not understand the meaning of life without parole. Because the trial court is obligated to instruct sua sponte on all principles of law connected with the case, the trial court erred in not clearly defining that life without parole in fact means that. McClain could not be released from prison for the duration of his life. (*People v. Wilson* (1967) 66 Cal.2d 749.) The governor's power to commute does not falsify this definition. McClain could only be released if he were serving a lesser sentence, which could only occur under very rare circumstances given his prior convictions.

Because there is a risk that the jury imposed a sentence of death because it did not understand the meaning of a sentence of life without parole, the trial court's failure to do so cannot be said to be harmless beyond a reasonable doubt. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Accordingly, the judgment of death must be reversed.

XXIV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT McCLAIN'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW.

Respondent argues that the death penalty is constitutional and does not violate international law. (RB 364-366.) Respondent relies solely on prior case law of this Court and asserts that no error occurred, without any substantive discussion of the cited case law.

McClain briefed this issue extensively in his opening brief (AMOB 458-523) arguing why this Court's prior case law must be reconsidered. Accordingly, no further reply is necessary as the issues are adequately presented in the opening brief.

XXV. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Respondent argues that there was no cumulative error, and if there were multiple errors, there was no prejudice. (RB 370-371.) Respondent's cursory arguments ignore McClain's main contentions.

This was, in fact, a very close case. The jury already found that McClain was not in fact a shooter, and then asked at the penalty phase to hear the trial court to see evidence from the guilt phase, which the trial court denied. (6 CT 1600-1610; 75 RT 7545.). It deliberated over the course of 6 days at the guilt phase (6 CT 1460, 1590) and nearly three days at the penalty phase. (75 RT 7552-7555.) This demonstrates that this was, indeed, a very close case.

McClain, in his opening brief, argued extensively why both the guilt and penalty determinations must be reversed due to the accumulation of numerous trial errors. (AMOB 523-526.) There can be little question that many of the errors were made as a result of the trial court's erroneous decision to try all defendants jointly at both the guilt and penalty phases. (See AMOB Claims VI, VIII, XV, XIX, XXI.) However, the large number of guilt and penalty phase errors, taken together, infected "the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is therefore required unless it can be shown that the combined effect of all of the errors, constitutional and statutory, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the numerous errors of federal constitutional magnitude combined with other errors].)

Here, Respondent has not made any attempt to demonstrate that the cumulative effect of the errors were harmless beyond a reasonable doubt. There is, in fact, little doubt that absent these errors, McClain would not have been convicted at the guilt phase, and even if he were convicted, a single juror may not have voted to sentence him to death. (*People v. Brown* (1988) 46 Cal.3d 432, 464-466 [error occurring at the guilt phase requires

reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) McClain's conviction and death sentence must be reversed.

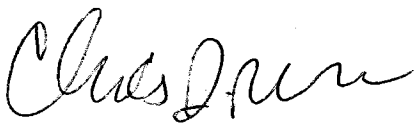
CONCLUSION

For the reasons stated above, as well as the arguments presented in McClain's opening brief and those of appellants Holmes and Newborn to which he has joined, the judgment must be reversed.

Dated: December 10, 2012

Respectfully submitted,

DEBRA S. SABAH PRESS



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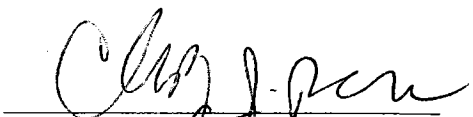
Attorneys for Appellant
HERBERT MCLAIN

CERTIFICATE OF WORD COUNT

I certify that this Appellant McClain's Reply Brief consists of 18,819 words.

Dated: December 10, 2012



CHARLES J. PRESS

DECLARATION OF SERVICE

Re: People v. McClain No. S058734

I, CHARLES J. PRESS, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442A Walnut Street #311; Berkeley, CA 94709-1405. I served a true copy of the attached:

APPELLANT McCLAIN'S REPLY BRIEF

on the following, by placing same in an envelope addressed as follows:

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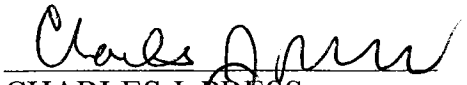
I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 10, 2012 at Berkeley, California.



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DECLARATION OF SERVICE

Re: *People v. McClain*; No. S058734

I, CHARLES J. PRESS declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442a Walnut Street #311; Berkeley, CA 94709-1405. I am serving a true copy of the attached:

APPELLANT McCLAIN'S REPLY BRIEF

on the following, in person at San Quentin, California, on December 17, 2012:

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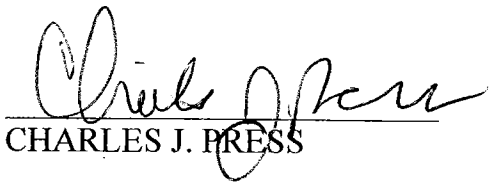
I declare under penalty that the foregoing is true and correct.

Executed on December 10, 2012 at Berkeley, California.



CHARLES J. PRESS