SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

No. S082828
San Diego No. SCE171425

v.

CORRELL THOMAS,

Defendant-Appellant./

Automatic Appeal from the Judgment of the Superior Court
County of San Diego
Hon. Allan J. Preckel, Judge

Appellant's Reply Brief

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I.

The Trial Court's Erroneous Refusal to Sever the McDonald Homicide from the Grote Homicide Violated Appellant's Right to Due Process of Law and a Fair Trial, Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the California Constitution

A.

Introduction

Joinder for trial of two or more separate incidents is not a tool for the promotion of accuracy in fact finding. Rather, it is an accommodation designed solely to promote judicial efficiency. As a general matter, when a defendant is facing charges stemming from more than one incident, few will disagree with the proposition that, absent considerations of cross-admissibility, a jury is more likely to reach a more reliable result if each incident is tried separately. Despite routine instructions to consider each incident on its own evidence, trying two or more unrelated incidents in the same trial always brings with it the danger that one or both of the charges will be tainted by leakage between the testimony presented as to each and the consequent danger that the jury will consider the evidence in the aggregate, rather than individually as to each incident.

Sometimes, the leakage will be evidence specific, in the sense that the jurors might be swayed to find a defendant guilty in an otherwise doubtful case because of joinder with a stronger case. Sometimes the charges and/or evidence in one the joined cases will be so inflammatory that it precludes the possibility of receiving a fair trial on the other matter. In almost all cases that are jointly tried, jurors will inevitably draw an inference of propensity to commit the class of crimes that prompted joinder – that if he did one he did

the other -- attributing to the accused the general propensity of criminality prohibited by Evidence Code §1101. "[T]he key inquiry before the trial court on a motion to sever is whether joint trials pose an unacceptable risk of prejudice, i.e., of unfairly affecting the adjudication of one or more of the charges." (*People v. Earle* (2009) 172 Cal. App. 4th 372, 387; *People v. Smith* (2007) 40 Cal.4th 483, 510.)

In a perfect world, where judicial resources are not constrained by budgetary and personnel considerations, separate trials of separate incidents would be the order of the day, save those instances where an evidentiary interrelationship between two cases requires consolidation. But even in the absence of a clear evidentiary connection between charges, this is not yet a perfect world and courts must still take into account scarce judicial resources and budgetary considerations in fashioning rules governing joinder and severance of trials involving more than one incident. This Court has repeatedly stated that joinder of trials is justified, not as an engine for the enhanced discovery of the truth, but by "the benefits to the state, in the form of conservation of judicial resources and public funds." (*People v. Beam* (1988) 46 Cal.3d 919, 939; *People v. Soper* (2009) 45 Cal. 4th 759, 774.)

In the case at bar, although the contention on appeal is that the trial court erred by refusing to sever the trials, the contention is somewhat of a misnomer. The trial court severed the trials, impaneled two juries, instructed each jury separately, and presided over separate opening and closing statements. The problem is that the trial court, perhaps swayed by the fact that a second jury box already existed in the courtroom where appellant's trial

took place,[1] severed the trials vertically,[2] rather than horizontally,[3] ordering two separately chosen juries, one for appellant and one for the codefendant, to sit at the same time, rather than sequentially. There were two juries sworn, one for each defendant, for the announced purpose of minimizing the conflicts between a capital and non-capital defendant in picking a jury[4] and to prevent appellant's jury from hearing of threats made by Kazi to witnesses; the Thomas jury was not present when the threat evidence was admitted.

The net result of the vertical severance effected by the trial court in this case neither saved one dime in public funds nor conserved one minute of judicial resources. Just as much time was spent selecting juries, presenting evidence, and making closing arguments as if the McDonald case had been severed from the Grote case. The net result of the vertical severance of the joint trial of McDonald and Grote cases saddled the trial with all the undeniable disadvantages of trying two unrelated charges of the same class of crimes together with none of the countervailing benefits that were the rationale of the Penal Code's authorization of joint trials in the first place. The net result was that appellant did not receive a fair trial. Appellant's convictions must be reversed.

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[1] "I have in mind my own personal experience last year presiding over a capital case of two defendants with a separate jury having been empanelled for each. We built out this courtroom at that time with a second jury box which remains in place presently

[2] Two juries hearing the case simultaneously." (R.T. 1271-1272)

[3] Two juries would hear the McDonald and Grote cases sequentially.

[4] While both defendants soought jurors who would be likely to accept defense evidence and arguments, the capital defendant would also be looking for jurors who would be unlikely to impose the death penalty. Jurors who might be acceptable to both defendants on guilt related issues might be unacceptable to the capital defendant on penalty issues.

B.

The Trial Court Abused its Discretion When it Denied Appellant's Motion for Severance

1.

The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Alleged Statement by Keisha Thomas Was Not Admissible in either the Grote or McDonald Cases Because it was Insolubly Ambiguous

As the Court will recall, in the hearing on appellant's motion to sever the McDonald case from the Grote case, the focus of the prosecutor's opposition to the motion was a statement that appellant allegedly made to Keisha Thomas shortly after the Grote incident. According to the proffer, as he was taking apart a handgun inside her apartment shortly after the Grote incident, appellant told Keisha that "[t]his is the second time I've done this." (R.T. 964) The prosecutor argued that that statement was an admission regarding the McDonald homicide.

At best, the prosecutor's argument was a red herring because even assuming that the statement meant everything that the prosecutor wanted it to mean – an admission that appellant was involved in the death of Mr. McDonald -- the matter of appellant's identity as a combatant in the McDonald case was never in dispute. As the court in *People v. Earle, supra,* recently noted in the context of a severance issue, "before potentially prejudicial evidence can be admitted to show an element of the offense there must be some concrete basis to suppose that the jury might fail to find that element beyond a reasonable doubt." (*Id.* 172 Cal. App. 4th at 391; *People v. Balcom* (1994) 7 Cal.4th 414, 423.)

In his opening brief, appellant contended that the statement made by Keisha Thomas was inadmissible in both the Grote and McDonald cases because it was insolubly ambiguous. "Done" what? Lost his temper? Had an argument with Nicole? Fired a gun? Taken apart a gun? Killed someone? Nothing further was presented at the hearing on the severance motion to explain what the statement referred to and since the prosecutor never asked Ms. Thomas about the statement when she later testified at trial, there is no explanation in the record of what "done this" referred to. Given the lack of any specific contextual reference within the statement itself, and the lack of elaboration at trial, any attempt to ascribe a specific meaning to the purported statement that would be of relevance to either case would be nothing more than an admixture of conjecture and speculation.

Evidence that is "insolubly ambiguous" is inadmissible, for good reason. (*Doyle v. Ohio* (1976) 426 U.S. 610, 671; *People v. Sutton* (1993) 19 Cal.App.4th 795, 801; *Clayborne v. United States* (D.C. 2000) 751 A.2d 956, 971; *State v. Bright* (La. 2000) 776 So. 2d 1134, 1143; *Commonwealth v. Croft* (Mass. 1979) 186 N.E.2d 468, 469.) Insolulably ambiguous evidence is evidence that is open to multiple interpretations with no rational means of selecting an accurate meaning. Choosing one over the other becomes mere guesswork, reducing the probative force of the evidence to nothing more than inadmissible speculation. (*People v. Morris* (1988) 46 Cal. 3d 1, 22.)

Respondent counters that the statement in question was admissible because Evidence Code §210 defines relevant evidence as evidence having "*any tendency* in reason to prove or disprove any disputed fact..." (emphasis original) and that the statement was incrementally relevant.

Not so. By emphasizing "*any* tendency," respondent ignores the all-important modifier that follows immediately after – "in reason." Not just "any

tendency" will do, no matter how speculative it might be – the tendency §210 calls for has to be "in reason." "[E]vidence which produces only speculative inferences is irrelevant evidence." (*People v. De La Plane* (1979) 88 Cal. App. 3d 223, 242; *People v. Morrison* (2004) 34 Cal.4th 698, 711

Respondent now concedes that the statement in question is not a specific admission by appellant of culpability in the McDonald homicide. Rather, respondent contends that the statement was relevant and admissible simply because the "statement to Keisha after the Grote murder had a tendency to prove that he had killed before" and because it "had a tendency to show that the Grote killing was his second homicide." (R.B. 33)

Appellant's response is two-fold. First, assuming *arguendo,* that "done this" refers to a prior homicide[5] at best, the statement merely evinces a propensity for violence, inadmissible under Evidence Code §1101(a), which makes "evidence of a person's character or a trait of his or her character...inadmissible when offered to prove his or her conduct on a specified occasion." Evidence proffered by the prosecution in a homicide case that does no more than tend to prove that the defendant has a propensity for violence is inadmissible. (*People v. Myers* (2007) 148 Cal. App. 4th 546, 551.) Given that respondent concedes that there is no principled way of determining with any measurable degree of certainty that the homicide referred to by "done this" is the McDonald homicide, respondent's contention must fail

Moreover, respondent's interpretation – that "done this" refers to a homicide -- is but one possibility among many. At the time he allegedly uttered the statement in question, appellant was [1] taking refuge in a friend's house, [2] disassembling a gun, and [3] looking for a place to hide the gun.

[5] Appellant was also allegedly involved in a homicide where a gun was used that had taken place a year before in Stockton. (R.T. 10655 *et seq.*)

"Done this" could have just as easily referred to any of those activities as it could have to a homicide. The problem is that there is nothing about the statement or the context in which the statement was made, short of sheer speculation, that makes the critical connection between "done this" and a homicide. As this Court has repeatedly noted, "speculation is not evidence." (*People v. Waidla* (2000) 22 Cal. 4th 690, 735; *People v. Berryman* (1993) 6 Cal. 4th 1048, 1081.)

The statement in question is a classic example of evidence that is insolubly ambiguous. It might have referred to a homicide or it might have referred to what appellant was doing at the moment the words were spoken. Even respondent makes no claim that the statement can be reliably taken as an admission to the McDonald homicide. If, as respondent posits, the statement proves no more than appellant's involvement in a prior homicide, it was inadmissible as being propensity evidence, barred by Evidence Code §1101. It is a truism, requiring no citation to authority, that if the statement was inadmissible because it was insolubly ambiguous or because it was improper propensity evidence, it was not cross-admissible and the trial court erred in relying upon that statement as a basis for denying the motion to sever.

2.

The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Inherent Prejudice of Joining Two Unrelated Murder Cases was Not Counterbalanced by Any Saving of Time or Public Funds

In his opening brief, appellant contended that the trial court abused its discretion when it denied appellant's motion to sever the McDonald case from

the Grote case because, in view of the procedures it had already decided to adopt – seating two juries, with separate voir dire proceedings, two sets of opening statements, two sets of closing statements, two jury instructions, and two jury deliberations – joinder of the McDonald case with the Grote case saved no money nor promoted judicial efficiency. On the other hand, the trial court's erroneous ruling exposed appellant, a capital defendant, to all the dangers inherent in trying two murder cases jointly. Having already decided to seat two juries, the course chosen by the trial court was the course least calculated to promote accurate fact-finding by the jury that tried appellant's case.

At the time the motion to sever was heard, the court had already indicated that two juries would be selected to try the case, albeit, one for Nicole Halstead and one for Mr. Thomas and Mr. Cooksey. (R.T. 857) After Nicole entered her plea of guilty, the trial court *sua sponte* reconsidered the previous severance arguments and, instead of simply severing the counts, which would have eliminated all of the problems attendant to both the joint charging of a capital and non-capital defendant and the joinder of two unrelated homicides, the trial court chose to deal only with the former, ordering empanelment of two separate juries to hear both cases simultaneously, with Mr. Cooksey's jury hearing only the evidence pertaining to the McDonald case. (R.T. 1272)

Although the trial court had all of the severance motions in mind when it ordered the empanelment of two different juries,[6] the trial court never

[6] "Now, let me talk for a few moments about the subject matter of severance and/or the empanelment of dual juries for this case. I recognize that we have been over this territory previously, that we have litigated motions pertaining to severance either of defendants and/or of counts on any one or more of several grounds, and the court has ruled regarding those motions." (R.T. 1269)

weighed the prejudice inherent in joining two unrelated counts of murder with the supposed "efficiency of a joint trial" under the unique circumstances of this case, where joinder resulted in no such efficiency. (R.T. 1269-1273) Once the decision to empanel two juries was made, the state-professed interest in trying the McDonald and Grote cases in the same trial for the purpose of saving money evaporated.

In an argument *ad horrendum* that seamlessly transitions to an argument *reductio ad absurdum,* respondent contends that if the trial court had severed the Grote case from the McDonald case, the trial court "would have had to impanel three juries rather than just two." (R.B. 36) Respondent asserts that *three* juries would have been necessary – presumably to sever appellant from Cooksey in the McDonald case – because evidence of threats made against a witness by Cooksey were inadmissible against appellant. Eschewing citation to relevant decisional authority, respondent blandly asserts that such evidence would have "necessitated severance." (R.B. 36)

Not so. Simply because evidence is admissible against one defendant but not admissible against another, does not, *ipso facto,* require severance. (*People v. Reeder* (1978) 82 Cal. App. 3d 543, 355.) Respondent cites no authority for such a proposition. Nor could it. When evidence is admissible against one defendant but not the other, Evidence Code §355[7] specifically authorizes a trial court to give a limiting instruction under such circumstances. (*cf. People v. Harris* (2008) 43 Cal. 4th 1269, 1287; *People v. Reader, supra.*) While there are some forms of evidence, such as an out of court statement of a codefendant implicating the defendant, for which a

[7] "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

limiting instruction would never be adequate (*Bruton v. United States* (1968) 391 U.S. 123), there is nothing about the threats made by Cooksey that would have *mandated* a separate trial. It is worth noting that appellant never moved for a severance on this ground.

Additionally, citing *People* v. *Avila* (2006) 38 Cal.4th 491, respondent rather disingenuously responds to a potential argument for severance that the defense never made in this case. Respondent contends that even if the McDonald and Grote trials were severed, there would have to be a further severance of the defendants in the McDonald case because the defendants had conflicting defenses. *People v. Avila* does not support respondent's contention. In *Avila*, not only did this court hold that no severance was required, it was noted that no California court "has found an abuse of discretion or reversed a conviction on this basis." (*Id.* 38 Cal.4th at 575; *People v. Coffman and Marlow* (2004) 34 Cal. 4th 1, 43.) Moreover, this would hardly have been a case for severance based on conflicting defenses. The only conflict in the defenses concerned the cause of Mr. Mcdonald's death -- whether it was the result of battery with the bottle of alcohol, attributable to Cooksey, or from kicking, attributable to appellant[8] -- hardly the basis for a severance.

Proceeding to an argument *ad absurdum*, respondent contends that despite the fact that the trial court's approval of the joinder of the Grote and McDonald cases still entailed two juries, two openings, two closings, and two sets of instructions, and two deliberating juries, trying the Grote and McDonald cases together still realized "significant systemic efficiencies"

[8] In a footnote, respondent rather cryptically notes that appellant had also made a motion for severance based upon *Bruton* because of statements made by Cooksey. (R.B. 36) Respondent neglects to note that the issue became moot early on in when the prosecutor decided not to introduce those statements. (R.T. 1095)

because, had the cases been severed, pretrial motions in the two cases would have had to proceed on "discrete tracks" and there would have been two appeals and potentially two petitions for review/rehearing and collateral attacks. (Opp. 37)

The fundamental problem with respondent's analysis is that it is drawn *in haec verbe* from this Court's decision in *People v. Soper, supra*, a case where, unlike the case at bar, *there was only one defendant.* In this case, however, there were two defendants, a capital and non-capital defendant, and, unlike *Soper*, the trial court had already made a decision to empanel two juries at the time the motion for severance was made.

In the joint trial that occurred in this case, because appellant was charged with a capital offense and Cooksey was not, there were two appeals, one by notice for Cooksey and an automatic appeal by appellant. Had the cases been severed, assuming guilty verdicts necessitated appeals, there would have been also been two appeals: one appeal for both Cooksey and appellant from the joint, non-capital trial of McDonald and one appeal by appellant from Grote, which, depending on the penalty verdict, would have been automatic or by notice. Consequently, in this case, joinder promoted no "systemic efficiencies" in the appellate process. Because this case had one capital and one non-capital defendant, there were going to be two appeals no matter how the pie was sliced, whether there was a joint trial of McDonald and Grote, or whether the McDonald and Grote cases were tried separately.

Contrary to respondent's argument, severance of the cases would not have had a multiplier effect on the number of pretrial motions any more than pouring water from one glass into another increases the cumulative volume of water in the two glasses. Appellant's motion was for severance of trials, not severance of pre-trial motions. As is customary in cases severed for trial, a

court concerned about judicial efficiency[9] would have kept the cases together for pretrial motions to deal with any motions in the severed cases that overlapped and instituted separate proceedings only when the cases were ready for trial.

3.

Given the Fact that the Trial Court was Aware that Joinder Would Not Save Either Public Time or Moneys, the Trial Court Used the Wrong Standard in Ruling on Appellant's Severance Motion

In his opening brief, appellant contended that because, unlike the usual context in which a severance motion is heard, the trial court had already determined that two juries would be impaneled to hear the case and because in that situation, joinder of the McDonald and Grote cases did not conserve judicial resources, the trial court erred in using the same standard to adjudge the severance motion as would be applicable to severance motions that would necessitate increased use of judicial resources. In view of the fact that the joinder of counts in this case still involved two juries etc. and thus did not result in any savings of public funds or judicial resources, it is appellant's position that the trial court was obligated to adjudge the propriety of joinder under Evidence Code §§1101/352 standards applicable to the admission of evidence of other crimes.

In the normal case where a defendant is requesting a severed trial of counts originally joined in one information, it has been repeatedly held that the trial court must consider "the benefits to the state of joinder" in assessing a defendant's allegation of prejudice flowing from joinder of counts. (*People v. Bean, supra*, 46 Cal. 3d at 939; *People v. Soper, supra: People v. Burnell* (2005)

[9] Not to mention trial counsel, who would probably have been just as concerned with having to argue the same motions twice.

132 Cal. App. 4th 938, 947.) "Trial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials." *(Frank v. Superior Court* (1989) 48 Cal. 3d 632, 639.)

As this Court recently explained, when a motion for severance is made, all of the prejudice that joinder of the counts could produce -- "likelihood to unduly inflame; bolstering of a weak case with a strong one; and conversion of charges into a capital offense)" -- *must be weighed "against the benefits to the state of joinder."* (*People v. Soper, supra,* 45 Cal.4th at 780.) (emphasis added) In this case, however, there was nothing to weigh against the prejudice of joint murder trials. There were no "benefits to the state of joinder." Having previously ordered the empanelment of two juries, as the matter appeared before the trial court at the time the severance motion was ruled upon, joined or unjoined, the trial of the charges in this case would expend exactly the same amount of judicial resources.

Because joinder of counts conferred no benefits to the state, the normal weighing protocol applicable to a severance motion did not apply. Because joinder produced no benefits to the state, admission of evidence of one homicide in the trial of the other was logically and legally subject to the same rules governing the admissibility of evidence of other crimes. The trial court was obligated to sever the McDonald case from the Grote case unless the prosecutor carried his burden of establishing that evidence from one was admissible for one of the purposes specified by Evidence Code §1101(b) ("motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident") in the trial of the other.

As might be expected, respondent contends that "there is no authority for Thomas' position that some lesser standard for evaluating prejudice

should be employed if judicial economy might not be realized as a result of joinder." (R.B. 38.) Precedential authority is not the *sine qua non* of judicial decision-making. If it were, cases of first impression would never be decided. The absence of a specific precedent on point does not prevent this Court from adjudicating appellant's claim based on logic, common sense, and analogous precedent. (*Diasonics, Inc. v. Acuson Corp.*, 1993 U.S. Dist. LEXIS 8871, ["In the absence of precedent, the Court looks to common sense solutions..." (D. Lowell Jensen, J)]; *Wells v. Riviere* (1980) 269 Ark. 156, 172, ["This being a case of first impression, we should face the issue squarely and use our common sense..."]; *Jeffer, Mangels and Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1439, ["in the absence of a precedent stating the obvious, common sense will do.".]

Common sense dictates that when neither time nor money will be saved by joining unrelated murder charges in one trial and where the risk of prejudice is both unavoidable and undeniable, each homicide allegation should be tried separately unless evidence from one is admissible in the trial of the other under Evidence Code §1101(b) to prove motive, intent, common scheme etc. The primary rationalization for joinder is saving the state time and money. (*People v. Soper, supra*; *People v. Bean, supra.*) If that justification does not apply, there is no reason to join the cases. In appellant's case, the only factual connection between the two cases was that appellant was charged in both. Beyond that, there was no evidence in one case that was admissible in the other under Evidence Code §1101(b).

Moreover, this is not just "*some* lesser standard," as respondent argues. (R.B. 38) Appellant did not pull the reference to 1101(b) out of a hat. The argument appellant makes here rests on well-established legal principles reflected in case law and codified in Evidence Code §1101(b). In *People v.*

Bean, supra, this Court noted that the differences between the court's decision-making authority under §954 regarding joinder and §1101(b), the admission of other crimes evidence, stemmed from the efficiencies derived from joinder. "[T]he trial court's discretion under section 954 to deny severance is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101 because additional factors favor joinder." (*People v. Bean, supra,* 46 Cal.3d at 935-936.)

> "A ruling on a motion to sever is based on a weighing of the probative value of any cross-admissible evidence against the prejudicial effect of evidence the jury would not otherwise hear, *but in the weighing process the beneficial results of joinder are added to the probative value side.* Therefore a defendant seeking severance must make an even stronger showing of prejudicial effect than would be required in determining whether to admit other-crimes evidence in a severed trial." (*Ibid.*) (emphasis added)

Consequently, in light of the trial court's decision to empanel two juries -- in essence, conducting two jury trials side by side -- and the consequent absence of the "the beneficial results of joinder," there was nothing to "add[] to the probative value side" of the admissibility equation. All that was left were the considerations governing the admissibility of evidence of other crimes. (*People v. Bean, supra.*) As with any motion to admit evidence of other crimes, the trial court should have placed the burden on the prosecutor to justify the joinder in the same manner imposed when the prosecution seeks to admit evidence of other crimes under §1101(b). (*People v. Anderson* (1987) 43 Cal.3d 1104, 1136.) Under the unique facts of this case, the prosecution should have been required to establish the evidence in one case was admissible in the other for some purpose sanctioned by §1101(b). Absent such a showing, joinder would be prohibited by the principles underlying Evidence Code §1101(b)/352.

4.

The Trial Court Abused its Discretion When it Denied Appellant's Motion for a Mistrial after the Prosecution Rested Without Introducing the Purported Admission that the Trial Court Relied Upon in Denying the Severance Motion

When the trial court denied the motion for severance, the trial court made it clear that the key to its decision to go ahead with joint trial was the prosecutor's representation that Keisha Thomas would testify that, shortly after the Grote homicide, appellant told her that "this was the second time he had done this." (R.T. 973)

In his opposition to appellant's motion to sever the Grote and McDonald trials, the prosecutor named "cross-admissibility" as his first reason that the motion should not be granted. (R.T. 963) The prosecutor argued that a statement allegedly made to Keisha Thomas shortly after the Grote homicide -- "this is the second time I've done this"-- was cross-admissible and "a critical piece of evidence which the people should be entitled to get in" and unless the McDonald and Grote cases were tried together, the jury wouldn't "understand[] what the context of it is." (R.T. 964, 967)

> "That is an incriminatory statement made to a witness that should be admissible against Mr. Thomas to show his involvement in a murder on May 18th. I suggest that it is, but how would you ever put that in perspective and set its importance to the jury unless the jury was aware of the fact that three weeks after the May 18th beating of Ricky McDonald there was a shooting death in which Mr. Thomas was also involved?" (R.T. 968)

In denying the motion to sever, the trial court accepted the prosecutor's representation that Ms. Thomas' testimony "crosse[d] the boundary, if you will, between these two incidents and brings them both together. " (R.T. 973

> "[S]everance of these two incidents and non-presentation of the Ricky McDonald incident [would] very effectively eviscerate the probative value and significance that might otherwise be attached

> to that testimony of Keisha Thomas in a trial of the two homicides jointly[.]" (R.T.974)

Of course, as it turned out, after vigorously arguing that Ms. Thomas' statement was a "critical piece of evidence" that warranted trying the both the McDonald and Grote case together, not only did the prosecutor fail to produce the "critical" testimony of Ms. Thomas, he didn't even try. It was not as though Ms. Thomas went sideways on the prosecutor when he pursued the relevant line of inquiry. Although there were six pages of testimony about the incident during which appellant supposedly made the statement in question, the prosecutor never bothered to ask Ms. Thomas about it. He asked Ms. Thomas about the hat appellant was wearing, the gun he had with him, whether he went to the window to look out, but nary a single question about the "critical" evidence that brought the two homicides "both together" and which allegedly justified joinder.

In view of the above, it is understandable that respondent attempts to back away from and/or minimize the significance of Ms. Thomas' statement vis a vis the trial court's ruling on the motion to sever, observing that "[h]ere, the trial court considered Thomas's statement to Keisha to be, at most, a mere modicum of cross-admissible evidence and concluded that whether there was cross-admissible evidence was not determinative." (Opp. 34)

Although the trial court did, in fact, use the word "modicum" to describe the extent of the cross-admissibility of the evidence in the two cases in comparison to *all* the evidence in the two cases, that did not lessen but rather emphasized the importance of Ms. Thomas' statement to the ruling on the severance motion. It simply meant that there wasn't much in the way of evidence that was even potentially cross-admissible and highlighted the importance of the trial court's declaration that Ms. Thomas' statement

"crosse[d] the boundary, if you will, between these two incidents and br[ought] them both together. " (R.T. 973) In short, what the trial court decided was that a mere "modicum" of evidence that purported to be cross admissible was sufficient to warrant trying both cases together.

Similarly, although the trial court did use the words "not determinative," it is clear that the trial considered Ms. Thomas's statement as central to its ruling, noting that in a severed trial, the statement would be "substantially eviscerat[ted." (R.T. 973-974)

> "[I]n a trial of the two homicides together, that testimony of Keisha Thomas packs, if you'll forgive me, one hell of a potential wallop. Whereas in the trial of the two incidents separately, it kind of comes before the trier of fact, it seems to me, with little more than a whimper and little more effect than mere fizzle." (*Ibid.*)

Simply put, respondent is in the odd position of [1] having urged the trial court to deny the severance motion because Ms. Thomas' statement was "a critical piece of evidence which the people should be entitled to get in" (R.T. 966) which the prosecution wouldn't be able to present in its proper context unless the cases were tried together, [2] having nevertheless made no attempt to introduce that statement after its request to keep the cases together was honored by the trial court, and [3] now arguing that the statement was no big deal and played only a minor role in the trial court's denial of the severance motion.

Having premised its ruling on the severance motion in large part on the prosecutor's representation that Ms. Thomas' statement was critical evidence, when the prosecution made no attempt to introduce that statement at trial, the trial court was obligated to declare a mistrial. Its failure to do so was an abuse of discretion.

C.

Appellant was Prejudiced by the Trial Court's Denial of the Motion to Sever Counts Rendering His Trial Fundamentally Unfair, in Violation of the Right to Due Process of Law Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

See Section III, *infra*.

II.

The Erroneous Refusal of the Trial Court to Exclude Evidence of the Milton Incident and Evidence of Mr. McDonald's Habit and Custom of Leaving Money for his Wife Violated Appellant's Due Process Right to a Fair Trial, an Impartial Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article One of the California Constitution

A.

Introduction

On the night of the McDonald incident, appellant was involved in two completely unrelated incidents. First he got involved in a fight at a liquor store with Mr. Milton, a drunk who had "mouthed off" to him. (R.T. 3867) Later that evening, when a very drunk Mr. McDonald confronted Kazi about the noise generated by the barbecue, words were exchanged and Kazi punched him in the face. As Mr. McDonald lunged forward to punch Kazi, appellant intervened and punched Mr. McDonald in the face. While there were wildly varying accounts of what happened next, most of the witnesses agreed that appellant subsequently kicked Mr. McDonald several times.

Initially, the prosecution charged appellant with robbery of Mr. McDonald because some of his personal property was allegedly taken after the fight ended. The magistrate refused to hold appellant to answer on the robbery charge. The prosecution recharged the robbery in the information and that too was dismissed pursuant to a Penal Code §995 motion. Undeterred by two judicial rulings finding that there was no evidence of pre-existing intent to rob, prior to trial, the prosecutor again sought to resurrect the "robbery" allegation on the pretext that he would be attempting to prove that Mr. McDonald died during a robbery-murder. The prosecutor told the

judge that he would prove the robbery-murder allegation by using evidence from the liquor store incident involving Mr. Milton (herinafter, the "Milton incident").

In addition, the prosecutor claimed that the Milton incident was relevant to prove appellant's intent when he confronted Mr. McDonald. The prosecutor told the trial court that he would introduce evidence to show that after the Milton incident, "Cooksey and Thomas were still hyped up and aggravated about not getting money during the Milton beating" and that the MIlton incident was part of "a continuing course of conduct which has some direct relevance as to the state of mind of the defendants as Mr. McDonald approaches them." (R.T. 1330)

The trial court ruled that the prosecution could introduce evidence of the Milton incident to prove robbery, state of mind, and that it was part of a continuing course of conduct. At the time the evidence was introduced, the trial court instructed the jury that the evidence was introduced "only for the limited purpose of determining if it tend[ed] to show the intent and/or mental state which is a necessary element of the crime of murder of Ricky McDonald as charged in count 1 of the information." At the end of the trial, however, the trial court ruled that there was insufficient evidence to go to the jury on robbery-murder, but instructed the jury that they could consider the liquor store incident as it bore on appellant's state of mind.

B.

The Trial Court Erred in Permitting the Admission of Evidence of the Milton Incident under Evidence Code §1101(b) on the Issue of Intent and/or a Continuing Course of Conduct Theory

1.

Evidence of the Milton Incident was Not Relevant to Prove Intent to Rob in the McDonald Homicide

In his opening brief, appellant contended that there was that there were insufficient similarities between the Milton incident and the McDonald incident to warrant admission of evidence of the Milton incident as evidence of intent to rob. Appellant further noted that, to the extent there were similarities between the two incidents, the similarities established that any intent to steal was formulated after the assaultive conduct had ceased.

In its reply, respondent does not take issue with appellant's contention that the Milton incident was not admissible under Evidence Code §1101(b) to prove intent to rob. (R.B. 50) "[T]he Milton incident was...not relevant or usable to prove Thomas harbored an intent to rob..." (R.B. 51)

2.

Evidence of the Milton Incident was Not Relevant to Prove Intent Relevant to the Homicide Allegation in the McDonald Incident

Having abandoned the untenable position that the Milton incident was relevant to prove intent to rob, which had been urged at trial as the primary reason for admitting the Milton incident, respondent now argues that the Milton incident was really relevant to prove intent relevant to the homicide allegation in the McDonald incident. Respondent contends that "even if the evidence were not relevant to prove an intent to rob, it was still relevant to demonstrate his heightened state of aggravation and volatility in the time shortly before the McDonald murder." (R.B. 50)

There are two problems with that analysis. First and foremost, the factual underpinning of respondent's contention is belied by the testimony.

There simply was no testimony that suggested or in any way intimated that appellant was in a "heightened state of aggravation and volatility in the time shortly before the McDonald murder." (*Ibid.*) Secondly, even if there were such testimony, which there wasn't, the offer of proof tendered by the prosecutor made no sense; "aggravation" and "volatility" stemming from a fight and/or disappointment with the lack of loot are neither elements of the offense nor logically relevant to prove intent in a completely unrelated homicide.

a.

There was No Testimony that Appellant was Aggravated or Hyped Up After the Milton Incident

During the hearing on the matter at trial, the prosecutor told the court that the Milton incident was relevant to prove intent in the McDonald incident because appellant and Kazi "were still *hyped up and aggravated* about not getting money during the Milton beating." (R.T. 1329) Again, when the motion to exclude the Milton incident was renewed, the prosecutor again told the judge that the evidence would show that when appellant and Kazi went "back to the Nogal Street apartments they're still *upset and hyped up* by this thing and mad that they didn't get his money." (R.T. 1431)

On appeal, respondent similarly argues that the Milton incident was relevant to show that appellant was in "a heightened state of agitation" after the Milton incident. (R.B. 45) Respondent contends that appellant "was riled and aggravated as a result of the Milton incident. (22 RT 3877, 3879-3880.) This altercation was therefore directly relevant to show Thomas' state of mind when he was confronted a second time in the same evening with a confrontational intoxicated man." (R.T. 51)

The exact opposite of the truth has rarely been stated with greater precision. The essential problem with respondent's contention is that it is not true; it is belied by the record. The portions of the transcript cited by respondent that supposedly support its contention -- "22 RT 3877, 3879-3880" – contain no testimony that appellant was "agitated," "riled," "upset," and/or "hyped up." The cited testimony establishes the polar opposite.

When specifically asked by the prosecutor "what was Mr. Thomas's overall demeanor? How was he acting after this beating?" Nicole Halstead did not say he was "agitated." She did not say he was "riled." She did not say he was "upset." She did not say he was "hyped up." She *did testify* that appellant was "*just regular, calm*, but, you know, like in a hurry because, you know, I wanted to get out of there..." (R.T. 3878-3879) (emphasis added)

Although at the hearing on the motion to exclude the incident, the prosecutor represented to the trial court that Ms. Halstead had stated that appellant was "hyped up and aggravated" after the Milton incident, when Ms. Halstead testified at trial that appellant was "just regular, calm" after the incident, the prosecutor made no attempt to refresh her memory or to elicit from her the statements he had proffered to the court.

Despite the above, the trial court still permitted the later testimony of Mr. Collins and Mr. Milton about the incident at the liquor store. (R.T. 4276-4293)

b.

Evidence of Appellant's Mental State After the Milton Incident was Manifestly Irrelevant to the Homicide Allegations

Even assuming the prosecutor accurately represented to the trial judge that he would produce evidence that appellant was "agitated" or "hyped up"

after the Milton incident was accurate, such a proffer was manifestly irrelevant to establishing appellant's mental state during the confrontation with Mr. McDonald.

In order to prove first degree murder, the prosecution was required to prove premeditation and deliberation. Even assuming that appellant was upset and/or agitated after Milton incident, how would that "fact" have any tendency in reason to prove that appellant acted with premeditation? After all, as this Court recently noted, "[d]eliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance." (*People v. Harris, supra*, 43 Cal. 4th at 1286.) It can hardly be maintained that evidence, even if it existed, that established that appellant was still "hyped up" or "agitated" would have a "tendency in reason" to prove that appellant "carefully weighed" his course of action vis-a-vis Mr. McDonald and/or that he "thought over in advance" what his reaction would be if Mr. McDonald hit Kazi.

Similarly, as was well known to the prosecutor at the time of the in limine motion, Nicole's account of any lingering emotion appellant might have had following the Milton incident was related to his alleged failure to check Mr. Milton's left pocket for valuables. It defies logic to posit that whatever minor emotional turmoil appellant might have experienced would be relevant to establish that he formed either an intent to kill or exhibited reckless disregard for life during his confrontation with Mr. McDonald.

Moreover, in order to introduce evidence of other crimes to establish intent in the charged crime, "'the uncharged misconduct must be sufficiently similar to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.'[citation]." (*People v. Ewoldt* (1994) 7 Cal. 4th 380, 402.) What places this case outside the parameters set by *Ewoldt* for

using uncharged offenses to prove intent is that the prosecutor sought to introduce evidence of the Milton incident, not to prove appellant's state of mind *during* the incident, but to establish his state of mind *after* the uncharged event was over. As proffered, the Milton incident provided no proof of intent from that *incident itself*, as opposed to the aftermath, that would permit a reasonable jury to infer "that the defendant " 'probably harbor[ed] the same intent in [the McDonald incident." (*Ibid.*)

3.

Evidence of the Milton Incident was Not Relevant to Prove that the McDonald Incident was Part of a Continuing Course of Conduct that Started with the Milton Incident

In its brief, respondent earnestly contends that the Milton incident "was admissible to demonstrate Thomas's mental state prior to the McDonald murder, the murder serving as the culmination of a course of conduct that began with the Milton beating." (R.B. 50) Preliminarily, it should be noted that there is no "course of conduct" exception in Evidence Code §1101(b) to the general rule prohibiting use of evidence of other crimes to prove character. To the extent that the respondent is suggesting that the Milton incident and the McDonald incident are part of a "common scheme or plan," respondent is plainly barking up the wrong tree. In *People v. Ewoldt, supra,* this Court explained that evidence of other crimes may be admitted to show a common scheme or plan only if there is "a concurrence of common features that the various acts are *naturally to be explained as caused by a general plan* of which they are the individual manifestations." (*Id.* 7 Cal.4th at 402.) (emphasis added)

> "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be

> relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts." (*Id.* 7 Cal.4th at 403.)

In this case, appellant had no plan. Rather, as a matter of happenstance, he got involved in two fights that were provoked by third persons. It makes no more sense to say that the Milton incident and the McDonald incident were part of appellant's "course of conduct" or a "common scheme or plan" than it would to say that a motorist who, through no fault of his own, happened to be struck from behind twice in one day had a scheme to get involved in car accidents. When evidence of other crimes is introduced to establish a common scheme or plan, it is because similarities between the two incidents show that *the accused* had a plan to commit crimes.

It is significant that the similarities between the Milton and McDonald incidents to which respondent draws the Court's attention relate toappellant's reactions to provocation in both incidents. Evidence of other crimes which arise in the context of spontaneous reactions to provocations by third parties are not admissible under Evidence Code §1101(b) as part of a common scheme or plan. "[T]he common features must indicate the existence of a plan *rather than a series of similar spontaneous acts...*" (*Id.* 7 Cal.4th at 403; *People v. Soper, supra,* 45 Cal.4th at 776; *Alcala v. Superior Court* (2008) 43 Cal. 4th 1205, 1223 (emphasis added)

In the case at bar, it is a fair guess that not even respondent would contend that appellant planned the Milton and/or the McDonald incidents. Leaving aside the propriety of appellant's *reactions*, it is plain that in both incidents, he was not the initiating party. He had no plan. Appellant's reactions to these situations demonstrate not a plan or common scheme, admissible under Evidence Code §1101(b), but, at best, a propensity evidence,

inadmissible under Evidence Code §1101(a). Many a camel has been shoved through the eye of a needle to justify the admission of other crimes evidence. This one just won't fit.

C.

Appellant was Prejudiced by the Admission of the Milton Incident

See Section III, *infra*.

III.

The Cumulative Prejudice of the Trial Court's Refusal to Sever the McDonald and Grote cases and Erroneous Admission of the Milton Incident Denied Appellant a Fair Trial and Undermined the Reliability of the Penalty Determination in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Introduction

In appellant's opening brief, appellant separately discussed the prejudice that resulted from the denial of the severance motion and the prejudice caused by the admission of the Milton incident. After reviewing respondent's brief and reconsidering the matter, it appears that there is a commonality between these two issues, both in the way the rulings were obtained, and the manner in which the consequences of the rulings were played out before the jury by the prosecution that requires ensemble consideration as cumulative error.

The most disturbing thing that the severance and other crimes issues have in common is the misleading way they were portrayed to the trial court by the prosecution. When the severance motion was heard, the prosecutor emphasized the "critical" nature of Ms. Thomas' prospective testimony – that she would say that appellant had told her that this was the "second time [he] had done this" -- to the prosecution's case. Yet not only did Ms. Thomas fail to so testify as she recalled the events of those early morning hours, the prosecutor never even bothered to ask her any questions that might have elicited that "critical" response. After convincing the trial court to try the two cases together because of the importance of presenting Ms. Thomas'

recollection of appellant's statement "in context," when it came time for trial, the prosecutor acted as though the statement never existed.

Similarly, the prosecution sought admission of the Milton incident, primarily on the grounds that it was probative of an intent to rob, but also, as respondent emphasizes on appeal, on the grounds that Ms. Halstead would testify that appellant was "agitated" and "hyped up" after the Milton incident, positing that this meant that appellant was in a murderous frame of mind when the inebriated Mr. McDonald confronted Kazi at the barbecue. But, at trial, Ms. Halstead testified to just the opposite. She told the jury that appellant was "just regular, calm" after the Milton incident.

While witnesses going sideways at trial is not an uncommon event, what is unusual is that in this case, the prosecutor made absolutely no effort to remedy the situation. Although the ostensible rasion d'etre of bringing in the Milton incident was to show appellant's murderous state of mind, and although the prosecutor represented to the trial court that Ms. Halstead would testify that appellant was "agitated" and "hyped up," when Ms. Halstead testified that appellant was "just regular, calm," the prosecutor made no attempt to either refresh Ms. Halstead's memory with her prior statement or to introduce the prior statement as inconsistent under Evidence Code §1235.

Worse still, on appeal, even though the record of Ms. Halstead's testimony contains nary a reference to "hyped up" or "agitated" or any other words of similar import to describe appellant's state of mind, respondent continues to press the issue, describing Ms. Halstead's testimony at trial as establishing that appellant "was riled and aggravated as a result of the Milton incident" and going so far as to give page citations where that description

supposedly, but does not, appear,[10] apparently deliberately oblivious to the fact that the only description of appellant's mood contained within the parameters of the pages cited by respondent was that he was "just regular, calm." (R.T. 3879-3880)

It is equally disturbing, but, at the same time, quite revealing, that after arguing strenuously for its admission, after calling Mr. Milton and his buddy Kevin Collins to testify about the incident and after questioning Ms. Halstead extensively about the incident, the prosecutor "neglected" to mention one word about the Milton incident in either his opening or rebuttal arguments. Not one word. The painfully obvious explanation is that, stripped of the prosecution's misleading gloss, not even the prosecutor could find anything relevant about the Milton incident worth arguing to the jury. All that was left was evidence of a propensity for violence which the prosecutor could not overtly argue to the jury in the guilt phase.

The common theme behind both the prosecutorial insistence on [1] trying the McDonald and Grote cases together, but never introducing Ms. Thomas' statement which it had argued brought them together, and [2] introducing the Milton incident, but never eliciting testimony that appellant was in an "agitated" state of mind, is that both were issues were pressed by the prosecution, not because of their relevant probative value of the evidence in question, but solely as a vehicle to prejudice the jury, to shore up what was otherwise an inconclusive McDonald allegation against appellant with otherwise inadmissible propensity evidence.

Having beat back the severance motion, having successfully convinced the trial court of the dubious proposition that the Milton incident was relevant

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[10] "He was riled and aggravated as a result of the Milton incident. (22 RT 3877, 3879-3880.)" (R.B. 51.)

to the McDonald incident, the prosecution was content to simply present the testimony, shorn of any of the purported pertinence the prosecution had proffered to the trial court, but still brimming with prejudice to the fairness of appellant's trial. The arguments presented by the prosecution for joinder and for admission of the Milton incident were not tendered in good faith.

B.

Appellant was Prejudiced by the Trial Court's Denial of the Motion to Sever Counts Rendering His Trial Fundamentally Unfair, in Violation of the Right to Due Process of Law Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

Murder cases are a breed unto themselves. Not only is the charge itself among the most inflammatory but the stakes the highest for the accused. In a capital case, all the dangers inherent in joining two unrelated cases for trial are most acute when the joined cases are homicides. The presumption of innocence notwithstanding, when two murder charges are tried before the same jury, the multiplicity of charges in and of itself inevitably leads to an aggregation of evidence that portrays the accused as a "killer," effectively negating that presumption of innocence. In this case, the danger of aggregation was potentiated by the trial court's failure to instruct the jury that evidence relevant to the Grote homicide was not admissible to prove the McDonald allegation.

Respondent notes that no such instruction was requested and that the trial court has no *sua sponte* duty to so instruct. Be that as it may, the fact of the matter is that the jury was not so instructed and the failure to so instruct exacerbated the natural tendency of a jury to aggregate the evidence. The prejudicial impact of the failure to so instruct the jury is separate, apart, and

not dependent upon whether or not the failure to so instruct was, in and of itself, an error cognizable on appeal. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084.)

Not surprisingly, the legislature has long recognized that because of the inherently inflammatory nature of murder allegations, there is a unique danger when a jury trying one murder case is informed of allegations that the accused committed another murder. For example, unlike any other special circumstance, where a prior murder special circumstance alleged, Penal Code §190.1 provides that the jury is not informed of that allegation until *after* there is a verdict in the guilt phase. As this Court observed in *People v. Hinton* (2006) 37 Cal. 4th 839, "a defendant may not be forced to undergo a unitary trial of the separate issues of the defendant's guilt of first degree murder and the truth of a prior-murder-conviction special circumstance, since such evidence may have an inflammatory effect on jurors who are asked to determine a defendant's guilt or innocence on a current charge of murder." (*Id.* 37 Cal. 4th at 873; *People v. Farnam* (2002) 28 Cal. 4th 107,146.)

To be sure, informing a jury of an allegation of a prior murder conviction is arguably more prejudicial than a concurrently charged murder accusation because guilt already has been adjudicated, but the prejudicial impact of a second murder charge cannot be denied. The taking of a life is in a class by itself. Indeed, a juror would be as likely to infer a murderous propensity from the bare accusation of a second homicide as from a prior conviction. There is "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." (*United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322; *Bean v. Calderon, supra,* 163 F.3d at 1084.)

Any analysis of the prejudice caused by the denial of a severance motion is, by its nature, fact intensive. In this case, the pivotal fact is that joinder conferred not one iota of judicial efficiency to the resolution of the charges pending against appellant. What makes the denial of severance in this case particularly egregious is that joinder did nothing to achieve judicial efficiency, but virtually assured that appellant would be prejudiced and denied his constitutional right to a fair trial.

This Court has stressed that the analytical difference between a motion to exclude evidence of other crimes and a motion to sever the trial of two cases of the same class of crimes turns on the judicial efficiency that is gained where two cases are tried together rather than in separate trials. It is the state's interest in judicial efficiency which places the burden on the defendant to show prejudice from joinder and supplants the ordinary Evidence Code §352 analysis pertinent to a motion to admit evidence of other crimes. (*People v. Soper, supra*; *People v. Bean, supra.*) Therefore, by parity of reasoning, when joinder does not promote judicial efficiency, it should be adjudged by the same standards applicable to the admission of evidence of other crimes. Unless the facts of the case to be joined are admissible for a purpose sanctioned by Evidence Code §1101(b), where joinder does not promote judicial efficiency, the cases should be tried separately.

In this case, there was no evidence from the Grote homicide that was admissible on issues of intent, identity, common scheme or plan, or any other admissible purpose sanctioned by Evidence Code §1101(b). As previously discussed, Ms. Thomas' statement, even if true, did not fill the bill. Thus, the motion for severance should have been granted.

Even applying the traditional severance analysis, it is clear that the joinder of the Grote case tainted the resolution of the McDonald matter.

Respondent characterizes the jury's verdict of second degree murder in the McDonald case as "tend[ing] to show that the jury evaluated the evidence of each murder count independently." (R.B. 39) A more compelling analysis is that the McDonald case was so weak on intent to kill that the trying it with the Grote case had the adverse spillover effect of encouraging jurors to ascribe a greater degree of culpability to appellant's actions in the McDonald case than the facts warranted.

C.

The Admission of Evidence of the Milton Liquor Store Incident Denied Appellant a Fair Trial, an Impartial Jury, and a Reliable Penalty Determination in Violation of the Due Process Clause of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The Milton incident had nothing to do with the McDonald incident. The evidence suggesting that appellant formed any larcenous intent prior to joining the already on-going fight between Mr. Milton and the denizens of the sidewalk adjacent to the liquor store was non-existent. Similarly, robbery had nothing to do with the confrontation in the McDonald incident. The trial court so ruled three times: once at the preliminary hearing, once in granting the §995 motion, and once at the conclusion of the prosecution case, when the trial court informed the prosecutor that it would not instruct on robbery/murder.

Rather than striking the evidence and telling the jury to disregard it however, the trial court instructed the jurors that they could still consider it "for the limited purpose of determining if it tends to show the intent and/or mental state which is a necessary element of the crime of murder of Ricky McDonald as charged in Count 1 of the information." (R.T. 6384) The

problem is that this instruction, first given just before Ms. Halstead testified and later, at the close of evidence, was based in part upon the prosecutor's proffer that Ms. Halstead would say that appellant was "hyped-up" and "agitated" after they left the scene. When she testified to the contrary, when she told the jury that appellant was "just regular, calm," whatever minimal patina of relevance that the Milton incident had to the McDonald case vanished. All that remained was the prejudice of introducing an irrelevant and unrelated act of violence that served no admissible purpose, that was nevertheless powerful, but inadmissible, evidence of appellant's propensity for violence.

Rather remarkably, respondent suggests that instead of prejudicing appellant, admission of the Milton incident "likely inured to Thomas's benefit" because appellant's "sensitivity to provocation had already been engaged and inflamed." (R.B. 52) The argument is utter nonsense. It is beyond comprehension that any juror would have factored such wounded sensibilities into their evaluation of appellant's mental state during the McDonald incident. What is far more likely is that jurors perceived the Milton incident as evidence of appellant's violent propensities and thus rejected the possibility that appellant's culpability was no more than voluntary manslaughter.

Respondent argues that any error was harmless because of the "merciless beating Thomas unleashed upon McDonald even after he fell unconscious into the bushes" and "evidence suggesting that Thomas finished McDonald off by stepping on his throat when McDonald started to awaken." (R.B. 52) Not so. What respondent treats as established fact was, in reality, primarily Ms. Halstead's version. Garnered with promises of a lesser sentence and immunity, Ms. Halstead's testimony was of questionable veracity. On the other hand, Cesar Harris, who saw the whole incident, saw appellant kick Mr.

McDonald three to six times after he fell with what he described as "short, little kicks." (R.T 4317) "He didn't really put much effort in." (R.T. 4242, 4399) As soon as Cesar saw appellant kicking Mr. McDonald, he went over put his hand on appellant's chest and told him that he had enough; appellant stopped. (R.T. 4245)

Although the jury was instructed to consider the Milton incident as it bore on appellant's intent in the McDonald incident, there was nothing about the Milton incident that was in any way probative of his intent with regard to Mr. McDonald. The originally proffered link between the two – intent to rob – was scuttled by the trial court on multiple occasions. The also proffered connection – that appellant was "hyped-up" and "agitated" by the Milton incident -- proved to be a non-event when Ms. Halstead described appellant as being "calm" and "regular" during that time period. All that was left was a violent incident which, in the absence of any viable connection to the charged case, could only have been considered by the jury as evidence of appellant's violent propensities.

True, the jury was instructed not to consider the Milton incident as character evidence. True, the law presumes that jurors follow instructions. But a presumption is no more than a presumed fact, not an irrefutable conclusion. As the presiding justice of the Mississippi Supreme Court sagely noted, "[a]s a matter of institutional necessity, we indulge in the presumption that jurors follow the instructions of the court. We should not carry this indulgence so far as to destroy our credibility in the court of common sense." (*McFee v. State* (Miss. 1987) 511 So. 2d 130, 140.)

In the case at bar, presumption or not, it is simply unreasonable to believe that the jurors considered the Milton evidence as anything but propensity evidence given the lack of any other apparent connection between

the two incidents and given the prosecutor's failure to argue the existence of any other evidentiary connection between the two.

D.

The Cumulative Impact of the Erroneous Denial of the Motion for Severance and the Erroneous Admission of the Milton Incident Require Reversal of Appellant's Convictions

The Milton incident should not have been admitted into evidence because it was probative of nothing but appellant's character for violence. The Grote and McDonald cases should not have been tried together because there was no cross-admissible evidence and, in view of the trial court's earlier decision to empanel two juries, joinder conferred no savings in judicial resources. Stripped of the advantage of having one trial instead of two, bereft of any cross-admissible evidence, and lacking any ticket of admissibility under an exception set forth in Evidence Code §1101(b), the Grote incident was nothing more than inadmissible evidence of another crime vis a vis the McDonald incident and vice versa.

There were no permissible inferences that the jury could infer from the Grote incident to the McDonald incident or from the McDonald incident to the Grote incident. There were no permissible inferences that could be drawn from the Milton incident to either the McDonald incident or the Grote incident.

By permitting the jury to hear evidence concerning all three in a joint trial, the trial court unconstitutionally permitted the jury to consider evidence of other crimes from which "no permissible inferences" could be drawn. (*Leavitt v. Arave* (9th Cir. 2004) 383 F.3d 809, 829; *Jammal v. Van de Kamp*

(9th Cir. 1991) 926 F.2d 918, 919.) The trial was thus rendered fundamentally unfair, in violation of due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (*Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1103; *Kealohapauole v. Shimoda* (9th Cir. 1986). 800 F.2d 1463, 1465.)

IV.

The Trial Court's Failure to Ask Juror Garganera if She Could Follow the Court's Penalty Instructions Despite Her Opposition to the Death Penalty Violated Appellant's Right to an Impartial Penalty Determination in Violation of the Right To Due Process, a Fair Trial, an Impartial Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Ask a dozen people on the street what they think about the death penalty versus life without parole as a punishment for a person convicted of murder and it is altogether likely that a dozen different answers will be forthcoming, ranging from enthusiastic endorsement of the death penalty as the only way to really punish a person who took another's life to abhorrence at the idea of the government getting into the business of taking lives itself. Under our constitution, a defendant in a capital case is entitled to a jury representative of a cross-section of the community not just in the guilt phase but in the penalty phase as well. (*Uttecht v. Brown* (2007) 551 U.S. 1, 15; *Wainwright v. Witt* (1985) 469 U.S. 412, 426.)

The key issue in selecting a jury in a death penalty case is not what views the juror may hold about the morality or efficacy of the death penalty as a court-imposed punishment, but whether the juror can set aside whatever view he or she might have and follow the court's instructions regarding penalty determination. "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 179; *People v. Wilson* (2008) 44 Cal. 4th 758, 785.) "[T]he mere fact a prospective juror, in a written questionnaire, checked a box or otherwise expressed a

personal opposition to the death penalty does not permit the court to automatically disqualify him or her from the jury." (*Ibid.*)

When called upon to decide the appropriate punishment in a capital case, "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519; *Adams v. Texas* (1980) 448 U.S. 38, 43; *Morales v. Mitchell* (6th Cir. 2007) 507 F.3d 916, 940.) "The Supreme Court has never retreated from [that] essential position [of] Witherspoon..." (*Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1547.)

This case presents a classic example of the wrongful exclusion of a juror, Ms. Gargenera, for cause based on her reservations about the death penalty rather than an expressed unwillingness to follow the law. Moreover, her antipathy to capital punishment was not categorical. As Ms. Garganera explained, there should be a death penalty provision in the law because, "[d]eep down in my heart, I know that *there's got to be more than just life imprisonment* if somebody has really done something bad." (R.T. 8554)

In fact, the only time Ms. Gargenera was asked if she would follow the judge's instructions even though she disagreed with the law, she said she would. (C.T. 11516)

- The trial court *never* asked Ms. Gargenera if her views concerning the death penalty would prevent her from following the court's instructions concerning penalty determination.
- The trial court *never* found that Ms. Gargenera's views on the death penalty would substantially impair her ability to fulfill her duties as a juror in a capital case.

Thus the state of the record is that Ms. Gargenera expressed willingness to follow the court's instructions despite any personal reservations to the contrary and her willingness to follow those instructions stands uncontradicted in the record. The trial court explicitly excluded Ms. Gargenera for cause, not because she could not follow the law in view of her beliefs about the death penalty, but based solely on her views about the death penalty. In the trial court's words, she "exhibit[ed] a very strong implied, if not actual, bias against the death penalty..." (R.T. 8650)

The trial court erred in so ruling.[11] "[N]either Witherspoon nor Witt requires that a prospective juror automatically be excused if he or she expresses a personal opposition to the death penalty." (*People v. Avila, supra*, 38 Cal. 4th at, 521; *Lockhart v. McCree, supra*, 476 U.S. at 176.)

Respondent contends that appellant forfeited this claim because he never asked the trial court to ask that Ms. Gargenera if she could follow the law despite her personal beliefs. (R.B. 64) Respondent has it upside down and backwards. The state of the record at the close of the voir dire of Ms. Gargenera is that she had unequivocally assured the court that she would follow the court's instructions even if they were contrary to her personal beliefs. (C.T. 11516) There was no reason for trial counsel to have her repeat her response on that issue.

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[11] Respondent, quoting dicta in a footnote to *People v. Carrera* (1989) 49 Cal.3d 291, 331, fn. 29, contends that appellant waived any objection on constitutional grounds because he did not specifically refer to *Witt* when he objected to the prosecutor's motion to exclude the juror. Not so. Given that it was the prosecutor, the moving party, who made the *Witt* motion to exclude without mentioning it by name, since all parties recognized the constitutional basis for the motion, it would be the ultimate elevation of form over substance to require the responding defense attorney to cite *Witt* by name in order to preserve the constitutional basis of the issue for appeal.

On the other hand, given that it was the prosecution who sought to disqualify Ms. Gargenera, *the burden was on the prosecution* to ask the trial court to ask any questions that would support her disqualification. (*Wainwright v. Witt, supra*, 469 U.S. at 423; *Morgan v. Illinois* (1992) 504 U.S. 719, 733.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Ibid.*)

Because it was the prosecutor who was seeking Ms. Gargenera's exclusion, it was the prosecutor who had the burden of requesting the trial court to ask the essential and dispositive question, to wit: can you set aside your views on the death penalty and follow the law as I give it to you? In view of Ms. Gargenera's expressed willingness to put aside her personal views and follow the instructions, undisputed evidence established that Ms. Gargenera was qualified to sit as a juror and her exclusion was improper under *Witherspoon, supra,* and *Witt, supra.* Her exclusion requires reversal of the sentence of death.

V.

By Instructing the Jury that, as a Matter of Law, the Jurors "Must Consider and Accept that Death is a Greater Penalty than Life Imprisonment Without Possibility of Parole," the Trial Court Violated Appellant's Right to Due Process of Law, Trial by Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Introduction

In his opening brief, appellant contended that the trial court erred by instructing the jurors that, regardless of their own opinions and beliefs on the subject, "*[f]or all purposes*, you must consider and accept that death is a greater penalty than life imprisonment without possibility of parole." (R.T. 9715, 11686) (emphasis added) Appellant noted that in making the choice between death and life without parole, jurors who wanted to impose the most severe punishment available, who thought that life without parole was the worst possible punishment, who thought that death was too good for the defendant, and who wanted to sentence the defendant to life without parole as the more severe punishment were nevertheless instructed that they could not do so, that they were required as a matter of law to treat the death penalty as the greater punishment.

Appellant acknowledges, as respondent has pointed out, that in *People v. Harris* (2005) 37 Cal.4th 310, this Court apparently approved a similar jury instruction informing the jury that "[y]ou can't inject your own belief as to what you think is tougher or not," the death penalty or life without parole. (*Id.* 37 Cal.4th at 361.) With all due respect, it is appellant's contention that *Harris* was wrongly decided, that the aforementioned holding is in fatal

conflict with the Eighth Amendment's fundamental teaching that the "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." (*McCleskey v. Kemp* (1986) 481 U.S. 279, 306; *Romano v. Oklahoma* (1994) 512 U.S. 1, 6; *Payne v. Tennessee* (1991) 501 U.S. 808, 824.)

The problem with the *Harris* decision is that it conflates "severe" or "greater" as a measure of the harshness of a statutory penalty with the metaphysical question of which is the "greater" penalty, death or being locked up in a cell in California's overcrowded, understaffed, and medically deficient prison system for the rest of one's life, with no hope of parole. There is no question that, as a matter of law, the penalty of death is different from a sentence measured in years. The jury was told pursuant to CALJIC No. 8.84.2 that unlike LWOP, a death sentence could not be imposed unless "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In the strictly legal sense, the penalty of death is greater than LWOP.

However, it is an unwarranted leap of logic to assume that the statutory and instructional matrix set forth above answers the metaphysical question that some jurors may well confront in their penalty determination: which is worse, death or life without parole? Viewed from that perspective, independent of one's personal feelings about the matter, there really is no answer. Simply put, the trial court had no business telling the jury to set aside their individual views on the matter and invaded the province of the jury by so doing. If a juror holds the belief that death is too good for the defendant and that the interminable confinement that comes with a sentence of LWOP is a worse and/or more appropriate punishment, by what authority would a trial court be permitted to tell that juror that he or she is precluded from acting on

that belief and voting for LWOP based on that belief? As this Court long ago held, a juror "must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540; *People v. Marshall* (1996) 13 Cal. 4th 799, 858.)

B.

By Erroneously Instructing the Jurors that they were Required to Consider Death as the "Greater" Penalty, the Trial Court Unconstitutionally Prevented Jurors in Appellant's Case from Choosing LWOP as an Appropriate Sentence Based Upon a Juror's Belief that LWOP was a Greater Punishment than Death, in Violation of Appellant's Right to Trial by Jury, Due Process of Law, and the Right to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, §§7, 15, 16, and 17

At the outset, it is important to note what issue is not raised by appellant's contention. By challenging the propriety of the trial court's instruction requiring the jury to consider death as a "greater" penalty than life without parole, appellant is in no way contesting the proposition that imposition of the death penalty requires proof of a greater quantum of circumstances in aggravation than does life without parole. In that sense, appellant has no quarrel with the notion that death is the "greater" penalty.

Rather, it is appellant's contention that in view of the fact that this jury was so instructed, in view of the fact that this jury was told that "[t]he death penalty can be an alternative for your consideration only in one circumstance, and that is where evidence in aggravation substantially outweighs evidence in mitigation" (R.T. 11694-11695), the further instruction that the jurors were

required to "consider and accept that death is a greater penalty" was not only unnecessary, it usurped the jurors' constitutional and statutorily unbridled discretion to consider any circumstance, including their assessment of the severity of the two penalty choices, in determining if the punishment of death was appropriate under the circumstances. (*McCleskey v. Kemp, supra*: 481 U.S. at 306; *Romano v. Oklahoma, supra*, 512 U.S. at 6; *Payne v. Tennessee, supra,* 501 U.S. at 824; *People v. Brown, supra*, 40 Cal. 3d at 541.)

Thus, while this Court's decision in *Harris, supra,* approved an instruction similar to the instruction at issue here, the rationale of *Harris'* approval of the instruction – that the quantum of proof required by Pen. Code §190.2 to impose the death penalty is greater than what is required for life without parole – begs the fundamental issue raised by the instruction, namely whether a juror can be forbidden to adhere to that juror's personal belief that LWOP is a worse punishment and therefore a reason to decline to impose the death penalty.

Simply because the state considers death to be the more severe punishment, it does not follow as a matter of logic or law that it is constitutionally permissible to instruct jurors that they must abandon their personal belief to the contrary in determining whether to impose the death penalty.

Instructing jurors that they may not act on their view that LWOP is a worse punishment than death as a reason for not imposing the death penalty contravenes the well-settled core principle of Eighth Amendment death penalty jurisprudence that a juror's penalty decision must be an "individualized determination" of what is an appropriate punishment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275-76) "[E]ach sentencer must be able to answer "no"

[to the death penalty] for whatever reason it deems morally sufficient..." (*Walton v. Arizona* (1990) 497 U.S. 639, 666 (Scalia, concurring); *People v. Brown, supra,* 40 Cal. 3d at 540; *People v. Marshall, supra,* 13 Cal. 4th at 858.)

As appellant pointed out in his opening brief, this is not simply an abstract issue. Some people do, in fact, think that LWOP is a worse punishment than death. In this case, one potential juror, Ms. Laura Garganera, opined that "a life imprisonment sentence is a way to make a person that's guilty suffer longer..." (R.T. 8558.) Further, appellant presented examples drawn from published decisions as well as news events chronicled on the internet of others who shared that view. These examples were not offered as quantitative proof of the extent to which this opinion is shared by others, but simply as illustrative of the assertion that the view that LWOP is a greater punishment is not simply an abstract possibility. (See *People v. Heard* (2003) 31 Cal. 4th 946, 964, ["The record further indicates that this answer to the questionnaire—that life imprisonment without the possibility of parole was considered to be a worse punishment for a defendant than death—was not an uncommon response from the jury venire as a whole, and, indeed, from a substantial number of jurors who actually sat on the case."].)

Remarkably, respondent asserts that any error in giving the instruction at issue was waived because "defendant's failure to interpose an objection to a jury instruction forfeits appellate review of the claim." (R.B. 68) Respondent is wrong. Respondent is apparently not familiar with, or has chosen to ignore, Penal Code §1259 which states that "[t]he appellate court may also review any instruction given, refused or modified, *even though no objection was made thereto in the lower court,* if the substantial rights of the defendant were affected thereby." (emphasis added) It almost goes without saying that

instruction as to penalty in a capital case affects "the substantial rights of the defendant."

Respondent asserts that the instruction was proper because the instruction removed the "danger of arbitrary or capricious imposition" of the death penalty. (R.B. 70) Not so. Respondent inadvertently undermines its own contention by pointing out that, independently of the instruction at issue, in all penalty cases, the jurors are told that they may not impose the death penalty unless they are convinced that the "aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death..." (R.B. 70.)

Exactly. The instruction here at issue did not further explain what jurors were required to find in order to impose the death penalty. A juror who wanted the defendant to receive the worse possible punishment and believed that LWOP was a worse punishment than death would still be enjoined from imposing the death penalty unless he or she found that "aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death..." The mischief created by the trial court's instruction is that a juror who made that finding, but nevertheless felt that LWOP was a worse punishment and the defendant deserved the worst, might well be enjoined from nevertheless voting for LWOP, as they were entitled to, by the trial court's admonition that he or she must banish that personal belief from their penalty determination. "A sentencer may not be precluded from considering relevant factors in mitigation of the death penalty." (*Jeffries v. Blodgett* (9th Cir. 1993) 988 F.2d 923, 938.)

Citing *People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal. App. 4th 31, respondent argues that because appellant's trial attorney never argued to the jury that LWOP was a worse punishment than death, "he cannot assert a

contradictory theory on appeal." (R.B. 71) The argument is meritless on its merits. Appellant's contention does not purport to raise a new theory on appeal, as was the case in *Colonia Chiques, supra,* where the failure to set forth the theory in the trial court precluded development of the relevant facts and barred review on appeal.

Appellant is not contending on appeal that, as a matter of law, LWOP is worse than death, but rather that jurors who held that view should not have been told that they had to abandon that belief in determining the appropriate penalty.

Finally, in his opening brief, appellant contended that under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and their progeny, by instructing the jury that death is a worse punishment than life without parole, the trial court invaded the jury's fact-finding province and violated appellant's right to a jury determination of penalty unfettered by preclusive factual findings made by the trial court. "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it [did not] encompass[] the factfinding necessary to put [a defendant] to death." (*Id.* 536 U.S. at 609.)

Respondent asserts that this Court "squarely rejected" appellant's argument in *People v. Salcido* (2008) 44 Cal.4th 93. Not so, again. In *Salcido, supra,* this court held only that *Apprendi* and its progeny did not require penalty findings beyond a reasonable doubt. The *Salcido* court did not discuss whether the constitutional requirement of jury findings in a penalty determination would be violated by a trial court's direction to the jury that death was a worse punishment than LWOP. On the contrary, as Justice Scalia noted in *Apprendi, supra,* "it has been assumed... throughout our

history [that the defendant has] the right to have a jury determine those facts that determine the maximum sentence the law allows." (*Id.* 530 U.S. at 499.)

C.

Conclusion

The essential vice of the trial court's instruction is that it told jurors nothing that they needed to know in order to follow the statutory and constitutional strictures of determining penalty in a capital case, but, at the same time, unconstitutionally restricted their discretion to decline to vote for death by commanding them to abandon a vital aspect of their personal view of the appropriateness of death as a punishment. (*McCleskey v. Kemp, supra*: 481 U.S. at 306; *Romano v. Oklahoma, supra*, 512 U.S. at 6; *Payne v. Tennessee, supra,* 501 U.S. at 824; *People v. Brown, supra*, 40 Cal. 3d at 541.)

VI.

The Erroneous Admission of Evidence of the Firing of a Gun Nearby Jesse Russell's House and the Erroneous Instruction that Permitted the Jury to Consider the Incident as Aggravating Evidence Undermined the Reliability of the Penalty Determination in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

The Stipulated Testimony Regarding the Russell Incident was Inadmissible Under Penal Code §190.3(b) as Evidence of Criminal Activity by the Defendant Which Involved the Use of, Attempted Use of, or Threat to Use Force or Violence or the Express or Implied Threat to Use Force or Violence

In his opening brief, appellant contended that the testimony regarding the incident at Jesse Russell's house should not have been admitted at the penalty phase because the stipulation that set forth the relevant evidence did not establish that appellant was involved in criminal activity involving force, violence, or threat thereof. The evidence was spare indeed. Mr. Atkins testified that he heard a voice he allegedly recognized as appellant's outside his back window say that he was going to get Jesse [Russell] and that he saw two people *run away* from his house. He saw nothing more, but heard a gun cocked and two shots fired. *Casings* from a gun were found *120-150 feet from the* front of the apartment house that Mr. Adkins lived in; Mr. Adkins lived in the back of the apartment house. (R.T. 10727)

There was neither physical evidence nor testimony that gave any hint of, much less established, the location from where the shots were fired or what, if any relationship, the trajectory of the bullets fired had to the location

of Mr. Adkins apartment. Given that it was the casings, not the slugs, that were found, presumably ejected when the gun was fired, the only thing that can be said about the manner in which the gun was fired is that when the shooter fired the gun, the shooter was half a football field away from the *front* of the apartment house where Mr. Adkins lived; Mr. Adkins resided in the back part of the house. Even assuming that the shots were fired by one of the two men Mr. Adkins claimed he saw, there was no evidence which one was the shooter.

Conduct is admissible in a penalty phase under Penal Code §190.3(b), only if it constitutes a crime and is directed at a person, not merely property. (*People v. Clair* (1992) 2 Cal.4th 629, 672.) In his opening brief, appellant pointed out that there was no evidence that the crime of a violation of Penal Code §246 was committed because there was no evidence that the shots were fired into a residence. In his brief, respondent does not argue otherwise.

Additionally, appellant contended that evidence adduced did not establish that the crime of a violation of Penal Code §243.6, negligent discharge of a weapon, had been committed. Penal Code §246.3 was enacted by the legislature "to deter the discharge of firearms [into the air] on holidays such as New Year's and the Fourth of July" by celebrants apparently undmindful of another law – Newton's – that what goes up must come down. (*People v. Alonzo* (1991) 13 Cal. App. 4th 535, 539.) While firing a gun in the air at a party where people are standing nearby is obviously negligent, it is equally plain that not every discharge of a firearm is negligent and not every negligent discharge of a firearm runs afoul of §243.6. Penal Code §246.3 requires proof that not only that the firearm was discharged "in a grossly negligent manner" but also that it was discharged in a manner "*which could result in injury or death to a person...*" (emphasis added)

Although respondent asserts that appellant "fails to appreciate that the full panoply of evidence presented to the jury supported that he violated section 246.3" (R.B. 76-77), respondent neglects to show where in this "panoply of evidence" is the evidence that this particular discharge of a firearm was done "in a grossly negligent manner *which could result in injury or death to a person.*" This is, of course, not surprising since there is zero evidence of what direction the bullets were fired in; the only evidence relating to the manner of discharge is that it occurred 50 yards away.

In a fine display of appellate sleight of hand, respondent slips every so smoothly from "proving" that appellant fired the gun to how the evidence showed an "express or implied threat to use force or violence" skipping over the bothersome requirement that evidence admitted under §190.3(b) must also constitute a violation of a penal statute. While in many instances, proof of a threat followed by a discharge of a weapon will contain both the elements of a crime and the elements of admissibility under §190.3(b), this isn't one of them. In this case there was simply evidence that a gun was fired. There no evidence that a firearm was discharged in a manner "which could [have] result[ed] in injury or death to a person."

Apparently recognizing the paucity of evidence, respondent contends that it can be inferred that the firing of the gun in this case could have resulted in injury or death because it was fired in a residential neighborhood. (R.B. 78) Not every discharge of a firearm in a residential neighborhood constitutes a violation of §246.3. For example, shooting at a target in an empty lot in a residential neighborhood would not violate the statute. Moreover, residential neighborhoods run the gamut from densely populated urban centers to sparsely peopled rural enclaves, with many stops in between.

There is nothing in the record to indicate what kind of neighborhood Mr. Adkins lived in or whether anyone was out on the street in front his house or in the vicinity other than the shooter; there are no facts from which it could be inferred that lives were endangered. Given that the shots were fired late at night, in an unknown direction, in a neighborhood of unknown description, by an unknown person, respondent's proposed inference is not only unreasonable, it is mere speculation. Speculation is not evidence.

Even in this limited arena, respondent fudges the evidence, implying that §190.3(b) requirement of proof of an "express or implied threat to use force" was satisfied when Mr. Adkins "dropped to the floor" as "the result of Thomas's actions." (R.B. 77) Not so. The only "threat" in the evidentiary stipulation was directed at Jesse Russell who was not present at the residence at the time the threat was made; no threat was made or implied to Mr. Adkins. From the evidentiary stipulation, there is no way of telling when Mr. Adkins dropped to the floor.

Simply put, evidence of this incident did not establish that a violation of Penal Code §243 took place, In the absence of such proof, this incident was inadmissible under Penal Code §190.3(b).

B.

The Trial Court Erred by Instructing the Jury that The Shooting Near Jesse Russell's House Could Constitute the Offense of Grossly Negligent Discharge of a Firearm

The trial court instructed the jury that "[t]he shooting in the area of Jesse Russell's residence on September 17th, 1995, you are limited to a consideration of the possible or potential offense of grossly negligent discharge of a firearm. Every person who willfully discharges a firearm in a grossly

negligent manner which could result in injury or death to a person is guilty of a crime." (R.T. 11664)

In his opening brief, appellant contended that the trial court erred in giving that instruction because, in order to warrant instructing a jury on an unadjudicated offense offered under Penal Code §190.3, there must be evidence sufficient to permit the jurors to find beyond a reasonable doubt that the alleged criminal activity took place. (*People v. Robertson* (1982) 33 Cal.3d 21, 53–55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.) In the case at bar, there was no such evidence, for all the reasons set forth above.

VII.

The Prosecutor's Prejudicial Argument to the Jury that Appellant Should Receive the Death Penalty Because He was Likely to be a Danger to Prison Personnel Violated Appellant's Right to Due Process of Law, a Fair Trial, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Introduction

The subject of "future dangerousness" occupies a unique position in the jurisprudence of capital penalty determination. As part of the standard instructions given to the jury at the penalty phase, the jurors in appellant's case were told in no uncertain terms that the only factors they could consider in aggravation were the statutory factors drawn from Penal Code §190.3. "The permissible aggravating factors are limited to those aggravating factors set forth in this instruction." (R.T. 11688) In appellant's trial, as in every capital case, the trial court admonished the jurors that they were not to consider past criminal conduct admitted under §190.3(b) and (c) as a factor in aggravation unless such conduct was proven beyond a reasonable doubt. (R.T. 11691) To emphasize the point, the jurors were reminded of the definition of reasonable doubt.

So far, so good. Unstated, but looming in the background, however, was the ever-present issue of future dangerousness. As every attorney and/or judge who has tried a capital case knows, and as this Court has undoubtedly gleaned from the hundreds of capital cases that have come before it, once the jury retires to deliberate, separate and apart from all the evidence that the jury heard regarding aggravation and mitigation, two issues are frequently

brought up for discussion in the jury room: [1] if the defendant gets LWOP, will he ever get out and [2] if we give him LWOP, will he be a danger to inmates and staff. While this Court cannot control what jurors discuss in the privacy of the jury room, this Court most certainly can limit what the prosecutor may argue.

Because "future dangerousness" is not a statutory factor in aggravation, the basis for any jury discussion of that issue comes not from evidence introduced in open court pursuant to the rules of evidence -- it comes from pure, unadulterated speculation. Because "future dangerousness" is not a statutory factor in aggravation, the jury was never instructed that the prosecution had any burden of proving the truth of that allegation that the defendant would be dangerous in the future as a prerequisite for consideration in the penalty determination process. Because "future dangerousness" is not a statutory factor in aggravation, appellant's jury was never instructed what part, if any, it should play in their deliberations. And yet there it was, like an errant thumb on the scales of justice: unproved and unprovable, but at the same time one of the single most critical elements in a jury's penalty determination.

B.

Permitting the Prosecutor to Argue Future Dangerousness in the Absence of Evidence of Future Dangerousness, Violated Appellant's Right to Due Process of Law and to a Reliable Penalty Determination Guaranteed by the Fifth, Eighth, and Fourteenth Amendments

As appellant noted in his opening brief, and as respondent reiterated in its brief, this Court has previously considered this issue on more than one occasion, ruling that while expert evidence may not be presented to "prove"

future dangerousness (*People v. Murtishaw* (1981) 29 Cal.3d 733), a prosecutor is free to argue what he cannot prove. (*People v. Harris, supra,* 37 Cal. 4th at 357; *People v. Champion* (1995) 9 Cal.4th 879, 940; *People v. Davenport, supra,* 41 Cal. 3d at 288.)

With all due respect to the doctrine of stare decisis, it "is a 'principle of policy' rather than 'an inexorable command.'" (*Hohn v. United States* (1998) 524 U.S. 236, 251; *Pearson v. Callahan* (2009) 129 S. Ct. 808, 816.) "[S]tare decisis is...not a mechanical formula of adherence..." (*Helvering v. Hallock* (1940) 309 U. S. 106, 119; *Peterson v. Superior Court* (1995) 10 Cal. 4th 1185, 1195.) As this Court has noted on more than one occasion, when upon re-examination, the basis for a prior decision has proven to be unsound, this Court will "undertake a reexamination of that decision." (*People v. Anderson, supra,* 43 Cal. 3d at 1138.) Such a reexamination of the tension between *Murtishaw* and *Davenport* on the issue of future dangerousness is long overdue.

As the law now stands, "future dangerousness" is a rogue factor in aggravation. Though it appears nowhere in Penal Code §190.3's list, it cannot be seriously doubted that future dangerousness looms large in the calculus of punishment made by each and every capital jury in which the prosecutor tenders the argument. In his opening brief, appellant contended that *Davenport's* reliance upon the United States Supreme Court's decision in *Jurek v. Texas* (1976) 428 U.S. 262 for the proposition that "future dangerousness" could be argued even if it could not be proved was misplaced because in *Jurek*, the high court simply approved "future dangerousness" as a statutory factor that the prosecution was required to prove by evidence presented to a penalty jury and subject to a burden of proof. The high court

has never approved such an argument untethered to a statutory aggravating factor.

By this contention, appellant is not suggesting that this court retreat from its well-considered decision in *Murtishaw.* Expert predictors of a defendant's future dangerousness have become no more reliable in their prognostications in the interim than palm readers in predicting the future. If, as *Murtishaw* held, predictions of future dangerousness by persons tendered as experts, who presumably have some qualifications to make such predictions, are too unreliable to permit a jury to hear that testimony in view of the constitutional "command for reliability in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina, supra,* 428 U.S. at 305*; People v. Murtishaw, supra,* 29 Cal.3d at 771), then surely the impassioned pleas of future danger by a prosecutor are even more inconsistent with the constitutional requirement of a reliable penalty determination.

As this Court observed in *Murtishaw,* "forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty." (*Id.* 29 Cal.3d at 767.) Such forecasts have become no more relevant in the intervening twenty-eight years since *Murtishaw* was decided. Appellant can think of no other instance in either civil or criminal litigation where one party is allowed to argue to the jury that they should make their decision based on evidence that is too unreliable to be heard in open court. It would make about as much sense to permit a party to argue to a jury that a witness shouldn't be believed because his testimony was so incredible that he wouldn't pass an inadmissible polygraph test.

Respondent contends that even if it were error to permit the prosecutor to make a future dangerousness argument, because evidence of appellant's prior criminal activity was admitted, "the prosecutor's brief argument about Thomas's future dangerousness could not reasonably be viewed as having infected the trial with fundamental unfairness." (R.B. 84.) The contention is a non sequitur. Nothing in the California statutory capital punishment scheme authorizes or suggests that the purpose of admitting appellant's prior criminal history is to establish future dangerousness. Aggravating factors, when weighed against those in mitigation, are used to "channel the sentencer's discretion" in determining whether death is the appropriate punishment." (*Stringer v. Black* (1992) 503 U.S. 222, 235.) Allowing the prosecutor to argue that the death penalty should be imposed because of future dangerousness "'creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.' [citation]." (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 473.)

It is emblematic of the power of the future dangerousness argument that the prosecutor saved it for the final minutes of his presentation, where he presented it as though it were one of Aesop's fables. It was brief, but the impact of an argument is not measured by its length. After all, the Gettysburg Address was penned on the back of an envelope. The prosecutor's argument was powerful and it was reserved for the end for maximum impact.

By permitting the prosecutor to argue that the death penalty should be imposed because of appellant's perceived future dangerousness, the trial court's ruling fatally undermined the reliability of the penalty determination in this case, in violation of the Due Process Clause, appellant's right to a fair trial, and appellant's right to a reliable penalty determination guaranteed by

the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellant's sentence of death must be reversed.

Dated: May 28, 2009

BARRY L. MORRIS
Attorney for Appellant
CORRELL THOMAS

Certificate of Word Count

I, BARRY L. MORRIS, attorney for appellant CORRELL THOMAS, hereby certify that the attached Appellant's Reply Brief contains 16,678 words.

Dated: June 4, 2009

BARRY L. MORRIS
Attorney for Appellant
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Proof of Service by Mail

Appellant's Reply Brief

I, Barry L. Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1220 Oakland Blvd., #200, Walnut Creek, California, 94596; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Walnut Creek by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

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

BARRY L. MORRIS