IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. TIMOTHY J. McGHEE, Defendant and Appellant.	California Supreme Court No. S169750 Superior Court No. BA244114

APPEAL FROM THE LOS ANGELES COUNTY SUPERIOR COURT

The Honorable Robert J. Perry, Judge

APPELLANT'S OPENING BRIEF

PATRICK MORGAN FORD
Attorney at Law
1901 First Avenue, Suite 400
San Diego, CA 92101
619 236-0679
State Bar No. 114398

Attorney for Appellant
TIMOTHY McGHEE

Under appointment of the
California Supreme Court

DEATH PENALTY

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Introduction

Appellant was charged with several counts of murder and attempted murder, but the state's case relied almost exclusively on the testimony of unreliable witnesses.

During guilt phase deliberations, the trial court discharged a juror who acknowledged that he didn't believe the state's witnesses.

The witnesses were mostly gang members who were high at the time of the killings, and all had received substantial benefits from the state, saving many of them from life prison terms. But the primary problem was the affirmative coaching by detectives who provided the witnesses with facts related to the killings, told them that appellant was responsible, and then conducted formal interviews.

Two of the jurors wrote a note during deliberations informing the court that the holdout juror was biased against the prosecution. During an inquiry into the claim, many jurors indicated the holdout was deliberating properly but simply didn't believe the state's witnesses who had been coached by the police. The trial court ultimately discharged the juror.

Appellant argues that the justice system broke down in two significant ways in the present case.

First, the discharge of a dissenting juror who accepted the defense theory of the case that the state's witnesses should not be believed does great damage to the credibility of our justice system.

Perhaps worse though, was the practice of the Los Angeles Police Department homicide detectives involved in the present investigation (all of whom would later claim memory loss) of manufacturing evidence

through coaching and incentives in an effort to build a case against a person they believed was responsible for committing serious crimes.

The practices adopted by the detectives in this case insult our commitment to fairness and embarrass our system.

The idea that the state could execute one of its citizens after cheating so badly in its zeal to convict is chilling.

Statement of Appealability

This is an automatic appeal from a final judgment following a jury trial that resulted in a death verdict. It is authorized by the California Constitution (Article 6, section 11) and Penal Code section 1239, subd.(b).

Statement of the Case

Appellant was charged by way of an information with three counts of murder in violation of Penal Code section 187[1] (counts three, four and 12), and six counts of attempted willful, deliberate and premeditated murder in violation of sections 664 and 187 (counts one, two, five, six, 13 and 14)[2]. (7 CT 1478-1485.) The information also

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[1] All further references will be to the California Penal Code unless otherwise specified.

[2] The numbered charges in the information are the same as those listed in the original felony complaint although counts seven through 11 were

alleges various enhancements for personal gun use under sections 12022.5 and 12022.53, as well as the gang enhancement described in section 186.22, subd.(b)(1). (7 CT 1478-1484.)

The information was later amended to add two prior convictions that qualified as "strike priors" under sections 1170.12, subds. (a)-(d) and 667, subd.(b)-(i). (7 CT 1486.)

The information also alleged the multiple-murder special circumstance described in section 190.2, subd.(a)(3), and the active gang participant special circumstance described in section 190.2, subd.(a)(22). (7 CT 1478-1484.)

The jury convicted appellant of all three murder counts, four of the six attempted murder counts, and further found all of the enhancement and special circumstance allegations to be true. (15 CT 3828-3835.) The jury found appellant was not guilty of two of the attempted murder counts. (15 CT 3826-3827.) The penalty phase jury was unable to agree on the appropriate sentence and so the court declared a mistrial. (29 RT 5764.)

Before the penalty phase retrial began, the state prosecuted appellant for his participation in a jail disturbance incident that had

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dismissed before trial.

taken place three years earlier. (30 RT 5822.) The jury convicted appellant of those charges and he received a life term under the three strikes law. (30 RT 5817.)

The trial court then conducted the penalty phase retrial where the jury recommended a death sentence. (39 RT 7768.) The only evidentiary difference at the penalty retrial was the felony conviction for the jail disturbance case.

The trial court denied appellant's motion to modify the verdict and imposed the death sentence. (22 CT 5716-5722.)

The appeal to this court is automatic pursuant to Penal Code section 1239, subd.(b).

Statement of the Facts

Prosecution's Guilt Phase Case

Background

Appellant was an active member in Toonerville, a notorious Hispanic street gang in the Atwater Village area of Los Angeles. (20 RT 3986-3987.) In fact, he was considered to be the gang's "shot-caller," and was known as either "Huero" of "Eskimo." (20 RT 3874, 3982.)

Police suspected that appellant was involved in several killings, and at one point there were several local and federal law enforcement

agencies with hundreds of officers looking for him. (35 RT 7059.) He was even featured on the "America's Most Wanted" television show that was aired in an effort to find him. (35 RT 7060.) Following a tip, police arrested him on February 12th, 2003, in Bullhead City, Arizona after a 15 month search. (13 RT 2726-2727; 19 RT 3913.) He was driving with his girlfriend, Dawn Butts, at the time of the arrest, and police proceeded to search Butts' nearby residence. (13 RT 2726-2727; 16 RT 3401.) While searching a box in the closet, police found a notebook that contained handwritten gang-style rap lyrics. (13 RT 2729.)

Appellant had written the lyrics, and wrote a note inside the cover of the notebook stating that everything in the book was fictional. (13 RT 3732.) Appellant enjoyed writing and performing his rap songs (he used a computer program to help with the music) and Butts believed he wanted to become a rapper. (16 RT 3407-3408.) The prosecution repeatedly used appellant's fictional lyrics against him when trying to establish his guilt for the charged offenses throughout the trial. (20 RT 3975-3979, 3982-3986, 3993-3997.)

The charges involved five incidents:

The Ronald "Cloudy" Martin murder

Cloudy Martin was a member of Frogtown, a Toonerville rival

gang. (12 RT 2575.) On October 14th, 1997, he was shot and killed outside the Elysian Valley Rec Center in the late morning. (14 RT 2858-2583.) A witness saw a white Bronco or Blazer leave the scene and noticed the driver's arm (with no identifying marks) hanging outside the driver's window. (12 RT 2592.)

A coroner would later conclude that Martin was shot 27 times, from an intermediate range, and police determined the shots came from at least two guns. (13 RT 2616-2717; 14 RT 3029, 3035.)

Gabriel "Acer" Rivas, a former Toonerville member with an extensive criminal background testified at trial after the trial court rejected his attempt to exercise his Fifth Amendment privilege against self-incrimination. (13 RT 2619, 2626-2627.) Rivas testified that he did not recall telling police that he heard appellant discussing the incident. (13 RT 2649.) He did not recall telling police that he was next door when appellant and "Frosty" Quintinilla drove away in Quintinilla's old white truck. (13 RT 2649-2650.) Neither did he recall that when appellant and Quintinilla returned, appellant bragged that "the fucking fool got smoked," or that "Cloudy" was shot "like 30 or 40 times." (13 RT 2560-2561.) The prosecutor then played the secretly recorded statement Rivas gave to the police, which contained the statements.

(13 RT 2686.)

Mark Gonzalez was another former Toonerville member with a substantial criminal record who testified for the prosecution. (15 RT 3167-3168.) He faced aggravated kidnapping charges, was still on probation for an earlier criminal threats conviction, and was in restraints while he testified. (15 RT 3166-3167, 3169.)

Gonzalez was a drug dealer during his time with Toonerville, knew appellant well, and described the details of life in the gang. (15 RT 3170-3172.) He indicated that from 1997 through 2001, Frogtown, Rascals and Pinoy Real were all enemies of Toonerville. (15 RT 3171-3171.) He said that appellant had been the "shot-caller" in Toonerville, identified 15 members of the gang, and discussed its territory, hang outs, rules and details of monthly meetings. (15 RT 3171, 3174, 3182.) Gonzalez acknowledged that he was a "snitch." (15 RT 3182-3183.)

A couple of years after Cloudy Martin's killing, appellant and Gonzalez were ingesting methamphetamine in Gonzalez's apartment when appellant told him that he and Frosty Quintinilla shot Cloudy. (15 RT 3185-3187.) Appellant and Frosty went to Frogtown and saw three guys near the handball courts. (15 RT 3185-3186.) When the others left, and Martin was alone, appellant asked where he was from

(which gang), and Martin said "nowhere." (15 RT 3187.) Appellant then had Martin raise his shirt and saw Frogtown tattoos. (15 RT 3187.) Martin begged for his life, but appellant told him to "die like a man, not like a bitch" and started shooting. (15 RT 3187.) Frosty then began shooting as well. (15 RT 3187.)

Appellant told Gonzalez that they shot Martin as payback for Frogtown's earlier killing of a Toonerville member known as "Hozer." (15 RT 3189-3191.)

Gonzalez acknowledged that he first told police he had received the information regarding Cloudy Martin's killing from Netty, a close family friend. (16 RT 3335.)

The Margie Mendoza Incident

In the late evening of November 9th, 2001, Margie Mendoza was shot in the head and killed. (16 RT 3417, 3425.) She was in the front passenger seat of a car driven by Pinoy Real gang member Duane "Duendo" Natividad, with a friend Erica Rhee riding in the back. (16 RT 3413, 3418, 3457.) Multiple shots were fired from another car, and Natividad was also shot in the hand. (16 RT 3420, 3426.)

Monica Miranda was outside of her house at the time, along with Rascals gang member "Chubbs" Mendoza. (18 RT 3467.) She noticed

two cars driving slowly. (18 RT 3650.) The lead car was a silver Ford Focus hatchback that was being followed closely by a black SUV. (18 RT 3648-3649.) She vaguely recalled seeing the two males in the Focus, including the passenger who had a tattoo on the back of his head that looked like a snake, an eagle and the Mexican flag. (18 RT 3656.) She had about a three-quarters view of his face. (18 RT 3658.)

While she was smoking a cigarette on the porch, she heard gunshots coming from the nearby intersection of Petite Court and Hollydale Avenue. (18 RT 3662.) She hid behind a tree and saw two people fire three shots. (18 RT 3664, 3666-3667.) One man was tall and muscular, with a handgun, and may have been the passenger in the Focus. (18 RT 3673-3675, 3707.) The Focus was stopped in the intersection at the time. (18 RT 3714.)

She went inside her house, but came out again to see if anyone had been hurt. (18 RT 3719.) She then heard squealing tires and hid behind cars parked on Hollydale. (18 RT 3722-3723.) She heard two male voices, with one saying "I dropped it here," and she heard a walkie-talkie type device. (18 RT 3724-2725.) She remained behind the cars. (18 RT 3725.)

Shortly thereafter, Miranda was back in front of her house, and

was approached by a woman acting suspiciously, who was looking for something. (18 RT 3728.) She also claimed to be looking for her relative "Andy," but Miranda didn't know of an Andy in the area. (18 RT 3728-3729.) The woman, who Miranda later identified as Christina Duran, was also talking on her cell phone and said "We got 'em" and "I can't get through." (18 RT 3729-3730.) Duran then entered her black SUV and left. (18 RT 3732.)

Natividad, the driver of the victim's car described two suspects, including one with a bald head under a dark hoodie, and the other with a baseball cap. (16 RT 3447, 3450-3451.) He didn't know appellant and didn't remember much about the shooting because he was high on methamphetamine. (16 RT 3448, 3676.)

Erica Rhee, the backseat passenger, didn't recall the incident as she was high on meth (and hallucinating) and ducked when the shooting started. (16 RT 3462, 3465-3466.)

A police officer later detained a black 4-Runner on Hollydale Boulevard after midnight. (18 RT 3617-3618.) The officer noticed someone trying to hide under a blanket in the rear cargo area of the vehicle. (18 RT 3622.) Another officer arrived after the car was detained and he saw Christina Duran exit the passenger seat and

appellant climb out of the rear cargo area. (17 RT 3475-3477.) Police searched appellant but found no weapons. (17 RT 3487.) He told the officer he was a Toonerville member known as "Eskimo," the officer prepared a field identification report, and drove appellant home. (17 RT 3479-3480, 3485.) Police released appellant but detained Christina Duran and took her statement while in custody. (17 RT 3485.) She implicated appellant in Mendoza's murder. (26 RT 5142.) Several days later she was found dead in her car after being shot in the head. (34 RT 6767, 6861-6863.)

On January 31st, 2002, Natividad was stopped by a police officer who noticed a tattoo on his neck that said "In loving memory of my wife, Margie Mendoza, RIP." (17 RT 3495.) He told the officer that "Eskimo" from Toonerville had killed his wife. (17 RT 3495.) Natividad had three weapons in the car. (17 RT 3496.) The next day at the police station, he described the two suspects in the car who killed his wife, and said the passenger had a shaved head covered by a hoodie. (17 RT 3508.) He was then shown a photo six-pack lineup, that included appellant, and said he didn't remember the faces but it might have been appellant. (16 RT 3432; 17 RT 3517.) The detective said Natividad pointed to appellant, and the detective asked if he knew his face from a

photo he had seen on posters. (17 RT 3513.) Natividad responded that he could not see the faces of the men in the car, but noted that everyone "on the streets" was saying that appellant killed Margie. (16 RT 3432; 17 RT 3513.) He did see one tall skinny suspect with a black hat carrying a rifle, and Mendoza's fatal injuries were consistent with a high-powered rifle. (17 RT 3519, 3601.)

The officers who searched the area after the shooting found a Nextel cell phone, and phone company records would later show that the billing address listed for one of the numbers on the account matched the address appellant had provided to the Department of Motor Vehicles. (15 RT 3207-3208.)

The police ambush incident

On July 4th, 2000, just before 4:00 a.m., Mark Gonzalez was in his apartment with appellant, and several other Toonerville members. (16 RT 3257-3258.) Earlier that day, two members ("Little Boy" and "Tiny") had test-fired automatic weapons at Atwater Park. (16 RT 3258-3259.) The guns were about 14 inches long and resembled machine guns. (16 RT 3259.) When they returned from the park, appellant suggested that they stop testing the weapons, and go out and use them. (16 RT 3260, 3262.) Little Boy, Tiny and Chubbs said they

were going to Rascals territory and left in a gold Honda. (16 RT 3263.)

Gonzalez, appellant, Panther and others were later listening in on a police scanner and heard there had been a robbery involving two males with machine guns. (16 RT 3264.) Gonzalez believed the robbery may have been committed by their friends who had left 30 minutes earlier with the automatic weapons, and the description of the car involved in the robbery also matched. (16 RT 3266.)

Panther decided they should go and help the others, and appellant agreed they needed to "go out there and do it." (16 RT 3267.) They left with appellant carrying a semiautomatic 9 mm handgun, Panther with a Glock, and a third man carrying a 357 revolver. (16 RT 3283-3284.)

Gonzalez left with the others but returned to get a jacket, when Smokey Cabrera (who never left) tried to convince Gonzalez to stay because the others were about to get into trouble. (16 RT 3270, 3284.) Gonzalez left anyway, but did not have a gun. (16 RT 3270.)

Los Angeles Police Department Officers Langarica and Baker had responded to the robbery call involving the gray Honda Accord at 3:54 a.m. (15 RT 3053.) They were informed that three male Hispanics armed with machine guns had robbed a victim. (15 RT 3050, 3059.)

The officers requested support once they spotted the suspects' car. (15 RT 3257.)

A high speed pursuit followed, and ended on Bemis Street in Chevy Chase Park. (15 RT 3058, 3088.) As the officers approached Bemis Street, someone threw a bicycle at the patrol car. (15 RT 3062, 3101.) The police car swerved to avoid the bike, and swerved again to avoid a washing machine that had been thrown into the middle of the street. (15 RT 3065, 3067.) Officer Langarica then heard eight to 10 shots being fired at the patrol car from behind, but it was dark and he couldn't see anyone shooting. (15 RT 3090, 3095.) At that point, he perceived shots coming from every direction. (15 RT 3097.)

Langarica then saw shots fired from the backseat passenger in the Honda. (15 RT 3071.) When the Honda slowed, Officer Baker forced it to crash near the park. (15 RT 3071-3072.) The front passenger jumped out pointing an Uzi-type gun at Langarica, but he didn't shoot. (15 RT 3071-3072, 3075, 3094.) The rear passenger (who had been shooting earlier) leaned out of the window with what appeared to be an Uzi. (15 RT 3077.) Langarica and Baker then exchanged fire with the suspects until they were finally apprehended by assisting officers. (15 RT 3073-3074, 3078.) Langarica was not injured,

but Baker was bleeding from his left temple and had a hole in his pant leg. (15 RT 3093.)

John Perez had been in bed at the time, but heard the shooting and looked outside of his bathroom window that faced Bemis street. (14 RT 2886, 2898, 2951-2952.) He saw a Honda driving north on Brunswick turn right on Bemis. (14 RT 2908.) He saw someone standing on the corner roll a bicycle into the intersection. (14 RT 2910.) He saw the police car following the Honda avoid both the bike and the washer or dryer that was in the middle of the street. (14 RT 2910.) He then heard shots being fired and saw muzzle flashes from the sidewalk, where a man appeared to be firing at the police. (14 RT 2915-2916.) The shooter soon walked close to Perez's driveway, and he could see that it was appellant. (14 RT 2921-2922.) Perez later told the police that the man was holding what looked like a 9 mm handgun. (14 RT 2922.)

Appellant proceeded in the direction of Veronica Ortega's apartment, which was two doors down from his, but Perez did not see appellant enter the apartment. (14 RT 2923.) He also saw the person who threw the bike enter a silver Volkswagen Jetta that had stopped at the intersection, but a police car then blocked the Jetta from moving.

(14 RT 2924.)

Perez was a Police Explorer, an extension of the Boy Scouts with an eight week police academy training course. (14 RT 2890, 2930.) He had a Radio Shack police scanner that was programmed to LAPD frequencies. (14 RT 2930.) He was asked to bring his scanner to Veronica's apartment for appellant, and appellant was there when he brought it in. (14 RT 2929-2930.) Police and an investigator from the DA's office interviewed Perez, but he denied seeing anything. (14 RT 2931.) He was later interviewed by detectives and said he saw someone throw a bike and didn't know who was involved although he did see the Honda. (14 RT 2932.) He had also told an upstairs neighbor that he hadn't seen anything, but had listened on his scanner. (14 RT 2927.)

He ultimately provided a taped statement to police where he acknowledged what he saw, and said his earlier denials were based on the fear of retaliation. (14 RT 2932.) In exchange for his testimony, the prosecutor arranged for Perez's family's protection, provided him with money, and relocated him. (14 RT 2933, 2936.)

Mark Gonzalez had also seen the incident when he walked out of his apartment. (16 RT 3271.) He saw shots being fired at the back of the police car. (16 RT 3271.) He then ran back inside but watched from

behind a wrought-iron door. (16 RT 3271.) He heard gunfire and saw the police car chasing the Honda as they passed his residence. (16 RT 3272, 3278.) The first shots he heard came from Bemis and Brunswick. (16 RT 3275.) He saw flashes and silhouettes of two men on the northwest corner, but could not see who they were. (16 RT 3276, 3316.) The next shots he heard came from the Chevy Chase Park area. (16 RT 3279.) He then saw "Little Boy" (who was not holding a gun) run past him. (16 RT 3280.) Little Boy was trying to enter a gray Jetta being driven by a female when the police arrived and ordered him to put his hands up. (16 RT 3280-3281.) Junior was already in the Jetta. (16 RT 3282.)

After the shooting, appellant called Gonzalez several times from Veronica's apartment and asked if Gonzalez had seen "that." (16 RT 3291.) Appellant thought Gonzalez had been involved and said they "dumped on the cops." (16 RT 3291.) Appellant told Gonzalez that he and Manfrey had shot from the gate located at the northwest corner. (16 RT 3356.)

Gonzalez was never charged with a crime relating to this incident even though he told a girlfriend he had been involved in the shooting, and initially told police he was sleeping and awakened when he heard

shots fired. (16 RT 3301-3302, 3305-3306.)

The Ryan Gonzalez incident

On June 3rd, 2000, Mark Gonzalez drove appellant and three other males to a party in Baldwin Park. (15 RT 3220.) On the way home, they drove by the Rascals neighborhood and appellant, sitting in the front passenger seat, told Gonzalez to get off the freeway. (15 RT 3222-3223.) He said he had a lucky feeling. (15 RT 3223.)

They soon saw a young male walking alone, towards the front gate of a residence on La Clede Avenue. (15 RT 322-3225, 3227.)

The young male walking through the gate was Ryan Gonzalez, a member of the Rascals gang. (13 RT 2745-2746.) Gonzalez's moniker was "Huero," which coincidently was appellant's moniker in Toonerville.[3] (13 RT 3768, 2791.)

Appellant told Gonzalez to stop the truck. (15 RT 3229.) Appellant got out of the vehicle holding a gun, and called Ryan Gonzalez over. (15 RT 3231, 3239.) Appellant asked where he was from ("hit him up") to see whether he was in a gang. (15 RT 3236.)

Ryan Gonzalez then ran and appellant chased him. (15 RT 3232.) They turned a corner and Mark Gonzalez lost sight of them, but he

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[3] Appellant was also known as "Eskimo." (20 RT 3892.)

heard multiple gunshots. (15 RT 3236-3239.) No one else had left the truck. (15 RT 3239.) Mark Gonzalez then locked up the truck and saw appellant standing over the dead body talking to himself. (15 RT 3240-3242.) He still held the gun and was clicking the trigger. (15 RT 33243-3244.) Appellant then reentered the truck and they drove home. (15 RT 3244-3245.)

The coroner determined that Ryan Gonzalez had been shot eight times. (17 RT 3605.)

Wilfred "Pirate" Recio, a former Toonerville member with a long criminal record, who was custody in another state, testified for the prosecution. (13 RT 2761-2762.) Recio provided a lot of history about Toonerville, and noted that he had once been a shot-caller in the gang, although appellant had more power. (13 RT 2777, 2788.)

Recio had just been released from prison in 2000, was living with appellant's former girlfriend, Veronica Ortega, and was holding a number of guns for appellant. (13 RT 2771, 2773.)

Recio testified that appellant made three statements about killing "Huero" Gonzalez. Appellant spoke of it the first time when he, Recio and another Toonerville member were driving in Rascals territory in 2000, and they saw a mural that said "Rascals and Huero RIP." (13 RT

2791.) Appellant told the others to cover the writing because he was the only "Huero" in Atwater Village, and he had "blasted the fool." (13 RT 2791.) Another time, Recio heard appellant tell Chino Kim (a longtime Toonerville member) to "Go blast those fools from Rascals. You know I got a murder under my butt already." (13 RT 2797; 14 RT 2863.) Still another time, Recio overheard appellant tell Toonerville member "Pappy" that "Because of me killing Huero from the Rascals they're going to end up killing you too." (13 RT 2801.)

Recio sought to have his out-of-state prison term reduced in exchange for his testimony against appellant. (14 RT 2807, 2842.)

The Pedro Sanchez and Juan Cardiel incident

Rascals member Pedro Sanchez was drinking and dropping acid with friends after work on October 10th, 1997. (12 RT 2419.) He, Juan Cardiel, and some others then went to Sanchez's house in Atwater Village to continue drinking. (12 RT 2422-2433.) Sanchez was "fried" on acid, and after he drank about eight more beers in 90 minutes at his house, they decided to get on their bikes, ride around and write graffiti. (12 RT 2424-2425, 2929, 2503.) At one point, Sanchez and Cardiel separated themselves from the group on Glendale Avenue near a Shell station. (12 RT 2430-2431, 2457.)

Sanchez saw two cars driving towards them, and the guys in the cars had shaved heads, and looked like gang members. (12 RT 2433-2434.) Sanchez challenged the others to a fight knowing they were gang rivals but not knowing for sure whether they were Toonerville members. (12 RT 2434, 2436, 2524.) Sanchez and Cardiel ran when someone displayed a rifle from the car. (12 RT 2436-2437.) Someone fired shots at the two men as they ran, and Cardiel was shot in the back and leg. (12 RT 2437-2438, 2505.) Sanchez had run in a different direction, into the Shell station where he locked the door, but felt broken glass as the others fired shots into the building. (12 RT 2439-2741.)

Cardiel, who was paralyzed from the waist down, later looked at the photographic lineup, a six-pack with appellant in the number two position. (12 RT 2542-2544.) He said number two resembled the shooter based on his moustache, light complexion and muscular build. (12 RT 2545-2546.) The police later lost the six-pack lineup they had shown Cardiel. (12 RT 2552.)

In July of 2002, Cardiel was interviewed by a detective who failed to record the conversation or take notes, and Cardiel never signed the subsequent report. (12 RT 2565-2566.) In the interview, Cardiel's story

was consistent with Sanchez's and he described the shooter as six feet tall, with a light complexion, and thought it was appellant. (12 RT 2562-2563.) But he had been interviewed by police a year after the incident and said he couldn't identify anyone because he did not see a face. (12 RT 2519.)

Sanchez was interviewed right after the incident, and again by Detective King in 2002. (12 RT 2451, 2568.) But King did not record the interview. (12 RT 2568.) Sanchez testified on cross-examination that he told King they were approached by a blue car as they were walking and someone in the car said "This is Toonerville." (12 RT 2558.) He also said the guy who chased him into the Shell station was six feet tall and wore a black beanie. (12 RT 2559.) Sanchez said he couldn't say the guy's name, but when asked if it was appellant, said "You already know it." (12 RT 2561.)

Defense Guilt Phase Case

The defense theory of the case was that the state's witnesses were low-life criminals who testified against appellant in order to get benefits for themselves. And the detectives who needed their testimony to build a case against appellant adopted the controversial approach of pre-interviewing the witnesses in a process that included first,

explaining the benefits the witnesses could expect, and second, providing facts about appellant that the detectives, especially Detective Teague, wanted the witnesses to repeat during the recorded interviews.

This theory of the defense was based on evidence presented at trial.

For instance, Gabriel Rivas was a primary witness in the Cloudy Martin incident. Rivas had a two hour pre-interview with Detectives Teague, Neal and Barron on April 28th, 2003 – five years after the murder. (13 RT 2662, 2686.) Rivas had a bad drug problem at the time, and had been arrested several times. (13 RT 2660.) He also had a serious parole violation pending for a methamphetamine charge but Detective Teague told him the charges would be dropped for that arrest if he provided information on appellant. (13 RT 2658-2662.) Rivas would have said anything to get back on the street to do drugs at that time. (13 RT 2661.) During the pre-interview, the detectives said things like, "We know McGhee did the crimes," "there were three guns," and Martin was shot "many times." (13 RT 2662-2663.) Rivas then provided incriminating information during the real interview that was videotaped without his knowledge. (13 RT 2665, 2694.) Rivas specifically acknowledged that he had been "coached" by the police. (13

RT 2665.)

The three detectives could not be questioned at trial about the pre-interview because Barron had died, Teague suffered brain damage and was no longer with the department, and Neal retired on a disability and took medication that impaired his memory. (13 RT 2692-2693, 2695.)

Several other witnesses had similar experiences. Wilfred Recio was a Toonerville member facing murder charges that he was never prosecuted for after he agreed to talk with Detective Teague. (14 RT 2826, 2828-2829.) He testified about appellant's involvement in the Ryan Gonzalez killing hoping to get favorable treatment in his own case. (14 RT 2808.) Detective Teague also offered Recio $5,000 for information against appellant. (14 RT 2869.)

Duane Natividad was the driver in the car where his girlfriend, Margie Mendoza was shot. (16 RT 3419.) He was a gang member who went to prison in 2002. (16 RT 3417.) Natividad was high on methamphetamine at the time of the shooting and didn't see the faces of the shooters. (16 RT 3436-3439.) Detectives showed him a photo six-pack and repeatedly pointed to appellant's photo. (16 RT 3431, 3439.)

Juan Rodarte was Christina Duran's boyfriend at the time she

was killed. (34 RT 6886.) Rodarte had felony cases pending against him at the time he was interviewed by Detective Teague. (34 RT 6905.) Teague said he wanted Rodarte's help in getting appellant and didn't care if he lied. (34 RT 690.)

Pedro Sanchez was a gang member who denied telling detectives that appellant was the person who shot him. (12 RT 2513.) He testified that he did not know who shot him but when the police interviewed him, they repeatedly mentioned appellant's name and showed him appellant's photo. (12 RT 2452-2453.)

Juan Cardiel was a gang member who was with Pedro Sanchez when they were shot on October 10th, 1997. (12 RT 2495.) He testified that Detective Teague came to his house about a year after the shooting, showed him several photos, and suggested to him that appellant was a possible suspect. (12 RT 2521.)

Trial counsel's closing argument focused on the fact that the state's witnesses were gang members who were high at the time of the crimes, and traded information about appellant in exchange for immunity, dismissal of pending charges, and "never-go-to-jail" cards. (21 RT 4374.) Counsel repeated the prosecution's strategy that "if you give me McGhee, we will set you free." (21 RT 4355-4356.) The police

did a pre-interview of Rivas telling him what to say. (21 RT 4352.) They agreed to drop his pending charges if he would say what they "talked about. . .earlier." (21 RT 4353.) Witnesses had nothing to say to police until they got arrested. (21 RT 4355.) Once Recio talked about appellant, his two pending murder charges were never mentioned again. (21 RT 4369.) Gonzalez was also given immunity from murder charges. (21 RT 4374.) Police repeatedly attempted to get witnesses to identify appellant, by several means including mentioning his name, and pointing to his photo in a lineup. (21 RT 4346, 4348, 4397-4398.) Police failed to record some of the interviews and curiously lost the original photo six-pack lineup. (21 RT 4347.)

So the defense theory was that the case against appellant was tainted by the combination of police coaching, and significant favors for witnesses who were high at the time of the crimes, and looking to avoid custody in their own cases by implicating appellant. The result was that the prosecution's case was totally unreliable.

Prosecution's Penalty Phase Case

The prosecution presented evidence of several incidents of aggravating circumstances supporting imposition of the death penalty.

The Geraldo Luperico incident

In the early morning hours of November 11th, 1989, Geraldo Luperico was with some friends at a house on Allen Street in Atwater when a car drove by with its lights off and a shot was fired toward him. (24 RT 4781-4786, 4788.) He was hit in the side of the face with bird shot. (24 RT 4788, 4795, 4802.)

A detective later searched appellant's house and found him there, along with a live round of bird shot and a newspaper article regarding the shooting. (24 RT 4899.) Appellant, then 16 years old, admitted to the shooting, but claimed he was not trying to hit anyone. (24 RT 4801, 4804.) The shooting stemmed from an earlier incident regarding appellant's gang and The Locos, a rival gang of which Luperico was a member. (24 RT 4801.)

The Ruby Mangas Incident

In July, 2000, Mangas reported to police that she had been sexually assaulted by appellant. (24 RT 4857.) They were at a party and appellant offered to drive her home at approximately 4:30 a.m. (24 RT 4860.) Appellant said he needed to stop at his house and Mangas went inside with him. (24 RT 4861.) He took her into a bedroom, blocked the door with an ironing board and took off his shirt. (24 RT

4861.) When she resisted his advances, he grabbed her by the arm and told her he could take her down to the river and kill her. (24 RT 4862.) He raped her several times, then told her to get out of the house. (24 RT 4862.) She contacted police and was given a sexual assault examination. (24 RT 4863.)

Appellant denied the incident. (24 RT 4810.) Mangas later recanted, saying police must have misinterpreted her statements. (24 RT 4841.)

The Christina Duran incident

On November 11th, 2001, Duran was interviewed by police regarding an incident (the Margie Mendoza killing) where appellant and another gang member, "Limpy" Rodriguez, were suspects. (26 RT 5142.) She provided information that was used to obtain search warrants for the homes of appellant and Rodriguez. (26 RT 5142.)

Shortly thereafter, Duran attended a party with her boyfriend, "Panther" Rodarte. (25 RT 5103.) Appellant was also at the party. (25 RT 4971, 5105.) At about 2:00 a.m., Duran called a friend and said she was leaving the party with Rodarte and appellant. (25 RT 4973.)

The party had become rowdy with arguments and fighting. (25 RT 4984; 27 RT 5382.) Police were called eventually. (27 RT 5388.)

Duran left the party with Rodarte, as appellant and another man followed in a second car. (25 RT 5018.)

The next day, Duran's body was found draped over the back seat of Rodarte's car. (26 RT 5155.) She had been shot in the head five times. (26 RT 5148.) The car was about two miles from the party. (26 5155.)

Various witnesses said that appellant wanted to kill Duran because she had snitched on Rodriguez and him. (26 RT 5133.) One said that Rodarte set up Duran by bringing her to the party and appellant was one of the "homies" who killed her. (26 RT 5133.)

The Youth Authority incident

On June 16th, 1994, appellant, then 21 years old, assaulted a Youth Authority staff member by hitting him and kicking him when he was on the ground. (24 RT 4911.) Appellant later admitted the assault, claiming he did it in order to be sent to adult prison, rather than another Youth Authority facility. (24 RT 4918-4919.) When he was told that he would probably not be sent to adult prison because of the incident, appellant said, "Well, next time I'll just stab him." (24 RT 4923.)

The contraband incidents

In October, 2004, appellant was housed in a "high risk" section of the Los Angeles County Central Men's Jail. (25 RT 4944, 4952.) A search of his cell revealed contraband items that could be used to manufacture weapons. (25 RT 5951.) These included a loose eyeglass lens, razor blades and a metal pin taken from a fire extinguisher. (25 RT 4954-3955.)

On December 26th, 2006, searches of appellant's cell revealed a loose razor blade hidden in an indentation of the sink, and a sharpened piece of metal wedged in a door track. (26 RT 5232, 5249.)

The jail disturbance incident

In January, 2005, a deputy noticed that an inmate housed in a cell near appellant's appeared to be drunk. (25 RT 5114.) As the deputy and the inmate walked by appellant's cell, appellant told the inmate to return to his cell. (25 RT 5115.) When the inmate attempted to turn around, the deputy blocked his way. (25 RT 5116.) Appellant then yelled to the other inmates in the area to "gas the juras," which means attack the deputies by throwing things at them. (25 RT 5116.) Appellant and several other inmates threw food and urine at the deputies. (25 RT 5116.) Appellant broke his toilet and began to throw pieces of ceramic at the deputies. (25 RT 5118.) A small riot ensued for

the next few hours. (25 RT 5120.)

The deputies performed a "cell extraction" of the assaultive inmates, with appellant being the last one. (26 RT 5263.) He was pepper-sprayed several times before deputies could remove him. (26 RT 5264, 5273.)

The restraint incident

On October 16th, 2007, a deputy was preparing appellant to go to court. (26 RT 5213.) When the deputy noticed that appellant's waist chain was loose, he re-secured appellant's right hand. (26 RT 5216.) Appellant complained the restraint was too tight and began physically resisting and said he refused to go to court. (26 RT 5218.) Appellant needed to be restrained by several deputies and suffered injuries that prevented him from going to court that day. (26 RT 5218, 5220.)

The tray incident

In December, 2003, deputies were escorting an inmate out of the cell block who had refused to surrender his meal tray. (26 RT 5204.) Appellant demanded to know where they were taking his "homeboy." (26 RT 5205.) When he was told to calm down, appellant began agitating the other inmates and told them to prepare for cell extractions by throwing soap and water on the floor, making it slippery for the

deputies. (26 RT 5208.)

Defense Case

A Los Angeles Police Department officer testified that she interviewed Ruby Mangas in 2000. (26 RT 5277.) Mangas denied being assaulted and did not want to pursue rape allegations against appellant. (26 RT 5277.) The officer also noted there had been inconsistencies in Mangas's original statement. (26 RT 5279, 5282, 5284, 5286, 5291.)

Jessica Ortiz, who lived across the street from Martin Villigran, the house where Christina Duran was last seen alive, testified that appellant was seriously intoxicated at the party (suggesting he may not have been capable of murder). (27 RT 5380.) She also testified that she saw two women leave the party in Duran's car, which contradicted the prosecutor's claim that appellant and another man left the party with Duran. (27 RT 5386, 5392. 5397.)

Various other friends and relatives spoke of their positive relationships with appellant and asked that his life be spared. This group included appellant's 13 year-old cousin, Steven Katz (26 RT 5307, 5310), Danny Puente, the 16 year-old son of appellant's former girlfriend (27 RT 5328-5332), appellant's aunt, Rachel Chargoy (27 RT

5335), appellant's uncle, Felipe Barraso (26 RT 5252, 5258), his aunt Becky Katz who was a deputy probation officer (28 RT 5501, 5506), and his godmother, Mary Tindall (28 RT 5590, 5593).

The verdict

After deliberations and discussions with the judge, the jury remained deadlocked at 10-2, in favor of imposing the death penalty. (29 RT 5764.) The judge declared a mistrial. (29 RT 5764.)

Penalty Phase Retrial

Because a new jury would hear the penalty retrial, the prosecution had to establish the circumstances of the offenses. The court instructed the jurors that they had to accept the prior jury's guilt findings. (31 RT 6202-6204, 6208-6210.)

The Prosecution's Case

The prosecution produced over 50 witnesses.

Circumstances in Aggravation

The Luperico Shooting

Carlos Orozco was a former associate of the West Side Locos gang. (32 RT 6453.) On November 11th, 1989, at approximately 1:00 a.m., he was among a group of about 10 people hanging out on the front lawn of a house on Allen Street in Burbank. (32 RT 6454.) A

"suspicious car" approached with its headlights off and parked nearby. (32 RT 6457.)

Seconds later, gunshots were fired at the group from the car. (32 RT 6457.) As he heard a "big blast," he and others ran behind a building for cover. (32 RT 6460.) Geraldo Lupercio was among the group, but did not take cover when the shooting started. (32 RT 6460.)

When the car drove off, Orozco went to the front lawn and saw Lupercio lying on the ground bleeding, with a gunshot wound to his head. (32 RT 6460.) He did not know what kind of car the shooters were driving, how many people were in the car, or whether the shots came from the front or back seat. (32 RT 6463.) He later saw spent bird shot pellets in the wall of the apartment building near the shooting. (32 RT 6460.)

A police sergeant at the Burbank Police Department arrived on the Allen Street scene and saw Luperico lying on the ground. (32 RT 6465.) He saw Luperico, who had been hit by bird shot, a few days later and he appeared to have fully recovered. (32 RT 6469.)

Appellant later admitted being in the car and firing a shotgun twice at the group–intentionally aiming high. (32 RT 6536.) The shooting was in retaliation for "someone" being chased out of the

neighborhood. (32 RT 6538.) A search of appellant's residence revealed a live bird shot round, and a newspaper article about the shooting. (32 RT 6541.)

The Christina Duran Murder

Martin Villigran was a longtime Toonerville member. (34 RT 6805.) He knew appellant as "Huero" or "Eskimo." (34 RT 6806.) On the evening of November 10th, 2001, he threw a birthday party for Christina Duran at his West Covina house. (34 RT 6807.) Others started the party before he arrived home from work that night. (34 RT 6812-6814.)

Villigran said that appellant became ill, apparently an adverse reaction to drugs. (34 RT 6814-6815.) He went to bed around 1:00 or 2:00 a.m., and Duran was still present. (34 RT 6811-6812.) Some witnesses said they saw Duran leave with "Sharpie" while appellant followed in another car. (34 RT 6874-6876, 6886.)

The next morning, Duran's car was found parked about two miles from Villigran's house. (34 RT 6861-6863.) Her body was inside the car. (34 RT 6864-6867.) Some car windows had been broken, with glass inside. (34 RT 6864-6867.) A medical examiner who performed the autopsy on Duran, said the cause of death was seven gunshot wounds,

five of them to the head. (34 RT 6767.) The shots were fired from point-blank range, and consistent with someone holding Duran's head or pulling her hair at the time. (34 RT 6773, 6778.)

Irma Quiroz lived close to where Duran's body was found on November 11th, 2001. (34 RT 68-19-6920.) Early that morning she heard a woman screaming, asking to be let go. (34 RT 6821-6822.) She heard men yelling, calling the woman a bitch, and then heard two or three gunshots. (34 RT 6821-6822.) She then heard a car drive up, a door close, then two cars drive away. (34 RT 6822.) She did not call police, but was interviewed later that day. (34 RT 6828-6831.)

The Youth Authority Assault

David Zavala, a former group supervisor at the California Youth Authority recalled an incident that occurred on June 16th, 1994. (32 RT 6473.) He was escorting a group of wards, including appellant, who were being transferred to different youth facilities. (33 RT 6575.) Appellant stepped away from the group and told Zavala "You're my ticket to the pen" (adult prison), and struck him in the jaw, knocking him down. (32 RT 6476.) Appellant kicked him while he was still on the ground. (32 RT 6476.) Zavala reached for his mace, but appellant surrendered as other staff members arrived. (32 RT 6478.)

Appellant later told group supervisor Robert Sedillo that the assault was "nothing personal." (32 RT 6486.) He did it so that he could be transferred to an adult prison rather than another youth facility. (32 RT 6486.) When Sedillo told appellant he would probably still be transferred to a youth facility, he replied, "Then next time I'll just have to stab him." (32 RT 6488.)

The Medina Assault

In 1997, Daniel Medina was 16 years-old and a member of the Rascals gang. (32 RT 6495.) Pete Sanchez was the Rascals' "shot caller." (32 RT 6496.)

On the afternoon of October 12th, 1997, he was walking on La Clede Avenue in Los Angeles (in "Rascal territory") with his girlfriend and two other Rascals members. (32 RT 6498.) A car with two male Toonerville members drove up and asked where "Pete" was. (32 RT 6499.) When Medina asked who they were, they responded "Toonerville," got out of the car and started fighting. (32 RT 6501.) Medina was hit with a steering wheel club, and all the Rascals members were beaten. (32 RT 6502.) The car drove away, but then returned. (32 RT 6503.)

Medina began "talking smack" about Toonerville to the men in

the car, who got out and one of them said "Let's get the gun," opening the car's trunk. (32 RT 6506.) Medina and his friends ran into someone's backyard and he got stuck on a broken fence. (32 RT 6506.) Medina was hit with the steering wheel club several more times, fracturing his skull and breaking his arm. (32 RT 6510.) He was taken to the hospital where he received sutures and a cast on his arm. (32 RT 6512.)

Medina later identified appellant from a six-pack photo lineup and initialed his selection, but in court was unable to make a positive identification. (32 RT 6512-6514, 6525.)

The Jail Housing Incidents

On December 6th, 2003, appellant was housed in the "high power" area of the Central Men's Jail. (35 RT 7024-7025.) An inmate, Barajas, had obtained some meal trays, which could be turned into weapons, and handed them out to appellant and other inmates in their cells. (35 RT 7027-7029.) As two deputies were escorting Barajas out of the area, appellant and another inmate began yelling at the deputies, and throwing items from their cells. (35 RT 7029-7030.)

Inmates in the area tied clothing around their cell doors so they could not be opened and threw water and soap on the floor outside their

cells, making it slippery for the deputies. (35 RT 7031-7032.)

On October 18th, 2004, a search of appellant's jail cell revealed loose eyeglass lenses, razor blades and a metal "cotter pin." (36 RT 7105-7106.) All of those items could be made into weapons. (36 RT 7105-7106.)

On January 7th, 2005, a deputy was escorting an inmate, Gonzalez, out of the housing area as he appeared to be intoxicated on "pruno"–jail made wine. (35 RT 7035.) As they walked past appellant's cell, he told Gonzalez not to go with the deputies. (35 RT 7034-7038; 36 RT 7138.) As Gonzalez attempted to break free of the deputy and return to his cell, appellant yelled at the other inmates to attack the deputies from their cells. (35 RT 7038; 36 RT 7131.)

Inmates began to throw food at the deputies, and "gas" them–throwing a mixture of urine and other substances. (35 RT 7035-7038, 7049; 36 RT 7141.)

Inmates, including appellant, then began breaking the ceramic sinks in their cells into shards and throwing pieces at deputies. (36 RT 7153-7154, 7165.) Inmates set fire to items thrown outside the cells. (36 RT 7170-7171.) An emergency response team arrived and stopped the riot. (36 RT 7185-7186.) Appellant was prosecuted for this offense

after the original penalty hung jury, and the new felony conviction was used as section 190.3 (c) evidence in aggravation in addition to the facts of the incident.

On July 1st, 2005, a search of appellant's cell revealed a 1½ inch metal object, sharpened on one end. (36 RT 7119-7122.)

On December 29th, 2006, a deputy searched appellant's cell and found a loose razor blade that had been removed from a razor handle. (36 RT 7126.) These can be attached to a toothbrush handle or comb and used as a weapon. (36 RT 7128.)

Circumstances of the Offenses

The Ronald Martin Murder

Los Angeles Police Officer John Gomperz was dispatched to a shooting at the Elysian Park Recreation Center shortly after midnight on October 14th, 1997. (33 RT 6556.) He heard, but did not see, a car revving its engine, and with tires squealing as it sped away. (33 RT 6555-6556.) He saw a male body on the ground, with blood pooling around it. (33 RT 6560.) The motionless man appeared to have suffered fatal wounds. (33 RT 6562.) He saw some expended rounds near the body, but did not see any weapons. (33 RT 6562.)

A detective with the Los Angeles Police Department arrived at

Elysian Park before the body – later identified as Ronald Martin – was removed. (33 RT 6568.) He saw that Martin had a "Frogtown" gang tattoo on his abdomen. (33 RT 6570.)

When the medical examiner turned the body over, the detective gathered the spent rounds as evidence. (33 RT 6574.) He found rounds from both .40 and .45 caliber guns. (33 RT 6582.)

A medical examiner explained that Martin's cause of death was multiple gunshots – he received 27 wounds, the most the medical examiner had ever seen. (33 RT 6588.) Gunshot wounds to the head, chest and abdomen were inflicted while Martin was standing upright, but the wounds to his back were made while he was lying on the ground. (33 RT 6606.)

The Ryan Gonzalez Murder

LAPD patrol officer Durate was dispatched to a shooting call near the intersection of Silver Lake and La Clede streets just before 2:00 a.m. on June 3rd, 2000. (33 RT 6610.) He observed a body in the street and drew an outline on the ground. (33 RT 6613.) He saw spent rounds near the body. (33 RT 6615.)

LAPD Detective Carrillo arrived on the scene at Silver Lake and La Clede and recognized the victim as Ryan "Huero" Gonzalez, a

member of the Rascals. (33 RT 6620.)

A medical examiner said that Rodriguez suffered eight gunshot wounds, from the top of his head down to his torso. (37 RT 7285-7288.)

The Margie Mendoza Murder

Detective Richard Ortiz was dispatched to the scene of the Margie Mendoza killing and attempted murders of Duane Natividad and Erica Rhee on November 9th, 2001, arriving at 2:30 a.m. (33 RT 6639.) Mendoza had already been transported to Glendale Hospital when he arrived. (33 RT 6639.) Ortiz observed several spent casings from an assault rifle, and a .45 caliber handgun. (33 RT 6645.) He also found a cell phone, later traced to appellant. (33 RT 6645, 6653.)

When he arrived, he saw a Toyota 4Runner leaving the scene and put out a radio call for units to locate and stop the vehicle. (33 RT 6639.) Another officer saw the 4Runner on Glendale Boulevard and stopped it. (33 RT 6672.) Duran was driving and appellant was hiding under a blanket in the back cargo area. (33 RT 6672.) Ultimately, Duran was detained and appellant was released. (33 RT 6672.)

At the hospital, he interviewed shooting victim Erica Rhee, who described the shooter's car. (33 RT 6664.) When called to the stand, Rhee claimed she could not recall anything about the shooting. (33 RT

6681.) She was under the influence of methamphetamine that night and was in the car when the shooting started. (33 RT 6689.)

At the station, Duran gave a videotaped statement regarding who was responsible for the shootings. (33 RT 6641.) She said that appellant and Edward Rodriguez committed the shootings. (33 RT 6656.) Appellant had asked her to take him to the scene to recover his cell phone. (33 RT 6666.) Warrants were issued for appellant and Rodriguez. (33 RT 6658.) Rodriguez was arrested that night, but police were unable to find appellant. (33 RT 6658.)

A criminalist testified that there were approximately 28 different rounds fired into the car at the Mendoza shooting. (33 RT 6696.) Twelve of those rounds actually entered the passenger compartment. (33 RT 6704.)

A medical examiner testified that Mendoza suffered two wounds, one to the head which caused massive brain damage, and another to her left hand, partially severing it. (33 RT 6712.) These were 7.62 caliber rounds, ordinarily used in AK-47 assault rifle. (33 RT 6712.)

The Attempted Murder of Officers
Carlos Langarica and Tom Baker

On July 4th, 2000, LAPD Officers Langarica and Baker were on patrol when they received a call regarding an armed robbery by three

male Hispanics in a gray Honda Accord. (35 RT 6953-6956.) The officers spotted the suspect vehicle and a pursuit ensued, with the robbers driving into Toonverville gang territory. (35 RT 6958-6961.) At one intersection a male suspect threw a bicycle at the patrol car, and gunshots followed. (35 RT 6961-6964.) The officers were being shot at by people in the area, and the suspect vehicle. (35 RT 6967-6968.)

The suspect's car went through a fence and stopped with the officers close behind them. (35 RT 6870.) The front passenger exited the car and began firing an Uzi at the officers. (35 RT 6971.) Eventually all suspects were apprehended with their weapons. (35 RT 6972-6973.) One suspect was shot several times, but survived. (35 RT 6978-6979.)

While appellant was not in the vehicle, other evidence indicated he was one of the shooters, and he was convicted of the attempted murder of Langarica and Baker. (35 RT 69921-6992.)

On February 12th, 2003, appellant was arrested in Bullhead City, Arizona. (35 RT 7060-7061.)

Victim Impact Evidence

The "Cloudy" Martin Murder

Martin's mother described him as a good-hearted person who was 23 years old when he was killed. (36 RT 7204-7220.) Their family had a

real estate business that Martin was going to join. (36 RT 7204-7220.) She went to Elysian Park and saw his body on the ground when she heard about the shooting. (36 RT 7204-7220.)

Martin's girlfriend, and mother of his child, also described him as good-hearted and spoke of his future plans. (36 RT 7221-7229.) His nephew said he and Martin were close and talked about sharing family holidays together. (36 RT 7230-7235.)

The Margie Mendoza Murder

Mendoza's aunt was close to her and the three children. (36 RT 7238-7249.) She was a devoted mother who was 25 years old when she was killed. (36 RT 7238-7249.) Mendoza worked at a hospital. (36 RT 7238-7249.)

Mendoza's sister said she was her best friend. (36 RT 7250-7257.) They shared the same friends and were supposed to meet the night she was killed. (36 RT 7250-7257.)

The Ryan Gonzalez Murder

Gonzalez' mother said that he was attending a technology school to be a construction engineer. (36 RT 7258-7270.) He loved animals and was a caring father. (36 RT 7258-7270.) He was 16 years old when he was killed. (36 RT 7258-7270.) His father spoke of fishing trips they

took together and construction jobs they occasionally worked on. (37 RT 7296-7302.)

Gonzalez' fiancee, and mother of his child, described him as her best friend and a good father whose young daughter still pretends to talk to him. (36 RT 7271-7281.)

Defense Case

Jessica Ortiz lived across the street from Martin Villigran, where Christina Duran's birthday party was held. (37 RT 7304-7305.) She went to the party for 20 minutes around midnight and saw about 40 people there. (37 RT 7304-7305.) She saw people doing drugs at the party, and appellant appeared to be really high, and in no condition to commit murder. (37 RT 7307, 7323.) Later that night she heard people yelling, and from her living room she saw two women yelling from a black 4Runner to people on the front porch of the house, suggesting that Duran may have left the party with another woman. (37 RT 7308-7309.)

Rodolpho Gonzalez was in the "high power" unit of the men's jail along with appellant on January 7th, 2005. (37 RT 7338-7339.) He heard over the public address system that he had a visit, and put on his jail uniform. (37 RT 7339-7341.) Once he was handcuffed and out of his

cell, he was told it was an attorney visit, but he told the deputy he did not have an attorney and did not want a visit. (37 RT 7343.) When he attempted to return to his cell, the deputy grabbed him around the neck and applied a choke hold. (37 RT 7344-7346.) Gonzalez struggled with the deputy who was punching him and trying to drag him toward the gate. (37 RT 7346-7347.) Other inmates yelled when they saw this, and the deputy sprayed him with mace. (37 RT 7349-7350.) He never spoke with appellant. (37 RT 7347-7348.)

Betty Katz was appellant's aunt (his mother's sister) and worked as a state parole agent for nine years. (37 RT 7366-7368.) She talked about appellant growing up without a father, and how his older brothers abused him. (37 RT 7373-7366.) Appellant didn't really "fit in" the Hispanic neighborhood as he was fair skinned, had blonde curly hair, and was obese. (37 RT 7383.) (37 RT 7383.) Appellant had three children, and also helped his girlfriend with her three children. (37 RT 7395.)

Appellant's younger cousin said they played video games together, and that appellant treated him well. (37 RT 7422-7426.)

An educator and gang investigator from the Youth Authority knew appellant, and believed he was sincere about getting an education

and getting out of gangs–even though he never did. (37 RT 7430-7433.)

A former neighbor, who was an LAPD officer, knew appellant growing up. (37 RT 7442.) He said appellant was "picked on" in the neighborhood and viewed as the chubby white kid. (37 RT 7443.) Years later, when some gang members wanted to use his truck to confront other gang members, appellant intervened and told them to leave those people alone. (37 RT 7446.)

Appellant's 14 year-old son told of the positive influence appellant had been in his life, trying to keep him away from gangs, and asked the jury to spare appellant's life. (37 RT 7458-7461.) Appellant's 17-year old stepson made similar statements and also asked that his life be spared. (37 RT 7471-7472.)

Appellant's aunt and godmother said that he was more like a son to her. (37 RT 7476-7477.) She stopped seeing him when he was around 15 years old, but still loves him. (37 RT 7376-7477.)

Appellant's mother and two sisters also testified regarding the hardships he suffered growing up. (38 RT 7493-7496, 7522-7524, 7541-7544.)

The jury returned a unanimous verdict recommending the death penalty. (38 RT 7768.)

Argument

I

The trial court prejudicially erred by discharging the lone holdout juror during guilt phase deliberations because the juror was properly performing his function but accepted the defense arguments that the informant witnesses had been coached by the police and were not believable.

Background

The guilt phase trial began with opening statements on September 26th, 2007. (11 RT 2303.) The trial lasted almost three weeks and the case was given to the jury for deliberations on October 15th, 2007. (22 RT 4543.)

On October 17th, 2007, after the jury had deliberated for almost a day and a half, two jurors (neither of whom was the foreperson) sent a note to the trial court. The note read:

> "We, Jurors #9 and 11 feel that the majority of the jury feels as though one juror (#5) has been swayed and is not capable of making a fair decision in any of the counts against McGhee. Juror #5 is using speculation as facts and has no rational explanation as to why he feels the way he does, other than saying *every* prosecution witness was coached and lying – yet the defense witnesses are all telling the truth and are believable.
>
> #9 I.D. #4710 #11 I.D. 8313" (15 CT 3753.)

The court then instructed the jurors to continue deliberating and

said the matter would be addressed the following morning. (23 RT 4565.)

The parties thereafter discussed the issue on the record. The prosecutor cited *People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, where the court found there was no error in discharging a deliberating juror who showed a bias against all police officers. (23 RT 4565-4566.) The trial court referred to *People v. Williams* (2001) 25 Cal.4th 441 and *People v. Cleveland* (2001) 25 Cal.4th 466, which discussed the proper procedure for handling a juror report that another juror may have been deliberating inappropriately. (23 RT 4566.) The court noted that Penal Code section 1089 permits the discharge of a juror following a showing that he or she is unable to perform the duty of a juror, and that "good cause" must be shown by a "demonstrable reality." (23 RT 4566.) The court noted the focus must be on the conduct of the jurors rather than the content of the deliberations. (23 RT 4566.) And the court found an inquiry was appropriate because the present situation involved the question of whether the jury was deliberating properly. (23 RT 4566.)

The court suggested having a hearing where it would question the reporting jurors, and noted this court's warning in *People v. Cleveland, supra,* that it was risky to permit trial counsel to question

deliberating jurors. (23 RT 4566.)

Defense counsel objected to the decision to question the jurors suggesting the note referred to juror disagreement rather than misconduct. (23 RT 4556.) Counsel emphasized the report that Juror No. 5 had been "swayed" showed only that he had been persuaded by the defense argument that the state's witnesses had been coached and were lying. (23 RT 4568-4569.) Counsel added that judicial intervention at this point would seriously jeopardize the deliberative process. (23 RT 4563.) Co-counsel, Franklin Peters, who was trial counsel in *Barnwell* noted that case was distinguishable since it involved a juror's failure to disclose during voir dire a bias against police, and the bias was shown during deliberations. (23 RT 4569-4570.) Here, there was no indication that Juror No. 5 had any bias. (23 RT 4570.) Defense counsel also indicated the note was not sent by the foreperson (who was in charge of the deliberations) but rather by two jurors who disagreed with Juror No. 5. (23 RT 4570.)

The trial court found the note was more "specific" than claiming a juror was "swayed" and said it involved an allegation that the allegedly offending juror was incapable of making a fair decision. (23 RT 4570-4571.) The court cited *People v. Cleveland, supra,* for examples of

misconduct such as jurors expressing a fixed conclusion at the beginning of deliberations, refusing to consider other points of view, refusing to speak to other jurors, and physical separation from the other jurors. (23 RT 4570-4571.) The trial court also recognized that the failure to deliberate well, or reliance on flawed logic do not constitute a refusal to deliberate, and do not justify a discharge. (23 RT 4571.)

The court then indicated it would conduct an inquiry and the prosecutor requested that the court focus on three areas: possible bias, speculation, and whether Juror No. 5 was discussing the evidence with the other jurors. (23 RT 4572.)

The inquiry

The court first spoke with Juror No. 9, one of the authors of the note. Juror No. 9 said Juror No. 5 didn't "believe people who have convictions." (23 RT 4573.) In response to the court's question, she said she believed Juror No. 5 had made up his mind before deliberations. (23 RT 4576.) She stressed that Juror No. 5 speculated by suggesting Monica Miranda (primary witness in the Margie Mendoza shooting) had something to gain by lying. (23 RT 4574.) The trial court asked two questions that had not been mentioned in the note: "Is it your view

that the juror is not fairly deliberating on the evidence; by that I mean he's not considering what others say about the evidence?," and "Do you sense a bias on his part?" (23 RT 4576.)

Juror No. 9 responded in the affirmative to both questions. (23 RT 4576.) When asked to explain why, she said it was because Juror No. 5 believed all of the witnesses, including Monica Miranda, were coached by the detectives. (23 RT 4576.)

Juror No. 11 (the other author of the note) was next. Interestingly, she had attempted to get released from the jury for job-related reasons eight days earlier. (19 RT 3736.) She informed the court that Juror No. 5 "doesn't believe people who have convictions." (23 RT 4578.) "He also doesn't believe the cops *in this case*." (23 RT 4580, emphasis added.) She couldn't say, in response to the court's questions, that Juror No. 5 had made up his mind before deliberations. (23 RT 4578.) When the court asked whether Juror No. 5 said anything suggesting bias towards the police or the prosecution, Juror No. 11 repeated that he didn't like the cops "in this case." (23 RT 4583.) She also mentioned the idea that Juror No. 5 believed the others were ganging up on him, when he said, "Everyone is kind of like - I don't want to say ganging up. . . everyone is like I don't mean to gang up on

you." (23 RT 4585.)

The trial court next interviewed the foreperson, Juror No. 4, who said Juror No. 5 seemed prejudiced in favor of gangs and against police. (23 RT 4590-4591.) In response to the court's question about whether the juror was refusing to deliberate, the foreperson said "In my view I think he's not shut down like you described. He's not not talking. But he's not making sense either." (23 RT. 4592-4593.)

Juror No. 10 was next. When the court asked if Juror No. 5 was properly deliberating or "engaged in wild speculation," the juror responded, "He speculates about everything." (23 RT 4594.) The juror volunteered "When he would not consider anything we say, I asked him 'so he is innocent of all counts?' and he said 'yes'." (23 RT 4596.) When the court asked if Juror No. 5 was prejudiced or biased in some way, he responded "Yes, we made a joke about that . . . I'm sure you got paid by McGhee's family." (RT 23 4596.) When the court asked if he was prejudiced against the police, the juror responded "I think so. I think something happened to him or maybe his family and maybe he had an agenda." (23 RT 4596-4597.) Juror No. 10 then added, "He just cannot accept their testimony (referring to witnesses with prior convictions or pending cases) because they all have something to gain," and then he

added "which is true in a way." (23 RT 4597-4598.)

The court next interviewed Juror No. 1. When the court asked whether any juror was "trying to speculate improperly," he responded "No, I don't think so." And when asked if everyone was properly discussing the law and evidence, Juror No. 1 said "We're trying to stick with the instructions. . . and to the evidence." (23 RT 4601.)

Juror No. 2 was next. When the court asked if anyone had a hidden agenda, or bias, or prejudice, he responded that Juror No. 5 just seemed "leery of testimony from all witnesses, period." (23 RT 4603-4604.) He continued "I wouldn't necessarily characterize it as a bias." (23 RT 4604.) When the court then asked whether Juror No. 5 demonstrated an "anti-police bias," he responded "Not necessarily. . . just a disbelief of the witnesses and what they saw." (23 RT 4605.)

The court next questioned Juror No. 6 and asked whether anyone demonstrated a bias against police officers. (23 RT 4607.) The juror responded, "I think there is no bias," and "Everyone is open-minded." (23 RT 4607-4608.)

After interviewing this juror, the prosecutor indicated there was a four-three majority of those believing Juror No. 5 was biased, and defense counsel responded this "majority" may have its own agenda of

trying to remove the nonconforming juror. (23 RT 4608.) The defense asked the court to end the inquiry and allow the jurors to resume deliberations. (23 RT 4608.) Counsel believed the fact that there was an inquiry sent a message to the jury. (23 RT 4609.)

Counsel noted that Juror No. 9 said Juror No. 5 had issues with witnesses Monica Miranda and John Perez, but these claims were based on evidence that the defense had presented, and the juror was entitled to reject the credibility of those witnesses. (23 RT 4610.) Counsel also referred to the problems with "Pirate" Recio's testimony. (23 RT 4610-4611.)

The prosecutor responded that some of the jurors concluded Juror No. 5 had an anti-police agenda, and there was no evidence that witnesses were coached. (23 RT 4611-4612.) Defense counsel replied that the juror's conclusion was reasonable if there was evidence of a single instance of coaching. (23 RT 4615.) Counsel concluded that the interviewed jurors all acknowledged that Juror No. 5 had his own opinions that were based on the evidence and it could not be said that he wasn't deliberating. (23 RT 4615-4616.)

The court then said it would interview the remaining jurors. (23 RT 4616-4617.)

Juror No. 3 was then brought in, and the trial court asked whether Juror No. 5 had shown an agenda or bias. (23 RT 4618.) The juror responded, "I can't tell if he has an agenda or not. . .what he's saying doesn't seem very rational or logical. . . a lot of what he says is – stems from the initial belief that maybe someone was tampered with or coached. And a lot of decisions are just based off that initial assumption." (23 RT 4618, 4620.) Juror No. 3 later claimed Juror No. 5 was biased against police and the prosecution due to his belief that police coached the witnesses. (23 RT 4623.) And Juror No. 3 didn't think Juror No. 5 responded properly after the others confronted him with "arguments that fit logically together." (23 RT 4626.) Juror No. 3 then noted that Juror No. 5 had been arrested when he was younger and this experience might have influenced his outlook. (23 RT 4624.)

Juror No. 7 was questioned next and said, "There is definitely a difference of opinions. Other than that, I think it's healthy discussions in there." (23 RT 4626.) When asked about an agenda, Juror No. 7 said "I'm not too sure about that. . .what I see is a little narrowness of thinking." (23 RT 4627.) The juror indicated in response to the court's anti-police bias questions that there may be an issue because Juror No. 5 can't reasonably explain why he feels the way he does. (23 RT 4627.)

Juror No. 8 next described Juror No. 5 as "hardheaded" but noted "He is starting to talk a little bit more now." (23 RT 4630.) "Yesterday he started to, I guess, open up a little. Because they were kind of like jumping on him. So it looked like he was getting a little bit more hardheaded, you know, like everyone was against him. . ." (23 RT 4630.) Number 8 said that's "how he thinks" and agreed with the court's suggestion that Juror No. 5 believed all of the witnesses had been coached and didn't believe them for that reason. (23 RT 4629, 4631.)

Juror No. 12 was next and thought Juror No. 5's problem with the police was a product of his earlier experience, and he agreed the juror believed the state's witnesses had been coached. (23 RT 4633-4634.)

The court then indicated that it was leaning towards dismissing Juror No. 5, even though he had not yet been questioned. (23 RT 4634.)

Juror No. 5 was then brought in and said that he was deliberating fairly, never said he wouldn't believe any prosecution witness because they were all coached, and did not harbor residual animosity for his arrest as a 13 year-old. (23 RT 4635-4636.) He continued, "I feel a wave from one or two people. And I feel like the wave is carrying over onto the others. And it's almost like, you know–

it's like they're trying to gang up on me. . .not really seeing me as logical – to me, they're not being logical. And then there's been a few times when another juror, you know, has backed up what I had to say in a more logical way." (23 RT 4638.)

The court then took a 15 minute break before counsel commented on the situation. (23 RT 4641.) The prosecutor thereafter argued Juror No. 5 should be dismissed because he believed all of the state's witnesses were coached or lying, he ignored the other jurors' questions, he was biased against the police and failed to deliberate. (23 RT 4642-4644.)

Defense counsel responded that Juror No. 5 never said all of the state's witnesses had been coached, and he had a rational basis for disbelieving certain witnesses such as Sanchez, Rivas, Recio and Gonzalez based upon the evidence the defense presented relating to those witnesses. (23 RT 4644-4645.) One juror acknowledged Juror No. 5 had begun to open up more, and he noted he felt a "wave" of pressure that started with Juror Nos. 9 and 11. (23 RT 4645.) Counsel repeated that there was a rational basis for believing that some of the witnesses had been coached, and referred to John Perez who claimed to have seen quite a bit but in reality could not have seen anything from his window.

(23 RT 4646.) Defense counsel argued that removing Juror No. 5 would constitute a fundamental miscarriage of justice, and would deprive appellant of his fundamental rights to due process and a fair trial. (23 RT 4646.)

The court's ruling

The trial court ruled that Juror No. 5 was not giving the prosecution a fair trial and removed him for juror misconduct. (23 RT 4647.) The court found it was improper to suggest the witnesses with prior convictions shouldn't be believed, and the juror's other statements were irrational. (23 RT 4647-4648.) The trial court acknowledged that faulty logic does not amount to a failure to deliberate, but the evidence in this case demonstrated a strong anti-prosecution bias, which was worse than mere faulty logic. (23 RT 4648.) The judge recognized that he put Juror No. 5 in a "difficult position" but found he lied when he claimed he didn't say he believed appellant was innocent on all counts. (23 RT 4648-4649.) The court found both that appellant demonstrated an anti-police bias, and that he failed to deliberate. (23 RT 4649.)

Defense counsel immediately requested a mistrial, and added that they had spent over a year reading evidence demonstrating misconduct by the police in interviewing witnesses before recording

them – an unfair practice that had become the crux of the defense case, and that dismissing a juror who adopted the defense position required a mistrial. (23 RT 4650.)

After excusing Juror No. 5, the court randomly selected alternate Juror No. 2. (23 RT 4651-4652.) The new jury then deliberated for four days before convicting appellant of three counts of murder involving victims Ronald Martin, Ryan Gonzalez and Margie Mendoza, and four counts of attempted murder involving victims Thomas Baker, Carlos Langarica, Duane Natividad and Erica Rhee. (15 CT 3828-3834.) The jury found appellant was not guilty of the attempted murders of Juan Cardiel and Pedro Sanchez. (15 CT 3826-3827.) And the jury found the multiple-murder special circumstance to be true. (15 CT 3835.)

The trial court later acknowledged the juror discharge might have been reversible error: "I don't think there is any way for the prosecution to protect the court if the court erred in throwing the juror off." (24 RT 4736.) The court made the comment after defense counsel noted he had been contacted by supervisors at the District Attorney's office who suggested a deal might be worked out that would include a life term for appellant if he waived his right to appeal the convictions. (24 RT 4735-4736, 4742-4743.)

Applicable Law

The Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, guarantees an accused the right to trial by an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155; *Turner v. Louisiana* (1965) 379 U.S. 466.) The Sixth Amendment also requires a unanimous verdict. (*Andres v. United States* (1948) 333 U.S. 740, 748. See also *Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404 (five justices concurred in the view that the Sixth Amendment requires juror unanimity); and *United States v. Gomez-Lupe* (9th Cir. 2000) 207 F.3d 623, 630.) The California Constitution additionally requires that a jury verdict in a criminal trial be unanimous. (Cal. Const., Art. I, 16; *People v. Feagley* (1975) 14 Cal.3d 338, 360, fn. 10 [121 Cal. Rptr. 509].) Moreover, a criminal defendant has a valued right to have his trial completed by the originally chosen jury. (*Crist v. Bretz* (1978) 437 U.S. 28, 35, citing *Wade v. Hunter* (1949) 336 U.S. 684.)

Penal Code section 1089 provides that a trial court may discharge a juror upon a showing of good cause that the juror is unable to perform his or her duty. However, the wrongful discharge of a juror may also violate a criminal defendant's constitutional rights to a unanimous

verdict and an impartial jury. (*Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 945, quoting *United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, and *Williams v. Florida* (1970) 399 U.S. 78, 86.)

In *People v. Cleveland, supra,* the court construed section 1089 in the context of juror reports that the lone holdout juror for acquittal refused to deliberate. The court determined in that case that the trial court abused its discretion in excusing the juror because the record did not establish as a demonstrable reality that the targeted juror had failed or refused to deliberate. (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.) The court found the dismissed juror simply viewed the evidence differently from the other jurors. (*Id.* at p. 486.) Moreover, the court emphasized that a refusal to deliberate consists of a juror's unwillingness to discuss the case with the others. (*Id.* at p. 485.) If a juror does not deliberate well or relies upon faulty logic or analysis, it is not a refusal to deliberate and is not a ground for discharge. (*Ibid.*)

While *Cleveland* involved an alleged refusal to deliberate, the court's ruling also addressed discharge in the context of juror bias, incompetence or other misconduct. (*Id.* at p. 478 quoting *People v. Keenan* (1988) 46 Cal.3d 478, 532.) The discharge in the present case was based on both juror bias and the failure to deliberate.

Cases analyzing the propriety of the discharge of a juror during deliberations

In *People v. Barnwell* (2007) 41 Cal.4th 1038, this court found the trial court did not err in discharging a juror during guilt phase deliberations in a capital case because the juror's disqualifying bias was established to a demonstrable reality. (*Id.* at p. 1053.) In *Barnwell*, the jurors had sent the trial court three separate notes describing the problem that one juror was refusing to deliberate based on his bias against police officers. (*Id.* at p. 1048.) The final note said that while the offending juror indicated he was willing to deliberate "I will never change my opinion." (*Ibid.*)

The court then conducted a hearing where it took testimony from all 12 of the jurors, nine testified that R.D. had expressed or exhibited a general bias against law enforcement officers, and the testimony of the other two jurors was inconclusive. (*Id.* at p. 1049.) The offending juror testified that it was not true that he disbelieved all police officers simply because they were police officers. (*Ibid.*) But several of the other jurors contradicted R.D.'s claims. The trial court impliedly ruled that R.D.'s testimony was not credible, and the testimony of the nine jurors who stated that R.D. expressed or exhibited a bias was credible.

(*Ibid.*) "The totality of the evidence here supports the trial court's evident conclusion that, more than simply disbelieving the testimony as given by these particular witnesses, R.D. judged their testimony by a different standard because the witnesses were police officers." (*Id.* at p. 1053.)

In *People v. Wilson* (2008) 44 Cal.4th 758, this court reversed a death judgment following the improper discharge of the lone holdout juror during the penalty phase. (*Id.* at p. 841.)

In *Wilson*, the defendant was black, and the trial court excused the only black juror, who originally voted for death during an early polling of the jury, but later changed his mind after thinking about the propriety of the ultimate penalty on a person raised in a dysfunctional family. (*Id.* at p. 814.) The allegedly offending juror mentioned race, and suggested that because of his own life experiences, he might be more persuaded by the defense argument in mitigation. (*Ibid.*) Following an investigation and inquiry of the jurors, the trial court excused the black juror for several reasons including the fact that his view of the penalty phase case was formed partly by "race-based assumptions," and during voir dire, he "concealed his racial biases and fundamental belief in racial stereotypes." (*Id.* at p. 819.) This court

found the record did not show that the juror concealed anything as he had not been asked during voir dire about family dynamics in black families, especially with regard to young men who grew up without fathers to serve as role models. (*Id.* at p. 823.) And the record did not "demonstrate Juror No. 5's personal evaluation of the evidence was the product of improper racial considerations any more than the non-Black jurors' rejection of his evaluation was influenced by their personal racial views regarding the dynamics of an African-American family." (*Ibid.*) The record did not establish to a demonstrable reality that the allegedly offending juror relied on facts not in evidence, concealed a racial bias, prejudged the appropriate penalty or otherwise was unable to perform his function as a juror. (*Id.* at pp. 824, 832, 840.) Instead, the juror was someone who, because of his own life experiences, viewed the evidence differently. (*Id.* at pp. 824, 832.)

Finally, in *People v. Allen and Johnson* (2011) 53 Cal.4th 60, this court reversed the guilt and penalty phase judgments after finding the trial court erred by discharging a juror for prejudging a case when the record showed that he was deliberating but simply disagreed with the others. (*Id.* at p. 64.) In that case, the jurors (including the foreperson) reported to the court their belief that Juror No. 11 had prejudged the

case. (*Id.* at p. 65.) Following a lengthy investigation of all jurors, the court found that Juror No. 11 had prejudged the case and relied on evidence not presented at trial. (*Ibid.*)

Regarding the claim of prejudgment, the record did show that at some point Juror No. 11 said words to the effect that, "When the prosecution rested, she didn't have a case," and the trial court interpreted that to mean the juror had prejudged the case by deciding to vote not guilty at the close of the state's case-in-chief. (*Id.* at p. 72.) However, the record showed the comment was subject to interpretation and was not an "unadorned statement" that he had prejudged the case. (*Id.* at p. 73.) The record did not show that Juror No. 11 failed to listen to all of the evidence, began deliberations with a closed mind, or refused to deliberate. (*Ibid.*) A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions. (*Ibid.*) That fact is reflective of human nature and the foreperson often takes a vote "as deliberations begin to acquire an early sense of how jurors are leaning." (*Id.* at p. 75.) The trial court erred by finding the juror's statement showed that he prejudged the case. (*Id.* at p. 76.)

The trial court in *Allen and Johnson* also found Juror No. 11 relied on facts not in evidence by stating that a claimed eyewitness did

not really see the shootings because his time card showed he was at work at the time of the shooting, and it was unlikely that a Hispanic person would clock in for an absent employee. (*Id.* at pp. 64, 76.) The question of whether the witness was actually present at the shooting went to the heart of his credibility and was key to the case. (*Id.* at p. 77.) Juror No. 11's opinion about the reliability of Hispanics in the workplace did not involve specialized information from an outside source. (*Id.* at p. 78.) "It was an application of his life experience, in the specific context of time cards and the workplace, that led him to conclude Connor was not telling the truth about the shooting." (*Ibid.*) The time card remark did not introduce unproven facts into the case, and the court erred by finding otherwise. (*Ibid.*)

Legal Analysis

The evidence showed Juror No. 5 was a qualified juror who was not biased and deliberated based on the evidence presented.

The present record does not support the trial court's finding that Juror No. 5 had a disqualifying bias, or that he failed to deliberate. (23 RT 4679.) To the contrary, the evidence showed that he participated in the deliberations and accepted the defense claim that the witnesses were largely people with criminal cases pending, and agreed to testify

against appellant only in response to police promises that their testimony could make their own problems vanish, which is precisely what happened. Moreover, the evidence did not establish an anti-police bias, but rather showed that Juror No. 5 believed all of the witnesses who admitted that they had been coached or prodded by Detective Teague and the others.[4]

The state's primary witnesses in the Cloudy Martin case were former Toonerville members Gabriel Rivas and Mark Gonzalez. Rivas testified that he had been coached during the pre-interview with police. (13 RT 2665.) Gonzalez was a violent drug dealer who got immunity in his own murder charge in exchange for his testimony against appellant. (16 RT 1330-1331.)

The primary witnesses in the Margie Mendoza incident were Monica Miranda and Duane Natividad, who were both high on methamphetamine at the time of the killing. (16 RT 3436; 18 RT 3639.) Miranda was in a treatment program and was high when she testified previously in the case. (18 RT 3640.) She admitted lying earlier to the police about appellant's involvement. (19 RT 3777, 3782-3784.) And

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[4] None of the officers involved were available for cross-examination. See arguments II and III, *infra*.

Natividad testified that the police repeatedly pointed to appellant's photo when they showed him the lineup, said he did it, and encouraged Natividad to identify him. (16 RT 3436-3438, 3449.)

The key witnesses in the police ambush case were John Perez and Mark Gonzalez again. Perez implicated appellant only after his own arrest, and no charges were ever filed against him. (14 RT 2977-2979.) Mark Gonzalez, the former Toonerville member had a bad methamphetamine problem, was high at the time of the shooting, and he only implicated appellant after his own domestic violence arrest in 2001. (16 RT 3309, 3314-3315, 3354.)

Wilfred Recio was the primary witness in the Ryan Gonzalez killing. He had a bad heroin and methamphetamine problem, and never mentioned appellant's involvement until he was facing multiple life terms or a death sentence for a double murder he was thought to have committed. (14 RT 2819-2830.) Charges were never filed against Recio in that case after he implicated appellant, and Teague went even further and offered Recio $5,000 to provide information against appellant. (14 RT 2868.)

In the Pedro Sanchez and Juan Cardiel shooting, both were gang members who were high on acid at the time, and acknowledged that

Teague repeatedly used appellant's name when showing them the photos, and during interviews. (12 RT 2417, 2451, 2453, 2462, 2503, 2569.)

So there was overwhelming evidence in the case showing that Detective Teague and the others broke all of the rules set up to produce a reliable investigation and did tremendous favors for the gang member witnesses (most of whom were high at the time of the various incidents and facing serious charges of their own). Most troubling of all, Detective Teague was never available to be cross-examined about his interrogation techniques or the offers he made in exchange for testimony. (See argument IV, *infra*.)

The defense theory of the case focused on the lack of reliability of the state's case due to the coaching of the key witnesses. Juror No. 5 apparently accepted the defense arguments, and was standing in the way of the convictions sought by the other jurors.

The court asked the others about whether Juror No. 5 was biased against the police in general and whether No. 5 was deliberating in this case. The jurors largely confirmed that No. 5 was deliberating and not biased against all police.

Juror No. 11, one of the authors of the note, refused to say No. 5

had made up his mind before deliberations, and emphasized that his bias was related to the police officers "in this case" because they have "coached the witnesses." (23 RT 4580, 4582.) Juror No. 4, the foreperson agreed No. 5 had not ". . .shut down. He's not not talking." (23 RT 4592-4593.)

Juror No. 1 reported that there was no improper speculation, and that everyone was discussing the evidence and the instructions. (23 RT 4601.)

Juror No. 2 said No. 5 was "leery" of the state's witnesses but was not biased. (23 RT 4604.) It wasn't that he had a police bias, ". . .it's more just a disbelief of the witnesses." (23 RT 4605.)

Juror No. 6 said there was no bias and "Everyone is open-minded." (23 RT 4608.)

Juror No. 3 said No. 5's strong attitude against the state's case was a product of his belief that the witnesses were coached by the police. (23 RT 4620, 4623.)

Juror No. 7 said there were difference of opinions, and No. 5 seemed to take a narrow view, but said they were having "healthy discussions." (23 RT 4626.)

Juror No. 8 said that No. 5 started out as "hard-headed," but then

opened up and was "talking more." (23 RT 4630.) He believed the witnesses had been coached and he didn't believe them for that reason. (23 RT 4629, 4631.)

Juror No. 12 said No. 5 had an "anti-police bias" because of his belief that all of the witnesses had been coached. (23 RT. 4632-4633.)

So the record shows that there was a fair amount of frustration during deliberations, certainly by a few of the jurors, about the fact that Juror No. 5 had been persuaded by the defense theory of the case. They suggested that he was hard-headed and took a narrow viewpoint, but almost all of the jurors found that he was deliberating – he hadn't shut down. The fact that while deliberating, he maintained a strong belief in his position didn't make him any different than many of the other jurors, who were likely fixed on a guilty verdict.

And while most of the jurors agreed that Juror No. 5 was offended by the actions of the officers "in this case," there was no support for the conclusion that he harbored a bias against police in general. The fact that he had been arrested for a minor offense as a 13 year-old did not support the claim that he would never believe the police. The record made clear that he didn't trust the police officers in this case, because of their unambiguous actions in cheating to

strengthen the state's case. The witnesses acknowledged they were coached by Detective Teague and the others, that he told them what to say in the pre-interview, and he told them which photo to select from the photo lineups. Some witnesses only came forward and provided information against appellant when they knew that doing so would allow them to avoid murder and other criminal charges they were facing, and free them to return to the street where they could get the drugs they so desperately needed. They were almost all high at the time of the events they described, some on methamphetamine, others on acid, one on heroin, and their earlier statements suggested that they didn't see anything.

So these witnesses said they had been coached by Teague and the others; defense counsel said the witnesses should not be believed because they had been coached by Teague and the others; Juror No. 5 said he didn't believe the witnesses because they had been coached by Teague and the others; and yet the trial court found that the juror was biased against the police in general.

The record in this case does not show by a demonstrable reality (or any other standard) that Juror No. 5 was unable to perform his function as a juror. To the contrary, he performed nobly and was a

credit to our justice system. The improper excusal of this juror requires reversal of both the guilt and penalty phase judgments. (See *People v. Allen and Johnson, supra*, 53 Cal.4th at p. 79.)

II

The investigating detectives committed outrageous government conduct by coaching the prosecution's key witnesses, essentially conditioning the benefits the witnesses would receive (dismissal of pending charges) on specific testimony implicating appellant in the charged murder.

Introduction

The investigating detectives in this case, primarily Detective Teague, engaged in a pattern of obstructing justice by conducting pre-interviews with witnesses where they would instruct the gang member witnesses (looking for deals) on the need to implicate appellant in the subsequent recorded interviews, and what they needed to say. The witnesses didn't know each other, as they were members of different gangs, but there were significant similarities in their claims about how they were coached by the police.

Background

Gabriel Rivas was a key prosecution witness regarding the Cloudy Martin killing. He invoked his Fifth Amendment privilege against self-incrimination at trial, but was told the privilege did not

apply and was ordered to testify. (13 RT 2619, 2624-2625.)

Rivas was a former Toonerville member, who testified that he had no direct knowledge that appellant was involved in the murder of Cloudy Martin. (13 RT 2647-2649.)

That killing occurred on October 14th, 1997. In March of 2003, Rivas was a serious drug addict, abusing rock cocaine, crystal methamphetamine and alcohol and would have said anything to the police in an effort to get back on the street to obtain drugs. (13 RT 2660-2661.) At that time, he was in custody with a pending probation violation for an assault charge that would have sent him to prison, but the police arranged for his release from custody. (13 RT 2658-2659.) He was arrested again for methamphetamine possession on April 26th, 2003, again facing prison, but was released thanks to Detective Teague who wanted Rivas's help in implicating appellant. (13 RT 2659-2668.) Rivas thereafter failed to appear for his court appearances and was rearrested but then released, thanks to Detective Teague and Deputy District Attorney Anthony Manzella, who were investigating the Martin murder. (13 RT 2662.) Manzella later testified at trial that the state was holding Rivas's probation violations over his head as a way to pressure him into testifying against appellant. (26 RT 5132.) Detective

Teague told Rivas directly that if he provided information about appellant, the state would drop his pending charges. (13 RT 2662.)

Teague conducted a two hour "interview" with Rivas, that was not tape-recorded. (13 RT 2662.) Rivas believed the purpose of the pre-interview was to provide him with details that he would later repeat in a formal interview. (13 RT 2664-2665.) Rivas believed he was being "coached" by Detective Teague, who told Rivas that he wanted appellant off the streets. (13 RT 2668-2669.) Teague wanted this evidence badly, and Rivas testified that his latest methamphetamine arrest was a pretext arranged by the police to apply pressure against him. (13 RT 2666.)

During the pre-interview, Teague told Rivas that appellant murdered Cloudy Martin, Martin was shot many times, and that there were three shooters. (13 RT 2662-2663.) Rivas testified that Detectives Teague and Neal provided these facts so that he could repeat them in the formal interview. (13 RT 2628-2630.)

Rivas was thereafter interviewed in a conversation that was secretly tape-recorded by Detective Teague, where he repeated many of the details Teague had given him during the pre-interview. (13 RT 2656-2657.) Rivas testified that he didn't remember implicating

appellant, and if he did, he only provided rumors he had heard on the street. (13 RT 2655-2656.)

The trial court then allowed the prosecutor to play the secretly recorded interview for the jury. (13 RT 2686.) Detective Neal was also present for the recorded interview. (13 RT 2686.) Neal testified at trial that he had a disability and was taking medication that impaired his memory, but he did recall that when Teague emerged from the pre-interview, he told Neal that appellant informed Rivas he had shot Cloudy Martin, but before the shooting Martin begged for mercy, and appellant told him to "die like a man, not like a bitch." (13 RT 2692, 2698.)

Mark "Pirate" Recio was a former Toonerville member, and a key prosecution witness regarding the Ryan "Huero" Gonzalez murder. (13 RT 2761-2762.) He had a long criminal record, was in prison for another offense, and was testifying in exchange for a reduced term. (13 RT 2460; 14 RT 2807, 2842.) He provided background information regarding the Toonerville gang, but also testified about three separate times that appellant admitted to shooting "Huero" Gonzalez of the rival Rascals gang, mostly because appellant was also called "Huero" and there should only be one. (13 RT 2791- 2792, 2801.)

Recio sold, and was addicted to crystal methamphetamine, and was responsible for many murders although he could not recall how many. (13 RT 2819-2821.)

Recio's parole officer had told him that he was a suspect in two murder cases, and he was then approached and interviewed by Detective Teague. (14 RT 2827-2828.) He understood that he would be sentenced to life in prison or death if convicted of the two murder charges he was facing, and he had "no love" for appellant anyway. (14 RT 2826, 2829-2830.)

Before being approached by Detective Teague, he had never mentioned appellant's involvement in the killing. (14 RT 2829.) After he implicated appellant, the prosecutor provided him with food, housing, clothing and dental care. (14 RT 2842.) And the pending double murders were never mentioned again. (14 RT 2851.) Teague also told Recio there was $5,000 in it for him if he implicated appellant. (14 RT 2869.)

Recio first met with Teague on October 21st, 2002, for a 90 minute interview that was not recorded. (14 RT 2845-2846.) He later met again with Detectives Teague and King where the officers took notes. (14 RT 2849.) Recio acknowledged that he provided incorrect

information while testifying at the preliminary hearing, and during his two interviews with Teague on the issue of when appellant mentioned the Huero killing. (14 RT 2860-2861.)

Duane Natividad was a key witness for the prosecution in the Margie Mendoza killing. (16 RT 3413.) He was a member of the Pinoy Real gang, and was in the car when Mendoza was killed. (16 RT 3417.) They had a son together and he loved Mendoza. (16 RT 3418, 3420.) He didn't see the shooter and did not remember much about the incident because he was high on methamphetamine at the time. (16 RT 3421, 3436.) He told police that he didn't see the shooter, but the police showed him a photo lineup, and police repeatedly pointed to appellant's photo suggesting that he was the shooter. (16 RT 3438-3439, 3449.) He said in the February 1st, 2002 interview, that the police pointed out appellant's photo, and kept saying appellant was the shooter, and Natividad merely acknowledged that "it could have been." (16 RT 3451-3454.)

Juan Rodarte was the primary witness in the uncharged killing of Christina Duran. He was Duran's boyfriend (although he was married to another woman), and he loved her. (34 RT 6886.) He was ingesting drugs with Duran the night of the killing and passed out on a couch at

the party they were attending. (34 RT 6894-6895.) He found out the next day that she had been killed at the party, but he didn't know who killed her. (34 RT 6898, 6901.) He was questioned by police months after the killing, at a time when he was facing criminal charges. (34 RT 6901, 6905.) Detective Teague insisted that he wanted Rodarte to implicate appellant in the killing, and testify at trial. (34 RT 6905-6906.) Teague said he didn't care if Rodarte lied by implicating appellant. (34 RT 6906.)

Pedro Sanchez was a member of the Rascals gang, and was high on LSD and beer when he was shot on October 10th, 1997. (12 RT 2456.) He never saw the man who shot him and could not make an identification. (12 RT 2449, 2466.) Police interviewed him several times, always mentioned appellant's name, and showed him appellant's picture. (12 RT 2462.) But he couldn't identify anyone. (12 RT 2462.)

A defense investigator testified at an in camera hearing about two other witnesses who were prepared to testify about similar police misconduct in the present case. (2 RT 53.) The investigator, Royce, described an interview he had with Minor Mejia, a prison inmate. (2 RT 53.) Police officers wanted Mejia to testify against appellant regarding the Margie Mendoza incident, and before interviewing Mejia

they provided him with police reports and the murder books so he would know the facts during the interview. (2 RT 53.)

And there was another inmate, Joseph Agasagwa, who was serving a life term and promised that he would be released from prison if he implicated appellant. (2 RT 55.) The police provided reports to Mr. Agasagwa and met with him several times. (2 RT 55.) Defense counsel stressed that this was consistent with the pattern of police misconduct by the officers investigating this case. (2 RT 55-56.) Investigator Royce mentioned Detective Teague and other detectives who had been involved in similar instances of misconduct in other cases over the years. (2 RT 71.)

The trial court granted the defense a continuance to further investigate the matter. (2 RT 72.) Neither Mejia nor Agasagwa were called by the prosecution in appellant's case.

(a)

The police misconduct in repeatedly manufacturing evidence by coaching the informants on what to say during subsequent recorded interviews and telling witnesses to select appellant's photo from the lineup constitutes outrageous government conduct in violation of appellant's right to due process.

Applicable Law

In *Rochin v. California* (1952) 342 U.S. 165, the court found there

was a prejudicial substantive due process violation based on police misconduct, and found that due process precluded convictions that are "brought about by methods that offend a sense of justice." (*Id.* at p. 173.)

Citing examples of repugnant police conduct that violated due process, the court noted the use of involuntary confessions that are inherently unreliable even though the facts included may be independently established as true, and the limited conduct in that case where police had a suspect's stomach pumped when seeking a prosecution for illegal drug use. (*Id.* at p. 173.) The court found that these practices by police "offend the community's sense of fair play and decency." (*Ibid.*) "This is conduct that shocks the conscience." (*Id.* at p. 172.)

In *Hampton v. United States* (1976) 426 U.S. 484, the court rejected the claim of outrageous government conduct where a government informant assisted the defendant in two heroin sales because in each case the jury determined the defendant was predisposed to commit the crime. (*Id.* at pp. 489-490.)

The Ninth Circuit Court of Appeals has shown that outrageous government conduct is difficult to establish, and the police conduct

must be repugnant to the American system of justice. (*United States v. Smith* (9th Cir. 1991) 924 F.2d 889, 897.) In *United States v. Simpson* (9th Cir. 1987) 813 F.2d 1462, 1468, the court distinguished between the government's passive tolerance of a private informant's questionable conduct (which did not establish outrageous government conduct) and the active misconduct of government agents. Substantive due process under the Fourteenth Amendment has "historically. . .been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 850.)

The California courts have also recognized the concept of outrageous police conduct. In 1978, this court stated, in dicta, "Sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of law." (*People v. McIntire* (1979) 23 Cal.3d 742, 748, fn. 1.) The court revisited the issue in *People v. Smith* (2003) 31 Cal.4th 1207, where the violation was alleged in the context of an undercover sting operation, but the court noted that defense was "superfluous" in entrapment cases. (*Id.* at. p. 1225.)

There have been three cases where the appellate court has either

directed or affirmed the dismissal of criminal proceedings based on outrageous government conduct. (See *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422; and *People v. Moore* (1976) 57 Cal.App.31 437.) However, each of these cases referred to the state's interference with the defendant's Sixth Amendment right to counsel, rather than to a substantive due process claim.

Legal Analysis

By manufacturing incriminating testimony in the manner the investigating detectives did in the present case, the state violated appellant's fundamental rights, which are deeply rooted in our nation's history and tradition, and specifically restricted appellant's ability to confront his accusers as guaranteed by the Sixth Amendment.

This was not a case, like some of those noted, where it was alleged that the police became actively involved in sting operations and presented suspects with an opportunity to get involved with a drug sale or some other crime.

This was a case where the police detectives, anxious to prosecute appellant who had been on their most wanted list, and was sought by hundreds of officers from several local and federal law enforcement

agencies, committed crimes themselves by obstructing justice, tampering with witnesses, and basically planting evidence.

The state proved its case against appellant largely through the use of informants, following their interviews with Detective Teague and the informants were all unreliable – even when compared to the normal informant who typically has an incentive to lie in order to receive a benefit of some kind.

Here, all of the relevant witnesses were gang members. They were almost all high on drugs at the time of the incidents they described. They were promised and received significant benefits from the police. They all said at some time that they did not actually see what happened. And they were all interviewed in a way that allowed the detectives to provide them with information they would later describe in a recorded interview or under oath.

There were two witnesses the detectives sought who were serving life sentences and were offered release in exchange for incriminating testimony against appellant. Minor Mejia was one of them. The detective visited him in the prison, provided him "with police reports, murder books" to let him study the information before being interviewed. (2 RT 53.) Police were investigating the Margie Mendoza

murder and suggested that he would "basically walk out of prison" if "he testified against Mr. McGhee." (2 RT 55.)

The second inmate was Joseph Agasagwa who had "innumerable meetings with the police in efforts to try to give evidence against Mr. McGhee, incriminating evidence." (2 RT 55.) Mr. Agasagwa was provided with various police reports by detectives investigating this case. (2 RT 55.)

Neither of these witnesses testified after this process was disclosed to the trial court by defense counsel and a defense investigator.

Gabriel Rivas was a key prosecution witness in the Cloudy Martin incident, and sought to invoke his Fifth Amendment privilege, but was ordered to testify. (13 RT 2619, 2624-2625.) He was a former Toonerville member who testified that he had no knowledge of the incident, and so the prosecution played his secretly recorded interview with Detective Teague to the jury. (13 2686.) The interview took place when Rivas had a major rock cocaine and crystal methamphetamine addiction, the police had arrested him for a probation violation, and he would have said anything to get back on the street to obtain drugs. (13 RT 2660-2661.) Detective Teague conducted a two hour pre-interview

with Rivas that was unrecorded and Teague took no notes. (13 RT 2662.) The prosecutor on the case at the time acknowledged that he was holding Rivas' probation violations over his head as a way to pressure him to implicate appellant. (26 RT 5122.) During the pre-interview, Rivas testified he was "coached" by Teague and provided with details he wanted Rivas to repeat during the later recorded interview – details including the number of shots fired into Cloudy Martin, and the fact that there were three shooters, including appellant. (13 RT 2662-2663) Teague told Detective Neal that during the pre-interview, Rivas said appellant told him that Martin pleaded for mercy but appellant told him to "die like a man, not like a bitch." (13 RT 2692-2698.) This was a highly inflammatory statement that may well have been made up by Teague (there was no record or recording of the statement) and it should never been presented to the jury.

Mark Recio was a key witness in the Ryan "Huero" Gonzalez killing. Recio was a former Toonerville member and methamphetamine addict who was a suspect in two murders, but those charges were never pursued after he provided Teague with information in a recorded interview that followed a 90 minute pre-interview. (14 RT 2845-2846,

2851.) Recio had never mentioned this to anyone previously but said in the interview that appellant had confessed the killing of Huero on three occasions. (13 RT 2791-272; 14 RT 2829.) After implicating appellant, not only did Recio avoid the pending murder charges, but he was provided with food, housing, clothing and dental care by the prosecutor, and Teague told him there would be $5,000 in it for him. (14 RT 2842, 2869.)

Duane Natividad was a Pinoy Real gang member who was in the car when Margie Mendoza was killed. (16 RT 3417.) He told police he didn't see the shooter and was high on methamphetamine at the time of the incident, but the detectives presented him with a photo lineup and repeatedly pointed to appellant's photo suggesting that he shot Mendoza. (16 RT 3421, 3438-3439, 3449.)

Juan Rodarte was the primary witness in the uncharged killing of Christina Duran, which was presented at the guilt and penalty trials. He had passed out from drug use on the night of that killing and did not know the details. (34 RT 6894-6895, 6898.) Detective Teague questioned him at a time when he was facing unrelated criminal charges, and insisted that he implicate appellant in Duran's murder. (34 RT 6905-6906.) Teague said he didn't care if Rodarte lied as long as

he implicated appellant. (34 RT 6906.)

Pedro Sanchez was a member of the Rascals gang who was shot on October 10th, 1997. (12 RT 2456.) He was high on LSD at the time of the shooting and never saw who shot him. (12 RT 2456, 2449.) But he was interviewed several times by detectives, who always mentioned appellant's name and showed him appellant's photo, but Sanchez still couldn't identify appellant. (12 RT 2462.)

The problem with the witness tampering was aggravated by the fact that appellant had no ability to cross-examine the offending officers about the illegal methods they used to gather evidence. Of the three primary detectives involved in the illegal activity, Detective Teague suffered a disability after a car accident that impaired his memory, Detective Neal retired on a disability and was taking medication that impaired his memory, and Detective Barron had died. (13 RT 2685-2686, 2692-8693.) The confrontation clause violation is addressed in argument IV, *infra*.

The conduct of the police in this case is offensive, and shows that when these officers wanted so badly to implicate appellant, they were willing to break any rule necessary to do that. But the justice system cannot condone this "ends justify the means" approach.

> "Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

(*Olmstead v. United States* (1928) 277 U.S. 438 (dis. opn. of Brandeis, J.), quoted in *Morrow v. Superior Court, supra*, 30 Cal.App.4th at p. 1262.) The *Morrow* court continued, "The judiciary should not tolerate conduct which strikes at the heart of the Constitution, due process of law, and basic fairness." (*Ibid.*)

Witness coaching has always been a potential problem in our adversary system as lawyers interviewing witnesses often do so in private meetings where notes aren't taken, and the only people who know about the substance of these conversations are the participants themselves. Prosecutors and defense lawyers interviewing witnesses will often feel pressure to eliminate inconsistencies in the witness' prior statements, or avoid details that might otherwise reduce the witness' credibility. But the system must accept a certain amount of shaping or polishing of witness testimony as no justice system is perfect, and many of the improper acts of an advocate in preparing a witness can be exposed by a skilled opponent during cross-examination. Unfortunately, the crucible of cross-examination was not available to

appellant in this case. (See Argument IV, *infra*.)

While any witness can be coached or influenced in an interview, the problem is greater where, as here, the witnesses are cooperating witnesses who have a great deal to gain by giving incriminating testimony against the accused. The witnesses in the present case were all facing serious criminal charges, including murder, that could have resulted in lengthy or life prison terms. They were interviewed not by the prosecutor, but by the investigating detectives, primarily Detective Teague, who used unrecorded pre-interviews to supply the informants with the information that fit his narrative, and largely shielded the prosecutor from their misconduct.

Not only did the detectives offer "get out of jail free" or "never face jail" cards for the career criminal witnesses, they also exploited other weaknesses. For instance, Gabriel Rivas was a crack and methamphetamine addict, who said he would have done or said anything to get back on the street to obtain drugs, and it was in this context that he made a statement repeating the details Teague had given him in the unrecorded pre-interview.

This was not a case of the state acceding to the pressure to minimize the impact of inconsistent statements the confused witnesses

may have made. Instead, this was the practice of Los Angeles Police Department homicide detectives tampering with witnesses, essentially planting evidence by instructing the gang member informants what they needed to say. It is hard to conceive of a more pernicious practice than showing potential witnesses police reports, murder books, and photo lineups and telling them what they need to say to avoid prison or other consequences.

The practice is especially harmful to the idea of a fair trial in the present case, where the witnesses would later acknowledge that they never actually saw what happened. The absence of such knowledge did not deter Detective Teague, as Juan Rodarte noted Teague said he didn't care if Rodarte lied as long as he implicated appellant. (34 RT 6906.) The evidence of this police misconduct was provided by witnesses who did not know each other or have any known opportunity to compare notes. Yet they were all consistent in their claims of witness tampering by the police and there was never even a denial by the officers involved, just a claim that they conveniently had no memory of the incidents.

The police practices in obtaining witness testimony in this case are repugnant to our system of justice. They involved more than

tolerating a witness' questionable conduct and involved the police committing serious misconduct in an effort to convict someone on their "most wanted" list. The deliberate misconduct by the officers in this case, who would later avoid questioning due to memory loss, should shock the conscience of all reasonable people interested in maintaining a reliable criminal justice system that seeks to provide due process of law to people facing the loss of liberty, or in this case, life.

The state's actions in the present case amounted to outrageous government conduct, and the denial of due process requires a reversal of the entire judgment.

(b)

The misconduct by the members of the prosecution's team also amounts to prosecutorial misconduct.

The prosecutor in this case was necessarily privy to some of the aggressive tactics used to obtain the incriminating statements by prosecutorial witnesses. The prosecutor would have had to approve any immunity offered to the witnesses, and in the case of Gabriel Rivas, the prosecutor acknowledged that he was holding Rivas' probation violations "over his head" as a way of pressuring him into testifying against appellant. (26 RT 5132.) Even if the prosecutor had no actual

knowledge of the lengths to which Detective Teague and the others actually went to procure incriminating statements, this misconduct must be imputed to the prosecution.

Applicable Law

The misconduct of a prosecutor constitutes a denial of due process when it inflects the trial with unfairness. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only, if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A prosecutor is held to a higher standard than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power of the state. (*People v. Kelly* (1997) 75 Cal.App.3d 672, 690.) As the United States Supreme Court has explained, "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. Unites States*

(1935) 295 U.S. 78, 88.) Bad faith is not a prerequisite to a finding of prosecutorial misconduct. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

In the context of disclosing material exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83, the scope of the prosecutor's obligation extends beyond the contents of the prosecutor 's case file and includes the duty to ascertain and divulge any favorable evidence "known to the others acting on the government's behalf." (*Kyles v. Whitely* (1995) 514 U.S. 419, 437.) Courts have consistently refused to distinguish between different agencies of the same government, focusing instead on the "prosecution team," which includes both investigative and prosecutorial personnel. (*United States v. Auten* (5th Cir. 1980) 632 F.2d 478, 481.) The prosecutor's office is the spokesman for the government. (*Giglio v. United States* (1972) 405 U.S. 150, 154.)

Legal Analysis

The prosecutor's investigative work was performed by the Los Angeles Police Department homicide detectives. How much the prosecutor knew about the detectives' improprieties when gathering evidence against appellant remains unknown, although the record does show the prosecutor pressured Gabriel Rivas to incriminate appellant

by holding a pending probation violation over his head.

The record shows that detectives took no notes during the unrecorded pre-interviews or conversations with the potential witnesses so there is no meaningful way to document such knowledge. And it may well be that the prosecutor in this situation did not ask questions about the relevant details concerning the investigation.

Nevertheless, the homicide detectives were a critical part of the prosecutor's team at the investigative stage, and any improper conduct by the police must be imputed to the prosecutor as the state's representative in this trial. (*Kyles v. Whitley* (1995) 514 U.S. 419 [knowledge by prosecutor that law enforcement withheld exculpatory evidence is imputed].)

The gross misconduct committed by the prosecution team must be found to constitute prosecutorial misconduct in violation of appellant's right to due process.

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(c)

Prosecuting a capital defendant with such manufactured evidence also violates the Eighth and Fourteenth Amendments

The witness statements that were produced by the police misconduct also failed to meet the "heightened reliability" requirement in capital cases imposed by the Eighth and Fourteenth Amendments.

A primary justification for upholding the death penalty against an Eighth Amendment challenge is that it is administered in recognition of the principle that death is different from all other punishment, and there is a need for heightened reliability in the evidence presented in a capital case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The requirement applies to both the guilt and penalty phases. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637.)

By pre-interviewing the potential witnesses in the way the detectives did here, and using the other suggestive methods described above to obtain incriminating statements against appellant, the state collected and presented evidence that contaminated the fact-finding process. By grossly overreaching as the state did in the collection of evidence, it violated appellant's right to enhanced reliability in his capital case.

The error requires automatic reversal of the judgment.

Federal constitutional errors are typically reviewed for prejudice under the standard described in *Chapman v. California* (1967) 386 U.S. 18, 24, where the prosecution has the burden of proving the error was harmless beyond a reasonable doubt.

However, under the California Constitution, this court has held that outrageous misconduct by the prosecution and/or law enforcement officials may require dismissal or other sanctions. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 759-760; and see *Boulas v. Superior Court* (1986) 188 Cal.App. 3d 422, 429, where the court emphasized that "Dismissal is, on occasion, used by court to discourage flagrant and shocking misconduct by overzealous government officials...") "Law enforcement agents are entrusted with awesome power. But with that power comes a responsibility to guard against its abuse, a responsibility that the government in this case has abdicated. Were we to tolerate the government's conduct in this case, we would participate in that abuse." *(Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1262) citing *United States v. Solorio* (9th Cir. 1994) 37 F.3d 454, 461.)

Reversal of the entire judgment should be imposed as a clear indication that misconduct of the magnitude presented here will not be

tolerated.

III

Gabriel Rivas's statement to Detective Teague was a product of police coercion and its admission violated appellant's right to due process.

Background

As noted above, Gabriel Rivas provided a statement to Detective Teague in a secretly recorded interview that was used by the prosecution in its case-in-chief relating to the Cloudy Martin murder.

In that statement, Rivas described several important details of the shooting that appellant had allegedly given him, including the fact that Martin had been shot many times and that he was shot from three different guns. (13 RT 2662-2663.)

Detective Neal, who was present at the interview, testified that Detective Teague told him that Rivas also said during the pre-interview that appellant told Martin before killing him, "Die like a man, not like a bitch." (13 RT 2692-2693.)

But the problem, as previously described was that the recorded statement the jury heard was a product of Detective Teague's coaching from the pre-interview. Teague (and perhaps Neal) had given Rivas the facts during the pre-interview that they wanted Rivas to repeat later in

the recorded formal interview. (13 RT 2662-2665.)

The pre-interview and interview occurred in 2003, at a time when Rivas was a mess. He was abusing rock cocaine, crystal methamphetamine and alcohol at the time, and he had been arrested on an assault charge. (13 RT 2658-2659, 2660-2661.) He testified that he would have done anything to get back on the street to obtain drugs. (13 RT 2661.) The prosecutor at that time, acknowledged that his office was using Rivas's probation violation (for which he was facing a prison term) over his head as a way to pressure him to implicate appellant. (13 RT 2660-2661, 26 RT 5132.) Detective Teague had Rivas released from jail and told him directly the state would drop his pending charges if he provided information against appellant. (13 RT 2658-2659, 2662.)

Rivas testified at trial that the only information he actually received about Martin's killing came from rumors he had heard on the street. (13 RT 2655-2656.) The trial court thereafter permitted the prosecutor to play the recorded statement to the jury. (13 RT 2686.)

Applicable Law

Statements coerced from third parties

In *People v. Badgett* (1995) 10 Cal.4th 330, 343-345, this court held that a defendant has standing to challenge involuntary or coerced

statements of a third party. A defendant has standing to challenge the statements — not by vicariously invoking the witness' Fifth Amendment privilege against self-incrimination — but by arguing the defendant's own due process rights would be violated by the admission of the coerced or involuntary testimony. (*Id.* at pp. 343-344.) Thus, it is not enough for a defendant who seeks to exclude trial testimony of a third party to allege that coercion was applied against the third party, producing an involuntary statement before trial. In order to state a claim of a violation of his *own* due process rights, a defendant must also allege that the pretrial coercion was such that it would actually affect the reliability of the evidence presented at trial. (*Id.* at p. 348.) (See also *People v. Jenkins* (2000) 22 Cal.4th 900, 963-969.)

This court originally considered the issue in *People v. Douglas* (1990) 50 Cal.3d 468, 498-506, where it recognized that the defendant may challenge the admission at trial of improperly obtained witness statements that violate the defendant's right to a fair trial. (*Id.* at p. 499.) A defendant who seeks to exclude the allegedly involuntary testimony of the witness has the burden of proving that the admitted statements were involuntarily obtained. (*Id.* at p. 500.) Because coerced testimony is inherently unreliable, the question is whether the

evidence actually admitted at trial was coerced. (*Ibid.*)

Finally, in *People v. Lee* (2002) 95 Cal.App.4th 772, the court expanded the law on this subject. In *Lee*, the court reversed a murder conviction after finding the police threatened to prosecute a third party for a murder unless he named defendant as the killer. The key ruling in *Lee* is that because the coerced statements of a third party are inherently unreliable, a defendant is not required to prove the lack of reliability. (*Id.* at pp. 786-787.)

The reviewing court should examine the entire record to determine whether the involuntary statements of a third party deprived the defendant of his right to due process. (*People v. Badgett*, *supra*, 10 Cal.4th at p. 350.)

Law regarding the voluntariness of statements

A confession is involuntary if an individual's will was overborne. (*Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

In determining whether a defendant's will was overborne, the courts must examine all of the surrounding circumstances – both the characteristics of the accused and details of the interrogation. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.)

Characteristics of the accused which may be examined include

the accused's age, sophistication, prior experience with the criminal justice system, and emotional state. (*Stein v. New York* (1953) 346 U.S. 156, 185-186.)

In *In re Shawn D.* (1990) 20 Cal.App.4th 200, the court reversed the conviction of a juvenile after finding his confession was coerced. The court based its ruling on several factors including the fact that the 16 year-old was unsophisticated, the officers lied in telling him that he had been identified by others, that they had sufficient evidence to convict him, and that they encouraged him to "be a man." (*Id.* at pp. 213-216.)

Details of the interrogation are also analyzed. For example, the courts may consider whether the police lied to the suspect. "While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary, such deception is a factor which weighs against a finding of voluntariness." (*People v. Hogan* (1982) 31 Cal.3d 815, 840-841.)

Similarly, a confession elicited by promises of benefit or lenience is involuntary whether the promise is express or implied. (*People v. Sullivan* (1988) 204 Cal.App.3d 511, 522.) If "the defendant is given to understand that he might reasonably expect benefits in the nature of

more lenient treatment at the hands of the police, prosecution or the court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible..." (*People v. Jimenez* (1978) 21 Cal.3d 585, 612,)

In *People v. Brommel* (1961) 56 Cal.2d 629, 634, the police detective told the suspect that unless he changed his story, the police would inform the judge that he was a liar. The court found this conduct constituted both a threat and an implied promise of leniency which rendered the subsequent confession inadmissible. (*Ibid.*)

In *People v. McClary* (1977) 20 Cal.3d 218, the police repeatedly called the defendant a liar, and told her that unless she altered her statement and admitted the true extent of her involvement, she would be charged as a principal to murder and would face the death penalty. (*Id.* at p. 229.)

Legal Analysis

Detective Teague's actions in the present case present a classic example of coercion of the statements of a third party, Gabriel Rivas.

Rivas had never earlier provided incriminating statements about appellant, and did so here only because of the pressure applied by Teague, and the prosecutor, Anthony Manzella. Rivas was a serious

drug addict at the time Teague approached him, as he had been battling the abuse of crack cocaine and crystal methamphetamine, as well as an alcohol problem. He was in custody for an assault charge that was alleged as a probation violation, and he was facing a prison term for that conduct. At that time he would have said anything the police wanted to hear in order to get back on the street where he could acquire drugs.

Detective Teague arranged for his release, but Teague and the prosecutor made it clear that his failure to implicate appellant would result in a state prison sentence.

With this background, Teague conducted a pre-interview with Rivas, where Rivas would later emphasize that Teague "coached" him by providing details of the Cloudy Martin killing that he wanted Rivas to repeat in the formal interview.

This was a classic case of a coerced statement as it was provided by a person not interested in talking, but given only after promises of significant benefits by the police. The legal analysis regarding voluntariness of a third party statement requires (like the analysis of a coerced confession) an examination of both the characteristics of the accused (to see whether he was vulnerable to coercion) and the details

of the interrogation.

Gabriel Rivas was highly susceptible to police pressure at the time as he had a bad drug problem and was faced with the choice of saying nothing and going to prison, or talking to Detective Teague and having his pending charges dropped, which would allow him to remain free and resume his drug use. This factor supports the claim of coercion.

The details of the interrogation also favor a finding of involuntariness, as there was a direct connection between Rivas implicating appellant, and the benefit of dropped charges and his freedom.

The present facts also demonstrate why coerced statements are inadmissible — that is because they are unreliable. A person in Rivas's situation was facing enormous pressure and would have said anything to free himself of those burdens. Detective Teague took advantage of Rivas's vulnerabilities by supplying him with facts relating to the killing in the unrecorded pre-interview, and then having Rivas regurgitate those facts during the formal interview. Rivas would later say the only information he had about the Cloudy Martin killing came from rumors on the street and not from appellant. Detective Teague

was the person who had the facts about the killing.

This was not a situation where there was a coerced statement from a third party before trial, but trial testimony that was unaffected by the earlier coercion. The law says that situation does not establish a defendant's due process violation. (*People v. Badgett*, *supra*, 10 Cal.4th at p. 348.) Rather, this was a case where the trial court allowed the jurors to hear the actual involuntary statement Rivas provided Teague during the recorded interview.

Viewing the entire record, the admission of Rivas's recorded statement violated appellant's right to due process under the Fourteenth Amendment.

The error was prejudicial.

The erroneous admission of the coerced statement of a third party is reviewed for prejudice under the test described in *Chapman v. California*, *supra*, 386 at p. 24, where the prosecution must prove the error was harmless beyond a reasonable doubt. (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 789.)

Rivas was a primary witness in the state's case against appellant on the Cloudy Martin murder charge. In his recorded statement he provided details that would only be known by the killer (unless

provided directly by the killer — or in this case, the police.) While Mark Gonzalez also testified against appellant regarding the incident, his testimony was unreliable because he too was only testifying in exchange for benefits. The state will not be able to prove beyond a reasonable doubt that the due process error in admitting Rivas's coerced statement did not affect the verdict.

IV

Introduction of the videotape of Rivas's statement also violated appellant's Sixth Amendment right of confrontation because Detective Teague had lost his memory and could not be questioned.

Background

Witness coaching by investigating detectives, like the facts show here, also present confrontation clause problems. The witness, Gabriel Rivas, testified that Detective Teague coached him — that is he provided Rivas with the facts Rivas would later repeat in the formal statement. The statements here included the fact the Cloudy Martin was shot many times, and that three guns were used.

Because these facts were originally supplied by Teague, he was the declarant and appellant had the right to cross-examine him.

Applicable Law

The Sixth Amendment to the United States Constitution

guarantees the accused in criminal prosecutions the right to be confronted with the witnesses against him.

In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court found that this provision prohibits the admission of out-of-court *testimonial statements* offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had the opportunity for cross-examination. Testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.* at p. 52.)

In *Davis v. Washington* (2006) 547 U.S. 813, the court explained the difference between testimonial and nontestimonial statements provided by a potential witness to a police officer. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p.

822.)

Legal Analysis

In the present case, Detective Teague interviewed Rivas in 2003, several years after Cloudy Martin was killed. There can be little doubt that the purpose of the interview (both the pre-interview where Teague gave Rivas the key facts, and the formal interview where Rivas repeated those facts) was to build a case to prosecute appellant at trial. As such, the statements were testimonial for purposes of the confrontation clause under *Crawford*. The original prosecutor confirmed this point in his testimony. (26 RT 5132.)

The recorded statement was admitted at trial after Rivas demonstrated his reluctance to testify, suggesting that his testimony might incriminate him, and later noting the only facts he had known before his pre-interview with Teague came from street gossip. (13 RT 2656-2657.)

The problem is that none of the investigating detectives testified at trial, as one of them had died in an accident, and Detectives Neal and Teague had suffered disabilities that impaired their memories. This fact is especially troubling as it related to Detective Teague who appears to have been in charge of the investigation, committed

egregious violations of appellant's constitutional rights, and then lost the ability to remember, which prevented him from testifying.

Assuming Teague's memory loss was legitimate, his failure to testify and face questioning regarding the details of his pre-interview with Rivas and the others, deprived appellant of his Sixth Amendment right to confront his accusers. It is simply unfair to admit the statement of a coached witness who claims the investigating detective provided him with the details, and then not be allowed to question that detective. (See *People v. Clark* (2011) 52 Cal.4th 856, 927, where the victim couldn't recall telling a doctor that defendant threated to kill her. The court found there was no confrontation clause problem because the victim testified at trial even though she couldn't remember anything.)

The error was prejudicial.

Confrontation clause violations are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, where the state must prove beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error. (*People v. Loy* (2011) 52 Cal.4th 46, 69-70.)

Again, Rivas's statement was the state's primary evidence

regarding the Cloudy Martin murder — that and Mark Gonzalez's incentivized testimony. The state will not be able to show beyond a reasonable doubt that the erroneous admission of this evidence had no impact on this conviction.

V

The trial court violated appellant's Sixth Amendment confrontation clause rights by admitting Christina Duran's videotaped police interview at the guilt and penalty phase trial.

Background

Margie Mendoza was killed on November 9th, 2001. (16 RT 3417.) The prosecution alleged that appellant committed that murder along with two others, and that he dropped his cell phone at the scene. (20 RT 4172.) Christina Duran, who was affiliated with the Toonerville gang, accompanied appellant to the scene in an effort to find the phone. (18 RT 3729-3730.) They were observed by police and detained. (18 RT 3617-3618.) The police released appellant but took Duran into custody. (17 RT 3485.)

Detectives questioned Duran in a recorded interview where she implicated appellant in Mendoza's murder. (26 RT 5142.) She said that the night of the Margie Mendoza murder, she saw appellant and Eduardo Rodriguez (another Toonerville member) drive off, she then

heard five shots, and both men returned in the car. (7 CT 1567.) Appellant told her that he had just shot someone and asked her to return to the scene with him to help find his cell phone that he had dropped. (7 CT 1567) When they returned, the police were already there so she went to look for the phone while he hid under a blanket in the back of the car. (7 CT 1567.)

The police released Duran after the interview. (26 RT 5242.)

Martin Villigran was a longtime Toonerville member. (34 RT 6805.) He knew appellant as "Huero" or "Eskimo." (34 RT 6806.) On November 10th, 2001, he threw a birthday party for Christina Duran at his house in West Covina. (34 RT 6807.)

Villigran testified that appellant was at the party but became sick — likely due to an adverse reaction to the drugs he had taken. (34 RT 6814-6815.) Appellant went to bed before 2:00 a.m., while Duran was still up partying. (34 RT 6811-6812.) Witnesses would testify that Duran left the party with "Sharpie," and that appellant followed in another car. (34 RT 6874-6876.)

The next morning, Duran was found dead in her car, which was parked about two miles away from Villigran's house. (34 RT 6861-6863, 6864-6867.) Some of the car windows had been shattered, and

glass was found inside the car. (34 RT 6864-6867.) The medical examiner who performed the autopsy found the death was caused by seven gunshot wounds, including five to the head. (34 RT 6767.) The gun was fired from point-blank range and the evidence was consistent with someone holding Duran's head or pulling her hair at the time. (34 RT 6773, 6778.)

Appellant was charged with the murder of Mendoza, and the trial court allowed the prosecutor to play Duran's videotaped police interview, which took place days before her murder, at the guilt and penalty phase trials. (20 RT 4051-4053; 33 RT 6841.)

The defense objected to the introduction of the recordings on hearsay and confrontation clause grounds, but the prosecutor argued the evidence was admissible under Evidence Code section 1350, because Duran was an unavailable witness. (7 CT 1566.) The prosecutor argued that because appellant participated in Duran's killing in order to prevent her from testifying against him, her out-of-court statement was admissible under the forfeiture-by-wrongdoing doctrine. (7 CT 1569.) The court then asked for additional briefing in light of *People v. Giles* (2007) 40 Cal.3d 833, 837. (7 CT 1627.) The trial court later ruled the issue was a "close call," and more complicated

than the prosecutor perceived it to be, but allowed the evidence to be presented. (4 RT 779, 781.)

The prosecutor played the videotape at the guilt (20 RT 4051-4053) and penalty (33 RT 6841) phases of the trial. The defense also relitigated the issue in a motion for a new trial after the convictions. (22 CT 5753.)

Applicable Law

Evidence Code section 1350 provides a hearsay exception in a serious felony case for properly memorialized, authenticated, trustworthy, and corroborated statements made to a police officer by someone who thereafter became unavailable as a witness or was killed for the purpose of preventing the defendant's arrest or prosecution.[5]

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[5] The full text of the statute reads:

(a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.

(4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

(5) The statement is relevant to the issues to be tried.

(6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and

In *Crawford v. Washington, supra,* 541 U.S. 36, the United States Supreme Court held the Sixth Amendment confrontation clause barred the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford* overruled *Ohio v. Roberts* (1980) 448 U. S. 56, which provided the framework governing the admissibility of statements from witnesses who did not testify at trial. (*Crawford v. Washington, supra,* 541 U.S. at pp. 61-68.) *Roberts* had allowed the admission of hearsay statements of unavailable witnesses,

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his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of section 1192.7 of the Penal Code, or any violation of Section 11351, 11352, 113478 or 11379 of the Health Safety Code.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

without violating the confrontation clause, if those statements fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness. (*Ohio v. Roberts, supra,* 448 U.S. at p. 66.) Holding that hearsay rules and judicial determinations of reliability no longer satisfied a defendant's right of confrontation, *Crawford* announced: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford v. Washington, supra,* 541 U.S. at pp. 68-69.)

Although *Crawford* dramatically departed from the earlier confrontation clause case law, it renounced only those exceptions to confrontation that purported to assess the reliability of testimony. (*Id.* at p. 62.) The court noted that forfeiture by wrongdoing, an equitable principle addressing the situation where the declarant is unavailable because of the actions of the accused, remains a valid exception to the confrontation clause. (*Id.* at p. 62.)

In *People v. Giles* (2007) 40 Cal.3rd 833, this court ruled that under the forfeiture by wrongdoing doctrine, the defendant lost the right to object on confrontation clause grounds to the admission of the out-of-court statements of a witness whose unavailability the defendant

caused – so the "defendant forfeited his right to confront his ex-girlfriend when he killed her." (*Id.* at p. 837.)

However, in *Giles v. California* (2008) 554 U.S. 353, 368, the United States Supreme Court disagreed, and found the "forfeiture by wrongdoing" doctrine was not a well-established exception to the confrontation clause, and could not trump a defendant's Sixth Amendment rights, unless the prosecution could establish that the defendant's *purpose* in killing the witness was to prevent him or her from testifying.

Legal Analysis

In the present case, the prosecution did not establish that appellant killed Christina Duran in order to prevent her from testifying that he killed Margie Mendoza. Instead, the prosecution presented evidence showing that Duran was killed after leaving the party at Villigran's house, and that appellant and another Toonerville member may have left the party shortly after Duran. (4 RT 531, 676-684, 690.)

The former prosecutor testified Gabriel Rivas had told him that Juan Rodarte told him that appellant wanted Duran killed because she was "telling on" him. (4 RT 592.) But the prosecutor was confronted with a tape-recorded conversation where Rivas told police that Rodarte

didn't know anything about who killed Duran. (4 RT 596.)

The defense also presented evidence showing that while appellant and Duran were at the party at Villigran's house, and they may have argued outside, Duran left the party while appellant had been sick and passed out from his drug and alcohol use that night. (4 RT 655, 670, 743, 746.)

The prosecution's claim was deficient for two reasons. First, it provided some evidence that appellant may have been involved in Duran's death, but that evidence came from the former prosecutor's contradictory testimony that was a product of double hearsay – Rivas told him that Rodarte told him that appellant wanted Duran killed. But this was not clear and convincing evidence establishing appellant's motive to kill Duran. And Rivas later denied knowledge of the event.

Next, Evidence Code section 1350, subd.(a)(4) requires that the statement be made "under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat or coercion." But Duran gave her statement at the police station after she was arrested for the Margie Mendoza murder. She was released after she implicated appellant, and the record in this case shows the police offered great benefits including dropping charges against anyone

who implicated appellant. These circumstances were evidence that her statement was unreliable. She wanted to be released from custody, and she told the police what they wanted to hear so that they would set her free — which is exactly what they did. The statement was not admissible under section 1350, and in any event, its admission violated appellant's right of confrontation.

The error was prejudicial.

Confrontation clause error is reviewed for prejudice under the *Chapman* standard. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.)

The prosecution's use of the evidence at both phases of the trial was prejudicial. It was critical evidence in proving appellant's guilt in the Margie Mendoza killing, as the case would otherwise have relied on the unreliable testimony of Monica Miranda and Duane Natividad, both of whom were high at the time of the shooting, and Juan Rodarte whose own felony cases were dropped, and he was told by Detective Teague that he could lie as long as he implicated appellant. (16 RT 3421, 3436, 3438-3439, 3449; 34 RT 6906.)

The evidence was also a significant part of the penalty phase retrial. Since the first penalty phase resulted in a hung jury, all pieces

of aggravating evidence were significant. The idea that appellant would murder a young female friend to weaken the prosecution's case against him was likely seen as repugnant by the jury who was deciding his fate.

The state will not be able to show the erroneous introduction of this evidence at the guilt and penalty phases was harmless beyond a reasonable doubt.

VI
The prosecutor committed misconduct by releasing to the press rap lyrics allegedly authored by appellant.

Background

Appellant was arrested at his girlfriend's house in Bullhead City, Arizona on February 12th, 2003 pursuant to a warrant suggesting that he had murdered Margie Mendoza. (13 RT 2727.) Detective Masterson of the Los Angeles Police Department searched the house and found a notebook inside of a box in a bedroom closet. (13 RT 2729.) The notebook contained what appeared to be original rap music lyrics, but there was a prominent note on the cover indicating that "Everything in this book is a work of fiction." (13 RT 2729, 2732.) The detective seized the notebook and forwarded it to the prosecutor. (13 RT 2729.)

Shortly before appellant's trial was to begin, the prosecutor filed

an unsealed motion to admit the "gang writings" and attached the seized notebook, which had the affect of placing the lyrics in the public domain. (8 RT 1734.)

A local newspaper reporter contacted the prosecutor asking about the pending pretrial motions. (8 RT 1735.) The prosecutor chose not to publically comment on the case, but informed the reporter that a copy of appellant's rap lyrics was attached to one of the motions. (8 RT 1735.) The reporter then obtained a copy of the motion and printed the rap lyrics in a newspaper article about the case. (8 RT 1734.)

Defense counsel thereafter asserted that the prosecutor had committed misconduct by including the controversial rap lyrics in the public motion, and then leading the reporter to that evidence. (8 RT 1734.)

The Lyrics

The notebook containing the lyrics was copied and added to the prosecutor's motion to admit trial evidence. (See 7 CT 1534-2563.)

The prosecutor highlighted the more inflammatory passages in the text of the motion. He presented them in various groups. The first group was used as evidence of authentication, as the lyrics suggested appellant had written the passages about himself. These included:

1) "Toonerville on my back. . . Feed these motherfuckers slugs if they don't like it."

2) "a Toonerville gangster coming out to play in Atwater Northwest LA."

3) "I make every party gangster as soon as I step in. This bald headed loco garrantied [sic] to pack a weapon. Big Eskimo with more stripes than a Viet Nam vet."

4) "We run this show! A bald head tattooed mother fucker criminals."

5) "Nowhere to run. Nowhere to hide. *Being hunted down for homicide.* . . My gangster life has been my only curse. . .fugitive on the run and yes I got a gun."

(7 CT 1526-1527.)

The next group of lyrics was presented as evidence supporting the imposition of the Penal Code section 186.22, subd.(b) gang allegations and the section 190.2, subd.(a)(22) special circumstance allegation: It included:

1) "Enemies, we body bagum. We love to tag um. Can't compete with our street when we serve up such heat. . . The village criminal conspiracy to murder with ways of killing you just never heard through sunshine and stormy weather. We slang the bang that there ain't none better, mass killing, grave filling, true fucken villen. Rooms covered in plastic bodies stacked to the ceiling."

2) "I've never cried for an enemy that died. And if I said I wished them dead. I wouldn't have lied. I laugh at the laws and challenge them 2 find me guilty."

3) "Fuck all enemies. You get execution style murder. Drop to your knees and you know I'm steady plottin how to make the next one smell fucking rotten. I'm out to make a killin. Represent for all you Villens. Toonerville on my back."

4) "Here I come last chance to run / Killer with a gun out to have some fun / In my dreams I hear screams / Pleasure I feel is so obscene." (7 CT 1527-2528.)

And there was another group of lyrics presented to show appellant hated the police.

1) "I'd love to see a punk police flatline."

2) "Fuck all police, judges, and DA's / You all can catch spray from my AK."

3) "Fuck the enemies and punk ass cops / Pigs."

4) "Here comes the pig I ain't hittin no fence. . . It's either him or me and you know I am strength / Because where I'm from we blast. . . Cardboard cartons just won't do that."

5) "Piggie piggie please stop telling that lies / Witness protection won't work / Realize your rats ain't going to make it to the stand to identify the man shootin up the ham / Can't promise protection when you can't protect yourself. Give it up Mr. Pig and place your badge on the shelf." (7 CT 1529-1530.)

Applicable Law

The misconduct of a prosecutor constitutes a denial of due process when it infects the trial with unfairness. (*People v. Gionis* (1995) 9

Cal.4th 1196, 1214; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A prosecutor is held to a higher standard than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power of the state. (*People v. Kelly* (1977) 75 Cal.App.3d 672, 690.) As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Bad faith is not a prerequisite to finding prosecutorial misconduct, and "an injury to a defendant is nonetheless and injury because it was committed inadvertently rather than intentionally." (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

In *People v. McKinzie* (2012) 54 Cal.4th 1302, 1327, this court

found that the prosecutor committed misconduct by leaking a story to the press during jury selection of a penalty phase retrial. The trial court noted the prosecutor acted improperly in seeking to publicize the defendant's statement because the admissibility of the statement was still in question at the time of the prosecutor's action and the prospective jurors could have been exposed to the news article. (*Id.* at p. 1325.) This court found that prosecutor's "conduct derogated from his duty to act as an impartial public fiduciary sworn to promote the evenhanded administration of justice." (*Id.* at p. 1329.)

In *People v. Brommel* (1961) 56 Cal.2d 629, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509, the court reversed defendant's murder conviction due to the admission of an involuntary confession. In that case, the prosecutor released the confession to the press before the trial court had ruled on its admissibility. (*Id.* at p. 636.) Noting the impropriety of this conduct, the court emphasized "Prosecuting officers owe a public duty of fairness to the accused as well as to the People, and they should avoid the danger of prejudicing the jurors by giving material to disseminating agencies which may be inflammatory or improperly prejudicial to the defendant's rights." (*Ibid.*)

Legal Analysis

In the present case, the prosecution had moved before trial to admit these rap lyrics that can only reasonably be characterized as highly inflammatory. (7 CT 1523.) The prosecutor argued the evidence was admissible at the guilt phase to show appellant's gang affiliation, gang loyalty, motive and intent. (7 CT 1532.) The prosecutor further argued that any unfair prejudice in admitting the controversial rap lyrics was outweighed by the relevance of the evidence. (7 RT 1532.) The motion was unsealed, which made it a public record. (8 RT 1734.)

Before the legal questions regarding the admissibility of the evidence were litigated, the prosecutor provided the lyrics to the press, by informing a reporter that the controversial rap lyrics were attached to his unsealed motion. (8 RT 1735.) The reporter then obtained a copy of the motion and printed the rap lyrics in the newspaper article about the case. (8 RT 1734.)

Defense counsel properly alleged prosecutorial misconduct for this action. (8 RT 1734.)

In *People v. McKinzie, supra*, 54 Cal.4th at p. 1327, this court found the prosecutor committed misconduct by leaking information to the press during jury selection of a penalty phase retrial. The court

criticized the prosecutor for seeking to publicize the defendant's statements when the admissibility of the evidence was still in question and publication could influence prospective jurors. (*Id.* at p. 1325.)

This court reached the same result in *People v. Brommel, supra,* 56 Cal.2d at p. 636, where the prosecutor leaked the defendant's confession to the press before trial. The court found it was prejudicial misconduct to attempt to influence potential jurors with inflammatory evidence before trial. (*Ibid.*)

There can be no logical explanation for the prosecutor's actions in this case other than that he intended to contaminate potential jurors by providing the reporter with appellant's alleged writings. These were writings where he spoke of loyalty to his violent gang that killed indiscriminately those considered to be enemies, and the fact that he would kill police officers who sought to enforce the laws against the gang.

Many legal questions needed to be answered regarding the admissibility of the writings.

The prosecution's motion showed there was an issue regarding foundation required to admit the evidence. (7 CT 1530.) The motion further showed there were issues regarding admissibility relating to

motive, intent, and Evidence Code section 352, which would require weighing the probative value of the evidence against its potential for prejudice. (7 CT 1532.)

In *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35, the court found the rap lyrics were admissible as to the defendant's state of mind and helped establish his motive and intentions. (See also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1342-1373, where the court found the defendant's rap lyrics were properly admitted to prove motive and intent where the trial court properly limited the jury's consideration of the evidence to those purposes.)

In the present case, there were several legal problems regarding the admission of the evidence. First, unlike the other cases allowing such evidence, the rap lyrics were described by its author as being works of fiction. (7 CT 1534.) The lyrics showed this to be true as there was no evidence in this case showing body bags stacked to the ceiling, or that shots had ever been fired at prosecutors or judges, or many other things. (See 7 CT 1528-1529.)

The lyrics in the case also didn't show appellant's state of mind (assuming he wrote them) at the time of any of the charged killings, which is the relevant inquiry. (See *People v. Zepeda, supra,* 167

Cal.App.4th at p. 35.) In fact, the songs were found and likely written while appellant was hiding.

Moreover, the rap lyrics here were cumulative of the evidence presented by most all of the state's other witnesses, primarily incentivized snitches from other gangs and gang officers who testified at length about the killings being a product of appellant's desire to kill rival gang members. And the court had the option when presented with 28 pages of songs to select a smaller number so as not to inundate the jurors.

All of these factors would be important in determining whether the evidence was admissible under Evidence Code section 352 or whether its admission would violate appellant's due process rights.

But the prosecutor decided to share the poisonous lyrics with the press without informing the court or defense that it would do so. There can be no legitimate reason for this decision and it can only properly be characterized as prosecutorial misconduct.

The error was prejudicial.

Prosecutorial misconduct so grave that it renders the trial unfair violates a defendant's due process rights and is reviewed for prejudice under the *Chapman* standard. (*People v. Gionis*, *supra*, 9 Cal.4th at p.

1214.) If the misconduct "only" involves "deceptive or reprehensible methods" it is error under state law and must be reviewed for prejudice under the test described in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) Under *Watson*, reversal is required if the defense shows there is a reasonable chance (more than an abstract possibility) that the error affected the verdict. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

In the present case, the prosecutor's act of leaking the rap lyrics to the press was reprehensible and it denied appellant a fair trial. Reversal may be required under either harmless error test. If the prosecutor believed he needed to infect the jury pool with such inflammatory evidence, it seems duplicitous to later suggest the error did not affect the verdict. Even if this error did not by itself prejudice the jury, it certainly added to the unfairness of the case, where the state presented so little legitimate evidence of guilt.

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Penalty Phase Arguments

VII

The state of the law at the time of appellant's trial excluding defense evidence of the secure conditions for life without parole prisoners violated the Eighth and Fourteenth Amendments, requiring reversal of the judgment of death.

Background

The trial court permitted the prosecution (over appellant's objection) to present evidence at the penalty phase regarding the jail disturbance where appellant and another inmate refused the orders of staff, and then physically resisted efforts to restrain them. (35 RT 7027-7032.) The prosecution presented additional evidence that appellant was found with "dangerous contraband" capable of being made into a weapon, that he refused to return his serving tray following a meal (36 RT 7105, 7119-7122, 7126), that he incited other inmates to assault jailers (35 RT 7029, 7031), and that he assaulted a staff member while confined in a juvenile institution. (32 RT 6473, 6476, 6488.)

The prosecution presented this evidence to demonstrate appellant's "future dangerousness" if permitted to serve life in prison–the alternative to the death penalty. (See 38 RT 7563.) He would be a danger to those working in prison if he was permitted to

live.

This court has previously found on several occasions that a defendant may not present evidence at the penalty phase showing what conditions are actually like for an inmate serving a term of life without the possibility of parole. Due to the state of the law at the time, most capital defendants had stopped raising the issue on appeal.

But this court recently changed course and held that when the prosecution presents evidence of a capital defendant's "future dangerousness" based on his conduct in confinement, it is error to refuse the defendant an opportunity to refute such evidence by informing the jury of the secure conditions an inmate serving life without parole would face. (*People v. Smith* (April 27th, 2015) – Cal.4th –, 2015 LEXIS 2337, slip opn. at p. 81.)

Given that appellant did not seek to introduce this evidence under then-current law, his failure must be excused by the futility exception to the forfeiture rule.

Applicable Law

Penal Code section 190.3 sets forth the type of evidence a defendant and the prosecutor may present to a jury in a capital penalty trial. That statute holds, in pertinent part:

In the proceedings on the question of penalty, evidence

> may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, *and sentence* including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

(Penal Code section 190.3 [emphasis added].)

The provision lists the various factors the jury should consider (subsections (a) through (k)). The statute further states that the jury:

> [S] hall impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

In *People v. Thompson* (1988) 45 Cal.3d 86, 139, and again in *People v. Grant* (1988) 45 Cal.3d 829, 860, this court held that evidence demonstrating the conditions under which a prisoner serving a term of life without the possibility of parole would be inadmissible in a penalty trial because such evidsence is "speculative." This ruling was followed in numerous cases where the court refused to reconsider its holding after referring to *Thompson* and *Grant.* (See, e.g. *People v. Gordon* (1990) 50 Cal.3d 1223; *People v. Daniels* (1991) 52 Cal.3d 815, 877-878;

People v. Fudge (1994) 7 Cal.4th 1075, 1116; *People v. Quartermaine* (1997) 16 Cal.4th 600, 632-633; *People v. Majors* (1998) 18 Cal.4th 385, 416; *People v. Ervin* (2000) 22 Cal.4th 48, 98; *People v. Ervine* (2009) 47 Cal.4th 745, 794-795; and, *People v. Eubanks* (2011) 53 Cal.4th 110, 150.)

However, this court recently departed from these decisions and held that when the prosecution presents evidence of a capital defendant's "future dangerousness" based on his prior conduct in confinement, it is error of constitutional magnitude not to permit the defendant to refute such evidence by presenting evidence of the secure conditions he would be confined under if given life without parole. (*People v. Smith, supra,* – Cal.4th –, 2015 LEXIS 2337.)

Legal Analysis

In the present case, much of the state's case in aggravation focused on appellant's future dangerousness to the people working in the state prison as evidenced by his violent actions during his confinement in the local jails and juvenile facilities.

In light of this evidence, appellant should have been permitted to respond with evidence showing the conditions for life without parole inmates were qualitatively different than for those in the local jails. In fact, he should have been able to present evidence to a jury showing a

"day in the life" of a prisoner serving a life term without the possibility of parole. But the controlling case law prevented a capital defendant from presenting this evidence.

In *People v. Fudge, supra,* this court affirmed its previous holdings in *People v. Grant*, *supra*, 45 Cal.3d 829, 860, and *People v. Thompson, supra*, 45 Cal.3d 86, 139, that testimony involving the conditions of confinement, i.e., "a day in the life of a life prisoner," was irrelevant and speculative "as to what future officials in another branch of government will or will not do." (*People v. Fudge, supra,* 7 Cal.4th at 1117, quoting *People v. Thompson, supra,* 45 Cal.3d at 139.)[6]

This court has now largely refuted this proposition. While not deciding that the exclusion of evidence demonstrating "a day in the life of a life prisoner" is error, the court held that when the prosecution presents evidence of a defendant's future dangerousness based on in-custody misconduct, it is error not to permit the defendant to rebut that argument by presenting evidence demonstrating the secure conditions

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[6] Notwithstanding the court's continued rejection of this argument, appellant asserts that exclusion of evidence of "a day in the life" of a prisoner serving an LWOP term violates the Eighth and Fourteenth Amendments by preventing him from presenting evidence which might persuade the jury to spare his life. (*McClesky v. Zant* (1987) 481 U.S. 279, 300; *Skipper v. South Carolina* (1986) 746 U.S. 1, 5; *Jurek v. Texas* (1976) 428 U.S. 262, 274; and, *Hitchcock v. Duggar* (1987) 481 U.S. 393, 398.)

for life prisoners in California. (*People v. Smith, supra,* (Slp. Opn. at p.81.) This is especially significant where, as here, the misconduct takes place in a county jail setting, rather than a maximum security prison.

As in *Smith*, the prosecution here presented evidence, including recent convictions, that appellant had assaulted guards, instigated riots and possessed contraband. (32 RT 6473, 6476, 6488; 35 RT 7029, 7031; 36 RT 7105, 7119-7122, 7126)

The prosecution's penalty phase case was based mostly on its portrayal of appellant as a violent and evil person, focusing in large part on his alleged dangerous acts and convictions for misconduct in the county jail. Had the jury fully understood the secure environment in which an LWOP prisoner is confined, it may well have decided that penalty would adequately provide for the protection of society, including future prison contacts.

Given the state of the law at the time of appellant's trial, and the trial court's obligation to follow these precedents under the doctrine of *stare decisis* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), it would have been futile for appellant to raise that claim here. The law has long held that an objection is not required to preserve an issue where it would have been futile to object. (*People v.*

Welch (1993) 5 Cal.4th 228, 237-238; *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Boyette* (2007) 29 Cal.4th 381, 432.)

The erroneous rule prohibiting prison condition evidence was prejudicial.

Error in denying a capital defendant the right to present relevant mitigating evidence is reviewed for prejudice under the *Chapman* test. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Smith, supra,* Slp. Opn. at p. 86-87.) As such, the prosecution must prove beyond a reasonable doubt that the error (or erroneous law in this case) had no impact on the death verdict.

The state's case here was based largely on its portrayal of appellant as an evil person who would be a danger to others even if confined in prison. Had the jury understood the full scope of a life without parole sentence, and the secure environment in which life without parole inmates live, it may well have determined that was an appropriate sentence for appellant. The judgment of death must be reversed.

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VIII

Appellant was subjected to a due process violation where the prosecution filed an old case it had not previously charged and tried it before the penalty retrial simply to improve the chances of a death verdict.

Introduction

Following appellant's convictions in the guilt phase and a hung jury at the penalty phase, the prosecution filed and obtained an expedited trial of charges against appellant stemming from an earlier disturbance at the Los Angeles County jail. Over defense objection, the trial was held prior to the penalty phase retrial and resulted in appellant's convictions and a life sentence. Those convictions were introduced by the prosecution at the penalty retrial, which produced a death verdict.

Appellant argues that the prosecution's pursuit of the convictions from the jailhouse incidents was motivated by a desire to use those convictions to improve the chances of a death verdict, and constitutes vindictive prosecution or a similar due process violation by trying that case at the time it did for no reason other than to gain an evidentiary advantage at the penalty retrial.

Background

On January 7th, 2005, a deputy was escorting an inmate,

Gonzalez, out of the unit as he was suspected of being intoxicated on "pruno."[7] (35 RT 7035.) As they passed his cell, appellant told Gonzalez not to go with the deputy and to return to his cell. (35 RT 7038.) Deputies believed appellant was the "shot-caller" of the unit, meaning other inmates would have to seek his approval for almost everything. (36 RT 7140.) As Gonzales attempted to turn back toward his cell, the escorting deputy grabbed him and tried to walk him out of the unit. (35 RT 7038.) Appellant then yelled at the other inmates to "attack the deputies." (35 RT 7038.)

Appellant and other Hispanic inmates threw apples, milk and other liquids at the deputies. (35 RT 7039, 7041.) Gonzalez was pepper-sprayed and kicked the deputies as he dropped to the floor. (35 RT 7041.) A deputy heard inmates breaking the ceramic toilets in their cells, and the inmates then threw shards of porcelain at the officers. (36 RT 7152.)

Most of the inmates eventually submitted to the deputies and were removed from the unit. (36 RT 7190.) Appellant and one other inmate had to be forcibly extracted from their cells by a jail emergency response team. (36 RT 7201.)

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[7] "Pruno" is inmate manufactured wine made from fermented fruit and sugar. (See *People v. Garcia* (2000) 84 Cal.App.4th 316, 327.)

Verdicts were returned in the guilt phase trial in November, 2007. (15 CT 3826-3825.) The jury in the first penalty phase trial could not agree on a penalty. (29 RT 5764.) The prosecution then filed charges against appellant regarding the disturbance at the jail. (30 RT 5822.) The prosecution indicated it wanted to try appellant on those charges before the penalty retrial. (30 RT 5795.) A conviction would provide the prosecution with a "third strike" felony to use in the second penalty phase trial pursuant to Penal Code section 190.3 (c). (30 RT 5797.)

Appellant objected, arguing that defending the jail disturbance charges at that time would hurt his ability to prepare for the upcoming penalty phase retrial. (30 RT 5799.) The trial court overruled the objection, denied the defense request for a continuance and also denied appellant's motion to recuse the judge, pursuant to Code of Civil Procedure sections 170.1, and, alternatively, 170.6, finding the recusal motion was untimely. (30 RT 5813, 5818-5820.) Appellant further objected that he was being subjected to discriminatory prosecution as he was the only inmate among those involved in the incident who was being prosecuted. (30 RT 5816-5817.) Appellant also believed the prosecution's failure to pursue the charges in a timely manner

prejudiced him in that a key witness had died in the interim.[8] (30 RT 5816.)

Applicable Law

In *North Carolina v. Pearce* (1968) 395 U.S. 711, 725, the court held due process requires that vindictiveness by a judicial officer against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.

The concept was expanded to the prosecutor in *Blackledge v. Perry* (1974) 417 U.S. 21, where the defendant was originally charged with, and convicted of, a misdemeanor successfully appealed his conviction and then faced a more serious charge on retrial. (*Id.* at pp. (28-29.)

In *United States v. Goodwin* (1982) 457 U.S. 368, 372-373, the court explained that punishing a person for doing what the law plainly allows him to do is a due process violation "of the most basic sort."

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[8] In an unpublished decision filed on June 23rd, 2010, the Court of Appeal, Second District (No. B212538), affirmed appellant's convictions and sentence of 75 years to life for conspiracy to commit an assault (Penal Code section 182 subd. (a)(1)), conspiracy to commit vandalism (Penal Code section 182 subd. (a)(1)), three counts of resisting executive officers in the performance of their duties (Penal Code section 69), and two counts of assault. (Penal Code section 245 subd.(a)(1). This case is currently pending in federal district court (*McGhee v. Chappell*, 12-CV-03578- JAK-E) and in this court (*In re McGhee*, S221382) on a federal exhaustion petition.

Legal Analysis

In the present case, the prosecution went to great lengths to prosecute appellant in his capital murder trial. After getting convictions from a reconstituted jury following the discharge of a juror who was skeptical of the state's case, the prosecution could not convince the penalty phase jury to recommend the death penalty.

The next event should have been a penalty retrial, if the prosecution wanted to pursue the death penalty. But here, the prosecution decided to file charges in the jail disturbance case based on an incident that took place almost three years earlier. There had been no indication of an intent to prosecute that case previously. At the penalty retrial, the only significant evidentiary difference was the felony convictions arising from the jail riot case and offered under section 190.3 (c).

Noteworthy here is that there were many inmates involved in the 2005 jail disturbance incident, but the District Attorney did not charge any other inmate with crimes stemming from the incident, and only charged appellant when he was seeking to beef up the evidence for the penalty phase retrial.

The record shows that the prosecutor had never attempted to charge appellant or any of the others involved in the jail riot for almost

three years and only did so after failing to secure a death verdict at the first penalty phase. The decision to charge the jail case was a direct response to the defense team's "hanging the jury" at the first penalty phase. The prosecutor manipulated the process by trying the cases out of order simply to improve his chances of obtaining a death verdict.

There is no case authority that has sanctioned a prosecutor's decision to conduct new criminal trials between a penalty phase hung jury and the retrial. Appellant argues it is a denial of due process to have allowed the jail riot trial to proceed before the penalty retrial simply to enhance the state's new penalty case with additional convictions.

The error was prejudicial.

Federal constitutional errors are reviewed for prejudice under the standard described in *Chapman v. California*, *supra*, 386 U.S. at p. 24. Under that standard, the prosecution has the burden of proving the error was harmless beyond a reasonable doubt. (*Ibid.*)

The state will not be able to show that the due process violation by allowing the state to proceed with new charges before the retrial was harmless beyond a reasonable doubt.

In the present case, defense counsel asked for additional time to prepare for the jail incident case but the continuance was denied.

Defense counsel also noted that the delay in filing the jail incident resulted in the loss of at least one important witness who died in the interim. By trying the jail case before the penalty phase retrial, the court prevented the defense from focusing on saving appellant's life at the penalty retrial. It also improperly and prejudicially allowed the prosecution to present newly created aggravation — a felony conviction admissible under section 190.3 (c). As noted, this was the only material evidentiary difference between the penalty phase presentations.

The result was that the prosecution presented a similar case at both penalty trials but added the convictions from the jail incident as aggravating evidence at the penalty retrial, and the jury returned a death verdict.

IX

California's death penalty statute, as interpreted by this court and applied at appellant's trial, violates the United States Constitution.

Many aspects of California's capital sentencing scheme, individually and in combination with each other, violate the United States Constitution. Because challenges to most of these have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional basis, and requests the Court's

reconsideration of each claim in the context of California's entire death penalty system.

Appellant further requests the Court to consider their cumulative impact on the functioning of California's capital sentencing scheme. As the US. Supreme Court has stated, "[t]he constitutionality of a state's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 US.163, 178, fn. 6.[9] See also, *Pulley v. Harris* (1984) 465 US. 37,51.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a constitutionally adequate basis for selecting the relatively few defendants to be subjected to capital punishment. In short, California's special circumstances are now so numerous and so broadly construed as to be chargeable in virtually every non-vehicular homicide.

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[9] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of" the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." 548 US. at 178.

Nor are there adequate penalty phase safeguards that ensure the reliability of the verdict. Instead, jurors are not required to agree with each other at all as far as the existence of aggravating factors, and jurors are not required to find that evidence of aggravating factors meets any burden of proof at all. The result is truly a "wanton and freakish" system that arbitrarily imposes the death penalty on a handful of unfortunate defendants from among the thousands of murderers in California annually.

A. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.*

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Ca1.4th 857,868.)

The 1978 death penalty law was drafted *not* to *narrow* those eligible for the death penalty but to *expand* liability to make virtually *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") Since 1978, the legislature has increased the number of special circumstances from 19 to 22, and both the legislature and the judiciary have expanded the scope of many of them.

Virtually all felony-murders are ostensibly special circumstance eligible, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or during a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Ca1.3d 441.)

Section 190.2's reach has been extended to virtually all intentional murders by this Court' s construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Ca1.4th 469, 500-501, 512-515.

B. *Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.*

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been

applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. *(People v. Dyer* (1988) 45 Ca1.3d 26, 78; *People v. Adcox* (1988) 47 Ca1.3d 207,270) The Court has approved numerous expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, (*People v. Walker* (1988) 47 Cal.3d 605,639) or having had a "hatred of religion, (*People v. Nicolaus* (1991) 54 Ca1.3d 551,581-582) or threatened witnesses after his arrest, *(People v. Hardy* (1992) 2 Ca1.4th 86, 204) or disposed of the victim's body in a manner that precluded its recovery. (*People v. Bittaker* (1989) 48 Ca1.3d 1046, 1110, fn.35.) It also is the basis for admitting evidence under the rubric of "victim impact." (See, e.g., *People v. Robinson* (2005) 37 Ca1.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, *Tuilaepa v. California* (1994) 512 U.S. 967, it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.)

C. *California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death, In Violation Of The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.*

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (section 190.2) or in its sentencing guidelines (section 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be

articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make - whether or not to condemn a fellow human to death.

1. *Appellant's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional right to jury determination beyond a reasonable doubt of all facts essential*

to the imposition of a death penalty was thereby violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. 534 All this was consistent with this Court's previous interpretations of California's statute. *People v. Fairbank* (1997) 16 Ca1.4th 1223, 1255, stated that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . .". But this position has been squarely rejected by the U.S. Supreme Court ' s decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 549 U.S. 270.

Apprendi held that a state may not impose a sentence greater than that authorized by the jury' s simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction)

are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

Ring struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law, *Walton v. Arizona* (1990) 497 U.S. 639, it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding that increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Blakely considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that

included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) *Blakely* ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

The governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely*, at p. 304.)

United States v. Booker (2005) 543 U.S. 220, 224 reiterated the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Cunningham rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to

enhance a sentence above the mid-term specified by the legislature. *Cunningham v. California, supra.* In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In the wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, any jury finding relied onto impose the death penalty must be found true beyond a reasonable doubt. However, California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance — and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Ca1.4th 43,79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of-proof quantification"].)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that further factual findings must be made before a death penalty can be imposed.

Under California law, the maximum punishment that may be

imposed upon a *guilt* verdict of first degree murder with special circumstances, the death penalty may be imposed *only* upon a *further* factual finding that is *not* encompassed within the guilt verdict or the penalty procedure.

Arizona argued in *Ring* that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment. *Ring* was therefore sentenced within the range of punishment authorized by the jury's *guilt* verdict. The Supreme Court squarely rejected that argument:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] exposed] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. *Ring*, 124 S.Ct. at 2431.

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in

Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Even where the jury finds a special circumstance true under section 190.2, a death verdict is not an available option unless the jury makes *further* findings that one or more aggravating circumstances exist, *and* that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) *Blakely*, made it clear that, as Justice Breyer complained in dissent, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely*, *supra*, 124 S.Ct. at 2551; emphasis in original.)

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is

concerned. California's failure to require the requisite fact finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

2. *This Court's interpretation of the capital sentencing provisions in a manner as to preclude intra-case or inter-case proportionality review in either the trial court or this court results in arbitrary, discriminatory, or disproportionate impositions of the death penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has not adopted. *In Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

Section 190.3 does not require that either the trial court or this

Court undertake a comparison between this and other similar cases regarding the appropriateness of the death penalty, either intra-case or inter-case proportionality review. (See *People v. Fierro, supra*, 1 Ca1.4th at p. 253.) Those common sense comparisons are essential to an equitable and constitutional capital sentencing mechanism, and are lacking in California.

D. *California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution.*

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339,366.) The non use of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty

International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.anmesty.org].)

Although California is not bound by the laws of any other sovereignty in the administration of its criminal justice system, both the federal and state governments have relied on the customs and practices of other parts of the world as relevant reference points. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, ' subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.' " (1 Kent 's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. ofFi e ld, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227.)

In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *(Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fu. 21, citing the Brief for The European Union as Amicus Curiae.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.") Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. *(Cf. Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.)* Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence must be set aside.

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Conclusion

A criminal justice system that includes a death penalty is only credible if it selects appropriate candidates for such prosecution, provides the charged defendant with a fair trial, and lets the jury make the final decision.

In the present case, the police believed appellant was a dangerous killer, but lacked proof and cheated in many significant ways when building its case. Detectives gave "get out of jail free" cards to gang members and drug users who had little to offer, but were facing lengthy prison terms for their own crimes. And the police essentially told these people what to say.

After some of the police misconduct was revealed by the defense at trial, one juror refused to convict appellant due to the lack of reliable evidence of his guilt. The trial court thereafter removed the juror, who was the only obstacle to a conviction.

The state completely failed in its mission to provide appellant with a fair trial. The practices used by the state in this case raise serious questions about the credibility of our system.

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It may be that we are not good enough to have a system that includes the ultimate penalty.

Date: 5/26/15

Respectfully submitted,

Patrick Morgan Ford
Attorney for Appellant
TIMOTHY J. McGHEE

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 35,480 words, as determined by the word count feature of the program used to produce the brief.

Dated: 5/26/15

PATRICK MORGAN FORD

People v. Timothy J. McGhee CASE No. S169750

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Opening Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

California Appellate Project
Attn: Scott Kaufman
101 Second Street, Suite 600
San Francisco, CA 94105

Tannaz Kouhpainezhad
Office of the Attorney General
300 S. Spring Street, 5th Floor
Los Angeles, CA 90013

Honorable Robert J. Perry
Los Angeles Co. Superior Court
Dept. 104
210 W. Temple St.
Los Angeles, CA 90012

Hoon Chun
Deputy District Attorney
201 N. Figueroa St., 12th Fl.
Los Angeles, CA 90012

Timothy McGhee, #G-47302
P.O. Box G47302
San Quentin State Prison
San Quentin, CA 94974

Clay Jacke
Attorney at Law
880 W. First Street#302
Los Angeles, CA 90012

Additionally, I electronically served a copy of the above document as follows: 1) Court of Appeal, 4d2nbrief@jud.ca.gov. and 2) Attorney General, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on May 27, 2015, at San Diego, California.

s/Esther Rowe
Esther F. Rowe