SUPREME COURT No. S130659 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	
v.	Los Angeles County Superior Court No. YA049592
CRAIGEN LEWIS ARMSTRONG,	
Defendant and Appellant.	

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE WILLIAM R. POUNDERS , JUDGE

OPENING BRIEF FOR APPELLANT CRAIGEN LEWIS ARMSTRONG

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The Honorable William R. Pounders , Judge

OPENING BRIEF FOR APPELLANT CRAIGEN LEWIS ARMSTRONG

STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, art. VI, section 11 and Penal Code section 1239, subdivision (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

Based upon a second-amended Information filed on August 18, 2004 appellant Craigen Lewis Armstrong was charged with eleven felony offenses. (4 CT 996-1004.)

Counts 1 and 2 charged appellant with the special circumstance multiple murders of Michael Florence and Torry Florence, respectively, on September 30, 2001, committed by the intentional discharge of a firearm from within a motor vehicle to a person outside the vehicle with the intention to inflict death within the meaning of Penal Code section 187, subdivision (a), and Penal Code section 190.2, subdivisions (a)(3) and (a)(21). (4 CT 996-1004.)

Counts 3 and 4 charged appellant with the premeditated attempted murders of Brian Florence and Floyd Watson, respectively, on September 30, 2001 pursuant to Penal Code sections 664 and 187, subdivision (a). (4 CT 996-1004.)

Count 5 charged appellant with the special circumstance and additional multiple murder of Christopher Florence on September 27, 2001, committed while appellant was an active member of a criminal street gang and with the intention to further the activities of the gang, within the meaning of Penal Code section 187, subdivision (a), and Penal Code section 190.2, subdivisions (a)(3) and (a)(22). (4 CT 996-1004.)

As to Counts 1, 2, and 5, murder, it was further alleged that appellant personally used and discharged a firearm causing death within the meaning of Penal Code section 12022.53, subdivision (b), (c), and (d). (4 CT 996-1004.)

As to Counts 3 and 4, attempted murder, it was further alleged that appellant personally used and discharged a firearm pursuant to Penal Code section 12022.53, subdivision (b)and (c). (4 CT 996-1004.)

Counts 6 through 11 charged appellant with six offenses committed on May 1, 2002. Specifically, Count 6 charged appellant with the torture of Tyiska Webster pursuant to Penal Code section 206, and further alleged that appellant inflicted great bodily injury within the meaning of Penal Code section 12022.7. Count 7 charged appellant with the second degree robbery of Tyiska Webster under Penal Code section 211. Count 8 charged appellant with first degree burglary committed while a person who was not an accomplice was in the residence under Penal Code section 459 and Penal Code section 462, subdivision (a). Count 9 charged appellant with assault with a semi-automatic firearm as against Tyiska Webster within the meaning of Penal Code section 245, subdivision (b). Count 10 charged appellant with the false imprisonment of Tyiska Webster by violence under Penal Code section 236. Count 11 alleged that appellant also falsely imprisoned Camry Arana by violence pursuant to Penal Code section 236.[1] (4 CT 996-1004.)

On December 20, 2002 the trial court denied appellant's motion to sever the trial of the non-homicide offenses committed against Tyiska Webster and Camry Arana on May 1, 2002 (Counts 6 through 11) from the homicide-related offenses committed in September of 2001, and to sever the trial of the murder of Christopher Florence (Count 5) from the murders and attempted murders of Michael, Torry, and Brian Florence, and Floyd Watson (Counts 1

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[1] As to all counts, appellant was further charged with having suffered a prior felony "strike" conviction within the meaning of Penal Code section 667, subdivisions (b) through (i). It was also alleged that appellant was out on bail on his own recognizance at the time of the shooting offenses pursuant to Penal Code section 12022.1. (4CT 996-1004.) Following the guilt phase verdicts, the District Attorney elected not to proceed on the prior "strike" conviction allegation upon appellant's stipulation that the on-bail allegation was true. (18RT 3089-3090.)

through 4). (2 CT 340-349, 403.)

The jury trial commenced on July 13, 2004 with voir dire and motions in limine. (3 CT 844.) Following the presentation of evidence, the jury retired for deliberations on August 18, 2004. (4 CT 1005-1006.) On August 20, 2004 the jury informed the court it was deadlocked on all counts. (4 CT 1015, 1018-1019.) The court ordered the jury to continue deliberations and advised it could request additional argument from counsel for further clarification. (4 CT 1018-1019.)

On August 23, 2004 trial court found that Jurors 5 and 12 committed separate acts of misconduct and dismissed both jurors. (4 CT 1025-1026.) The defense objections and motion for a mistrial were denied. (4 CT 1025-1026.)

Thereafter, pursuant to the jury's request and over the defense objection, the trial court ordered counsel to re-argue particular points of evidence at 10:30 a.m. on August 26, 2004. (4 CT 1030-1031, 1035-1036.) At 4:15 p.m. on the same date, the jury announced it had reached verdicts on all counts. (4 CT 1036-1037.) On August 27, 2004 the jury verdicts finding appellant guilty on all counts and further finding the charged allegations to be true were read and recorded. (4 CT 1049-1067; 13 CT 3560.) With the agreement of counsel, the trial court struck the multiple murder special circumstances found true as to Counts 2 and 5. (13 CT 3568.)

The penalty phase of the trial commenced on September 16, 2004. (13 CT 3571.) The jury retired to deliberate on September 21, 2004. (13 CT 3578-3579.) On September 24, 2004 the jury rendered its verdicts of death as to Counts 1, 2 and 5. (13 CT 3588-3590, 3631.)

On January 5, 2005 the trial court denied appellant's motions for a new trial and for modification of the verdicts of death. (13 CT 3689-3703.) At the

sentencing proceedings on the same date, the trial court sentenced appellant to death for the special circumstance murders as to Counts 1, 2 and 5. Consecutive terms of life in prison plus 20 years were imposed for the attempted murders and attached firearm enhancements as to Counts 3 and 4. A consecutive term of life in prison for torture as to Count 6, and consecutive determinate mid-terms of three years for Count 7, robbery, and eight months, one-third of the midterm, for Count 11, false imprisonment, were imposed. The sentences for Counts 8, 9 and 10 were imposed and stayed pursuant to Penal Code section 654. (13 CT 3689-3703, 3704-3722, 3723-3726.)

The Commitment to the Judgment of Death was signed by Judge William R. Pounders on January 5, 2005. (13 CT 3682-3688.) This appeal is automatic.

STATEMENT OF THE FACTS

GUILT PHASE

Prosecution Evidence

The Murder of Christopher Florence (Count 5)

The Shooting Incident

At approximately 9:00 p.m. on September 27, 2001 Jaqueline Martinez was at her residence on Woodworth Street in Inglewood waiting outside for Christopher Florence[2] to arrive and spend the evening with her at her house. (12 RT 1842, 1849, 1851-1852.) Martinez had met Christopher at a block party in her neighborhood and knew he drove a Black Honda Civic. (12 RT 1842, 1849.) Christopher had called Martinez earlier to arrange their meeting and to obtain her address. (12 RT 1845-1847.) Martinez directed him to drive

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[2] Since the four victims in this case were brothers each with the last name of "Florence," they will be referred to by their first names for ease of reference. No disrespect to the family is intended.

to Crenshaw Boulevard and turn right, then to turn right on 104th Street, and then make a right turn at the stop sign onto Woodworth where her house was located. (12 RT 1847, 1850-1851.)

As Martinez waited outside in her front yard for Christopher, she heard approximately seven gunshots which she thought came from 10th Avenue, a street one block east from Woodworth. (12 RT 1852-1853.) About 10 to 15 seconds after the gunshots, Martinez saw a black Honda turn onto Woodworth traveling northbound in the direction of Century Boulevard.[3] (12 RT 1852-1853.) Martinez did not see who was driving the car or whether there were passengers inside. (12 RT 1857.) Martinez believed it was Christopher, whom she thought had driven by her house and then returned home upon hearing the gunshots. (12 RT 1857.)

A few minutes later Martinez called Christopher at home and reached one of his brothers who told her Christopher was not there. (12 RT 1856-1857, 1858.) Martinez waited for awhile and then called Christopher again, this time reaching his mother, who said he was not home yet. (12 RT 1858-1859.) Martinez went to bed. (12 RT 1859.)

Vincent Lofton was driving southbound on Crenshaw Boulevard shortly after 9:00 p.m. on the night of the incident. (13 RT 2048.-2049.) As he drove, he saw a black Honda turn onto Crenshaw Boulevard from 104th Street and then crash into a tree. (13 RT 2050-2052, 2054.) Lofton parked his car and went to assist the driver whom he assumed was intoxicated. (13 RT 2052,

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[3] Martinez did not recall telling police on the night of the incident that the Honda traveled southbound on Woodworth in the direction of 104th Street. (12 RT 1954-1855.) Detective Craig Lawler interviewed Martinez and recalled that she was confused about the direction the Honda traveled and finally concluded she was not sure. (14 RT 2247-2249, 2271-2272.)

2054.) Lofton saw bullet holes in the car and recalled the driver was leaning forward into the steering wheel and shaking, appearing badly wounded. (13 RT 2055.) The driver did not respond to Lofton's questions as to whether he was alright, so Lofton flagged down a passing ambulance. (13 RT 2056.) According to Lofton, the Honda's driver's side window was down and the inside of the vehicle was smoky or hazy. (13 RT 2056-2057.)

The Initial Law Enforcement Investigation

At approximately 9:20 p.m. on September 27, 2001 Inglewood police officer Cesar Jurado responded to a radio call regarding shots fired in the area of Bartdon and 10th Avenue in Inglewood. (12 RT 1876-1878.) At the south and southwest corners of the intersection, Jurado recovered eight nine-millimeter bullet casings. (12 RT 1877-1878; 14 RT 2133.)

Officer Jurado and officers Alcala and Gonzalez, who were also called to the scene, approached a Cadillac which was parked on the east side of 10th Avenue, just north of Bartdon, and facing south. (12 RT 1885, 1901.) There were two males in the car; one was laying down in the back seat and the other was in the nearly-reclined front passenger seat. (12 RT 1885, 1902-1903.) Jurado and Gonzalez recognized the males as members of the Crenshaw Mafia gang whom they had contacted on previous occasions: Ikenna Ogauha. known as "Ike," and Darryl Johnson, known as "Two Face." (12 RT 1886-1887, 1902-1903; 14 RT 2151-2152.) .)

The two males were asked to step out of the car and were patted for weapons. (12 RT 1887.) Jurado recovered three baggies of what appeared to be marijuana in the car and noted the interior smelled of marijuana. (12 RT 1889-1890.) After handcuffing and arresting Ogauha and Johnson, the officers found money on both males, and further found 59 additional baggies of marijuana in the trunk of the car. (12 RT 1890, 1896-1898.) Officer Gonzalez

opened the hood and determined the radiator hoses were cold. (12 RT 1904.) No weapons were found. (12 RT 1903.) The eight bullet casings were located about 15 to 20 feet from the Cadillac.[4] (12 RT 1894.)

Inglewood patrol officer Martin Sissac also responded to the call regarding shots fired at Bartdon and 10th Avenue. (10 RT 1582, 1589-1590; 14 RT 2133.) According to Officer Sissac, the area of the shooting was known as the "Darby-Dixon" area, also commonly referred to as the "Bottoms." (10 RT 1585-1587.) The boundaries of the "Bottoms" area included Club Drive, Woodworth and Lawrence Avenues, and Century and Crenshaw Boulevards. (10 RT 1587.) Officer Sissac approached the shooting scene by driving down Woodworth Avenue. (10 RT 1589-1590.)

After learning of the casings recovered at the intersection by Officer Jurado, Officer Sissac went to the scene of the Honda collision on 104th Street and Crenshaw Boulevard. (10 RT 1582, 1589-1591.) He saw the black Honda Civic straddling the center island on Crenshaw facing southbound. (10 RT 1591.) Paramedics were treating the driver of the car. (10 RT 1592-1593.) There was no evidence on the street of gunfire, although the Honda had two gunshot holes in the driver's side door and one gunshot in the trunk. (10 RT 1592-1593.) It was subsequently determined the incident of the Honda collision was related to the crime scene on 10th Avenue and Bartdon Avenue. (10 RT 1593.) The following day, Officer Sissac learned the driver of the

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[4] Ogauha and Johnson's hands were tested for gunshot residue. (12 RT 1890, 1898.) No gunshot particles were found on Johnson's hands. (13 RT 2080, 2086.) While particles were observed on Ogauha's hands, occupational or environmental origins could not be ruled out. (13 RT 2082-2083.) It was possible Ogauha had handled a firearm that had been discharged or had been in the environment of gunshot residue. (13 RT 2083.)

Honda was Christopher Florence, the brother of Michael, Torry, and Brian Florence, whom Sissac knew.[5] (10 RT 1592-1595.)

A forensic investigator examined the Honda Civic on the morning after the shooting. (13 RT 1973-1974.) Two expended projectiles and one bullet fragment were recovered from the interior of the car. (13 RT 1975.) The fragment was found on the floorboard behind the driver's seat, and the two projectiles were recovered from the glove compartment and the trunk. (13 RT 1976.) The investigator did not observe damaged or shattered glass in the car. (13 RT 1981, 1983.)

The Investigation by The Florence Brothers

Brian Florence was 18 years old in September of 2001. (9 RT 1501.) He was a student at that time, but his brothers Christopher, 21 years old, Michael, 27 years old, and Torry, 29 years old, had jobs. (9 RT 1501; 15 RT 2307.) None of the brothers belonged to a gang or had criminal histories. (9RT 1501; 15 RT 2309.) According to Mrs. Florence, Michael had one tattoo depicting his mother's name on his left arm. (15 RT 2309.) Christopher, Michael, and Torry had all graduated from high school and owned homes. (15 RT 2312.)

Brian Florence recalled that at approximately 6:30 a.m. on September 28, 2001, his brother Torry Florence awakened him to tell him that Christopher was dead. (9 RT 1447-1448.) Mrs. Florence was in the living room with detectives, and at some point, their brother Michael Florence, who lived in Downey, also arrived at the house. (9 RT 1448-1450.) That day the family went to the hospital to identify Christopher and at some point, they drove by

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[5] Over defense objections, the trial court permitted evidence that Michael Florence had been a volunteer "Explorer" with the Inglewood police department. (9 RT 1440; 10 RT 1594.)

the scene where Christopher died. (9 RT 1450-1451.) All of the brothers stayed at the family home with their mother that night. (9 RT 1451.)

At about 8:00 a.m. on the following morning, September 29, 2001, Brian, Michael, Torry and their mother drove to the "Bottoms" area where Christopher was shot. (9 RT 1450-1451, 1505.) When they saw several gang members hanging out on 10th Avenue, Michael put his hand out the window and used his fingers to simulate the pointing of a gun. (9 RT 1505-1507, 1510.) According to Brian, both Michael and Torry were familiar with the "Bottoms" area. (9 RT 1508-1510.)

At some point on the same day, Michael Florence called Officer Sissac to inform him that his brother Christopher had been killed. (10 RT 1595.) When Sissac went to the Florence home to offer condolences, Michael told him he was trying to investigate his brother's death. (10 RT 1596-1597.) According to Sissac, Michael appeared angry but not vengeful. (10 RT 1597.) Michael gave Sissac an envelope which contained a Washington Mutual savings account statement in Christopher's name. (10 RT 1598-1599.) On the outside of the envelope was printed, "Crenshaw, right one stop Woodworth, 104th right." (10 RT 1599.) Michael also gave Officer Sissac a piece of paper which reflected the name and phone number for "Jackie." (10 RT 1600.)

Michael contacted Officer Sissac two more times that day to let him know what he had learned about Christopher's death. (10 RT 1598.) During their final conversation at approximately 11:00 p.m. on September 29th, Michael told Sissac that he was going to meet with a woman by the name of Nicole the following day near 104th Street and Van Ness. (10 RT 1606-1607, 1611.) He told Sissac he planned to drive over to the area that night to see the neighborhood because he was unfamiliar with the streets. (10 RT 1606.) When Sissac told Michael that he should leave the investigation to the police,

Michael said he "wanted to do anything he could to find his brother's killers." (10 RT 1608-1609.) Michael did not tell Officer Sissac that he had driven through the "Bottoms" area earlier that day. (10 RT 1608.)

The Autopsy of Christopher Florence

According to the medical examiner, Christopher died from a bullet wound which entered the left side of his body, damaging his left kidney as well as several abdominal blood vessels including the left aorta. (10 RT 1622.) Each of the internal injuries was independently fatal. (10 RT 1622.) According to the medical records, the bullet was recovered during surgery. (10 RT 1621; 12 RT 1837-1839.) Toxicological analyses were negative for the presence of drugs and alcohol. (10 RT 1621.)

The Murders of Michael and Torry Florence (Counts 1 and 2) and the Attempted Murders of Brian Florence and Floyd Watson (Counts 3 and 4)

Preliminary Incident at the 7-Eleven Store

At approximately 11:50 p.m. on September 29, 2001 Jason Martin and a companion arrived in separate cars and bought snacks at the 7-Eleven store on the corner of Prairie and Arbor Vitae in Inglewood. (8 RT 1275-1276, 1279, 1311-1312.) While talking in front of the store Martin saw a red or burgundy Contour, which was traveling northbound, pull up to the stop sign on Prairie, then back up and pull into the store parking lot and back into a space. (8 RT 1280, 1290, 1313-1314.) A male got out of the back passenger seat. (8 RT 1280, 1302.) According to Martin, a female was driving and at least one or two other females were also in the car. (8 RT 1280, 1301-1302.)

Martin was approached from behind by the male who asked him where he was from. (8 RT 1276, 1318-1320, 1334.) Martin responded he did not

gang bang.[6] (8 RT 1276, 1320.) The male, whom Martin later identified as appellant, was wearing gloves, a red belt, as well as a long red "hoody" with a front center pocket, and was known as "Juvenile" from the Crenshaw Mafia gang.[7] (8 RT 1277-1279, 1302-1303, 1309, 1315, 1320-1321, 1325, 1328, 1334, 1338; 14 RT 2248-2250.) At that moment, Martin saw another car drive up from which a male passenger exited and said to appellant, "He lives in the neighborhood." (8 RT 1276, 1303, 1321-1322.) When Martin turned back around appellant hit him in the face and then walked into the 7-Eleven store. (8 RT 1276-1277, 1279, 1303, 1323.) Martin did not retaliate and walked away. (8 RT 1278-1279, 1302-1303, 1324, 1328.) According to Martin, appellant was not displaying a gun and did not appear to be reaching for a firearm during the encounter. (8 RT 1325, 1328.) Martin, who was upset, went back to his car and drove away at a high rate of speed. (8 RT 1307, 1326-1327.) He was signaled to stop by a police car and he told the officers what had taken place at the 7-Eleven store. (8 RT 1308, 1316; 14 RT 2178-2181.)

Inglewood police officer Scott Collins and his partner stopped Martin. (14 RT 2178-2179.) According to Officer Collins, Martin described the suspect as a medium-complexioned black male wearing a red sweater who

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[6] At trial, Martin denied that he told the male he was from the Crenshaw Mafia gang. (8 RT 1321.)

[7] On October 1, 2001 Martin identified a photograph of appellant from a six pack of photographs [People's Exhibit No. 5]. (8 RT 1294.) On the same date, Martin also identified the woman who was seated in the front passenger seat of the red car from another six pack of photographs [People's Exhibit No. 4]. (8 RT 1292-1293.) Two weeks prior to trial, Martin again identified a photograph of appellant from an array of nine photographs [People's Exhibits 6A, 6B, and 6C]. (8 RT 1295-1297, 1316, 1335-1337.)

punched him and then went into the 7-Eleven store. (14 RT 2180-2183.) Martin said the male was in a red Ford Taurus with some females. (14 RT 2180-2181.) After unsuccessfully attempting to locate the suspect, Officer Collins advised Martin to file a report at the police station. (14 RT 2181.)

The Shootings

During the day and evening of September 29, 2001, friends of the Florences were visiting the family residence located on Flower Street to mourn Christopher's death. (9 RT 1364, 1395, 1451; 14 RT 2252.) Floyd Watson, a friend of Brian's, also spent the day there. (9 RT 1362-1363.) The house was approximately a three-minute drive from the 7-Eleven store on Prairie and Arbor Vitae. (9 RT 1456.)

According to Brian, sometime before midnight that night, his brother Michael received a telephone call from a female who identified herself as "Nicole" and who told him she had information about Christopher's death. (9 RT 1439-1440, 1452, 1514.) Michael and Torry decided to leave to get something to eat and look into the information about Christopher. (9 RT 1452-1453, 1513-1514; 10 RT 1555.) Brian and his friend, Floyd Watson, joined them. (9 RT 1364-1367, 1394-1396, 1452-1453.) According to Watson, no one was carrying a weapon.[8] (9 RT 1425.)

They left the house in Michael's Ford Mustang. (9 RT 1453.) Michael drove, while Torry rode in the front passenger seat, and Brian and Watson were in the back seated behind Michael and Torry, respectively. (9 RT 1366, 1455-1456.) Their first stop was to be the Burger King located at the

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[8] Brian denied that Torry owned a .380 firearm or that the brothers brought such a gun with them on the night of the shooting. (9 RT 1512.)

intersection of Century and Crenshaw Boulevards. (9 RT 1366, 1455.)

Michael drove eastbound on Century Boulevard and stopped at a red light at the corner of Century and Doty Avenue, an intersection which, to the north, also served as the entrance to the Hollywood Park Casino. (9 RT 1367-1368, 1455, 1533.) While the car was stopped, Watson heard someone yelling from a car next to them and he looked out the tinted rear window of the Mustang. (9 RT 1367-1368, 1426.) He saw a light-skinned African-American male with curly hair and a mustache leaning out from the window of the back passenger seat of a burgundy Ford Contour which was stopped completely behind the Mustang in the left lane. (9 RT 1368-1370, 1372, 1374.) The male was looking at Michael's car as he yelled and according to Watson, he appeared frustrated and aggressive. (9 RT 1372-1373, 1375, 1429-1430.) Watson also noticed a female in the front passenger seat of the Contour. (9 RT 1373.) Watson pointed out the male to Michael, who then started to roll the driver's side window down to see what was the matter. (9 RT 1375, 1459-1460, 1488, 1526-1527.) Michael rolled his window all the way down when he spoke to the male, and then partially rolled it up again. (9 RT 1488, 1538-1539; 10 RT 1558.)

Brian also saw the burgundy Contour, which he described as stopped about one-half a car length behind the Mustang, and observed two females in the front seat. (9 RT 1455, 1457.) He asked Torry if he knew them, and Torry responded, "That's Randi and her sisters." (9 RT 1457-1458, 1523-1524.) Brian did not know Randi. (9 RT 1457.) Brian also saw a shadow of a male in the back seat. (9 RT 1539.) Watson commented that the male appeared to have an "attitude." (9 RT 1459.) Brian looked back at the car and said to Michael, "Watch out, watch out for that guy in the car," and "Dude, he's up to

no good."[9] (9 RT 1458, 1525, 1538.) Although Brian did not hear what Michael said to the male, he believed they were having some kind of "conflict." (9 RT 1488-1489, 1526-1527.)

Moments later, Watson saw the male lean back into the car and retrieve a small gun. (9 RT 1392-1393, 1408, 1431, 1423.) According to Watson, the cars had not moved. (9 RT 1376.) Watson yelled to his companions to get down, saying, "He's got a gun." (9 RT 1389, 1460-1461, 1530, 1539.) Brian looked back and did not see a gun, but when he turned and looked toward Michael, he heard four or five gunshots and ducked. (9 RT 1460-1461, 1463, 1486, 1529.) Watson laid across the back seat toward Brian so his head would not be visible and heard approximately five gunshots. (9 RT 1376-1377.) One bullet shattered the driver's side window next to Michael. (9 RT 1528.)

After the shots, Brian looked up and saw the male put his head outside the car window and look at the Mustang. (9 RT 1463-1464, 1489, 1521.) According to Brian, the Contour then moved slowly nearer to the Mustang and then picked up speed and drove away quickly. (9 RT 1465, 1521.) Brian ducked again so the male could not see that he and Watson were still alive in the back seat of the Mustang. (9 RT 1465-1466.) He observed that the male was light-skinned with "curly-top" hair, thick eyebrows, and a goatee. (9 RT 1458, 1466, 1497, 1500, 1542; 10 RT 1562.) He also noticed the male was wearing a red hooded sweatshirt with a print of the skeleton logo of the brand Johnny Blaze on the front. (9 RT 1466.) Watson saw the Contour continue

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[9] Brian testified he recalled telling the police that the male was "mad-dogging" him, but at trial could not recall that actually happening. (9 RT 1463.) On October 30, 2001 Officer Sissac interviewed Brian Florence. (14 RT 2134.) According to Sissac, Brian described the shooter in detail and reported that the shooter was "mad dogging" him. (14 RT 2134-2135.)

straight eastbound on Century Boulevard toward Crenshaw. (9 RT 1378.)

Both Watson and Brian saw that Michael was shot in the head and choking as he bled from his nose and neck, while Torry was shot in the back of the head and leaning in his seat toward the passenger door. (9 RT 1378-1379, 1410, 1486-1487.) Michael put the car in gear and as it began to move, Brian jumped to the front seat to steer the car toward the middle of the road and out of the way of oncoming traffic. (9 RT 1380, 1412, 1468, 1486, 1488, 1519-1520, 1530.)

Brian, who did not have a cell phone, got out of the Mustang and jumped into a yellow city truck which had pulled up alongside, telling Watson he was going for help. (9 RT 1378, 1380-1381, 1414, 1467, 1518, 1530-1531; 10 RT 1566-1568.) Brian directed the driver of the truck eastbound on Century, then northbound on Crenshaw to the corner of Crenshaw and Manchester. (9 RT 1468-1469.) He attempted to call the police on a pay phone at a Fish Market restaurant on Crenshaw and Manchester, but when he heard the police sirens, he hung up and asked the driver of the truck take him back to the shooting location.[10] (9 RT 1469-1474, 1536-1537.)

Immediately after the shooting, Watson also got out of the Mustang and entered a passing vehicle containing two females. (9 RT 1381, 1413-1414.) Watson's car followed the construction truck that Brian was riding in eastbound on Century Boulevard, then north on Crenshaw to the intersection of Crenshaw and Manchester but Watson did not see the Contour again. (9 RT 1381-1383, 1415.) Watson phoned the police from a store and then returned

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[10] The driver of the truck, Mark Skelly, testified that they only stopped at a gasoline station and that Brian did not get out of the truck. (10 RT 1574-1575.) Skelly described Brian as very panicked, fearful, and distraught. (10 RT 1567, 1572.)

to the scene of the shooting. (9 RT 1382, 1415-1416, 1423.)

The Law Enforcement Investigation

The Initial Police Response, the Collection of Evidence at the Scene, and the Identification of Appellant as the Shooter

At 12:04 a.m., Inglewood police officer Gary Siddell and his partner, Don Sevesind, responded to a radio call regarding a shooting and two victims laying in the street at the intersection of Century Boulevard and Doty Avenue. (9 RT 1352.) Upon arrival, Officer Siddell saw one victim, whom he later learned was Michael Florence, in the driver's seat of the Ford Mustang with blood on his face, as well as blood on the front driver's and passenger seats. (9 RT 1352-1353, 1359.) Officer Siddell also saw a second victim laying face-down and motionless in a large amount of blood on the street on the passenger side of the vehicle. (9 RT 1353-1354.) His left cheek was on the pavement and he had two bullet wounds which appeared to be entry and exit wounds; one was to the back of the head and the other was behind his ear. (9 RT 1353.) Officer Siddell approached the male, whom he later learned was Torry Florence, and asked who shot him. (9 RT 1353, 1358-1360.) Torry responded faintly, "CMG's." (9 RT 1354, 1360.) When Officer Siddell asked Torry whether he recognized anyone involved in the shooting, Torry answered, "Yeah, a girl named Randi." (9 RT 1354-1355, 1360.) Torry did not move or speak again. (9 RT 1355.) According to Officer Siddell, the "CMG's" are a blood gang set known as the Crenshaw Mafia Gangsters. (9 RT 1354.)

Officers at the scene of the shooting also recovered six bullet casings at the intersection of Century Boulevard and Doty Avenue. (14 RT 2130, 2246.) Five of the casings were in the roadway and one was on the curb line. (14 RT 2130.)

Officer Collins and his partner, who had stopped Jason Martin earlier in the evening, were dispatched to the intersection of Century Boulevard and Doty Avenue where Officer Collins first spoke to Brian Florence. (14 RT 2182.) Brian explained that the two males in the Mustang were his brothers and he described the male who had shot them. (9 RT 1475; 14 RT 2183.) Realizing that Brian's description of the suspect was the same as Martin's description of the male who had punched him at the 7-Eleven store earlier, Officer Collins decided to take Brian to the police station for questioning. ((9 RT 1475-1476, 1540-1541; 14 RT 2183.) Brian was handcuffed and put into a police car. (9 RT 1475-1476.) On the way to the station, the officers stopped at the 7-Eleven store on Prairie and Arbor Vitae where Officer Collins reviewed the computerized video system. (14 RT 2184.) He saw a photo of the suspect entering the store. (14 RT 2185.)

Inglewood police Sergeant Percy Roberts responded to the scene of the shooting at Century Boulevard and Doty Avenue in the early morning of September 30, 2001. (8 RT 1340.) The detectives who had been assigned to the incident were Detectives Steinhoff and Lawler.[11] (8 RT 1341; 14 RT 2203-2204, 2243.) Sergeant Roberts and Detective Steinhoff immediately went to the 7-Eleven store at Prairie and Arbor Vitae based upon information regarding the existence of a videotape of an incident there. (8 RT 1342; 14 RT 2205.) They also had information that the suspect who was seen at the store earlier, as well as the male who committed the shooting, was riding in a red car with females. (8 RT 1341-1342; 14 RT 2205.) When Sergeant Roberts reviewed the videotape, he told Detective Steinhoff that the suspect in the

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[11] Detective Lawler retired from the department a few months before the instant trial and Detective Steinhoff became the primary case investigator. (14 RT 2204.)

video was appellant, who was also known as "Juvenile." (8 RT 1342-1344; 14 RT 2206.) Sergeant Roberts was certain of his identification of appellant as the male in the video based upon several previous contacts with him. (8 RT 1346.)

Detective Steinhoff went to the law enforcement Cal Gangs computer system and requested the program to pull up photographs of the members of the Crenshaw Mafia gang, limiting the search to 25 photos per set. (14 RT 2208.) The computer produced the first set of 25 photos, which included a photograph of appellant randomly positioned in slot number 3. (14 RT 2208.) Nine photographs were visible on the screen at any given time. (14 RT 2209, 2232.) Detective Steinhoff also entered the name "Randi" in Cal Gangs as a member of the Crenshaw Mafia Gangsters. (14 RT 2216-2217.) A photograph of Randi Reddic appeared in position number 4. (14 RT 2216-2217.)

In the early morning hours of September 30, 2001 Detective Lawler interviewed Brian at the Inglewood police station. (14 RT 2260, 2268-2269.) Brian described the shooter in detail, including the red sweatshirt he was wearing. (14 RT 2260-2262.) He also told Detective Lawler that he and his family had driven to the Bottoms on the morning of September 29, 2001. (14 RT 2269.) Brian described Michael Florence's hand gesture depicting a gun in front of the numerous gang members assembled in the neighborhood. (14 RT 2269.)

After Brian's interview with Detective Lawler, Detective Steinhoff showed Brian the computer photo display. (9 RT 1477; 14 RT 2207, 2210-2213.) He selected the photograph of the male in slot number 3 as the shooting suspect. (9 RT 1479, 1542-1543; 14 RT 2212-2214.) He also described the male whose photograph was in slot number 23 as resembling the

suspect, although he was "pretty positive" the shooter was the male in slot number 3. (9 RT 1479-1480, 1544; 14 RT 2212-2214.) At trial, Brian identified appellant as the person whose picture was placed in slot number 3 and testified he was "100 percent positive" he was the shooter. (9 RT 1480-1481.)

Watson was also taken to the police station and interviewed for approximately 30 minutes.[12] (9 RT 1417.) He was not handcuffed. (9 RT 1391-1392.) Detective Steinhoff showed Watson the computer screen of photographs from which he identified the males in photographs numbered 3 and 23 as looking like the suspect. (9 RT 1388-1389, 1417-1418; 14 RT 2214-2215.)

On October 8, 2001 the Detective Lawler visited Watson and Brian at the Florence home and separately showed them a black and white photocopy of the computerized pictures they had previously seen, as well as photos of the red Contour. (9 RT 1389; 14 RT 2216, 2251-2253.) Both Brian and Watson once again identified the man whose photo was in slot number 3 as the closest to the shooter. (9 RT 1389-1391; 14 RT 2253-2254, 2259.) Brian also stated the photos of the Contour looked like the car the shooter traveled in, although the actual car was darker in color. (14 RT 2255-2258.) At trial, Watson identified appellant as looking similar and having the same facial features as the person with the gun. (9 RT 1387.)

At some point, Detective Lawler showed Jason Martin the 25 photographs on the Cal Gangs computer screen. (14 RT 2249.) Martin identified the person in position number 3 as being the person who hit him at

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[12] Watson and Brian were not questioned together. (9 RT 1476, 1541.)

the 7- Eleven store. (14 RT 2249-2250.)

Detective Lawler also tried to locate Nicole, the female who had purportedly contacted Michael Florence with information about his brother's death. The detective never found her. (14 RT 2247, 2270.)

The Videotape from the Hollywood Park Casino

A video camera situated on top of the Hollywood Park Casino was positioned to record activities at the intersection of Century Boulevard and Doty Avenue where the shooting took place.[13] (14 RT 2221-2222.) In the videotape, shot from the camera at approximately midnight on December 29, 2001, two cars could be seen approaching the intersection.[14] (14 RT 2222.) The red Contour arrived at the intersection first, but stopped at the red light one car length behind the limit line. (14 RT 2222.) The Mustang then pulled up, passing the Contour, and stopping at the limit line. (14 RT 2222.) After approximately 20 seconds, the Contour pulled up a few feet. (14 RT 2222.) When the signal turned green, the Contour began moving forward. (14 RT 2222.) The Mustang, however, started to move slowly and then veered into the westbound traffic lanes and out of the camera's view. (14 RT 2222.)

On October 14, 2001, Detective Lawler oversaw a re-creation of the incident which was based upon the videotape from the casino, as well as upon the descriptions given by Brian Florence and Floyd Watson. (14 RT 2266-2267, 2272.) The actual vehicles were used. (14 RT 2266.) The red Contour

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[13] The camera was a significant distance away from the intersection and Detective Steinhoff acknowledged the video was unclear. (14 RT 2222.)

[14] The videotape was marked as People's Exhibit No. 113 and shown to the jury during Detective Steinhoff's testimony. (14 RT 2221, 2223.)

was positioned in the number one lane, and the Mustang was placed in the number two lane, although in the video camera it appeared the cars were in the number two and number three lanes, respectively. (14 RT 2272, 2274-2275.) Five of the shell casings were recovered from lane number three. (14 RT 2273-2274.)

The Search of Appellant's Home, His Arrest, and the Recovery of the Firearm

On October 3, 2001 Downey police officer Michael Parino conducted a "high risk felony stop" on Darrin Armstrong, appellant's younger brother, and his passenger, Shaun Jones, who were riding in Darrin's Ford Escort.[15] (12 RT 1790, 1908-1912.) Darrin gave consent for a search of his car. (12 RT 1912.) Officers located a Bryco or "Jennings" nine-millimeter pistol in plain view in the right door-jamb or molding, leaning up against the passenger seat [People's No. 73]. (12 RT 1913-1916, 1919; 13 RT 1987, 1989, 1992, 2068.) The firearm was loaded with nine bullets, including eight bullets in the magazine and one chambered. (12 RT 1914-1916.) The evidence was retained and booked by the officers. (12 RT 1915.)

On the same day, Downey police detective Detective Mark Galindo was assisting in the surveillance of appellant's and Darrin's home. (12 RT 1926-1927.) The goal was to take appellant into custody. (12 RT 1928.) At some point, Detective Galindo and his partner were radioed that appellant was in a

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[15] The stop arose from information that a homicide suspect was in the vehicle. (12 RT 1910.) Rather than approach the car directly, the officers remained behind the car with their firearms pointed and yelled for the occupants to exit the car with their hands up. (12RT 1910-1911.) It was subsequently determined that the homicide suspect the police were seeking was not in the car. (12 RT 1912.)

moving vehicle and they drove into a position to follow it. (12 RT 1928.) At the intersection of Firestone and Downey Boulevards, the officers initiated a "high risk" traffic stop and located appellant in the passenger seat of a red Ford Contour. (12 RT 1928-1929; 14 RT 2124-2125.) He was wearing red clothing, a red cap, and red shoes. (12 RT 1930.) He did not resist arrest. (12 RT 1930.) The vehicle was driven by its registered owner, Tonesha Washington. (12 RT 1928-1929; 13 RT 1935.)

During the evening following appellant's arrest, Detective Steinhoff conducted a search of appellant's family home on Cherokee Road in Downey. (14 RT 2217-2218, 2250.) A red sweatshirt was recovered from appellant's closet. (14 RT 2218-2219.) The sweatshirt was subsequently tested for gunshot residue. (13 T 1952.) Although highly specific particles of gunshot were found on the fabric, the analysis only permitted the conclusion that the sweatshirt had been in the environment of gunshot residue. (13 RT 1954-1957.)

Detective Lawler examined the Coutour after appellant's arrest. (14 RT 2245.) He did not observe any gunshot damage to the car. (14 RT 2245.)

The Ballistics Investigation

A Los Angeles sheriff's department criminalist and ballistics expert, Dale Higashi, compared rounds fired from the semi-automatic firearm found in Darrin's Ford Escort with the eight bullet casings recovered from the area of the Christopher Florence shooting, the six casings recovered from the intersection of Century Boulevard and Doty Avenue, as well as the two bullets and fragment recovered from the Honda, the bullet removed from Christopher Florence during his surgery, and the bullet removed from Michael Florence during his autopsy. (13 RT 1986-1987, 1996.) Bullets were test-fired from the pistol and the sample expended projectiles and casings were compared to those

collected as evidence. (13 RT 1988-1990.) According to Higashi, all of the bullets, fragments and casings were fired from the Bryco pistol.[16] (13 RT 1990-1995.)

Higashi also examined photographs of Christopher Florence's Honda and determined the car was struck at least six times. (13 RT 1999.) One bullet struck the driver's side door approximately four inches below the door handle. (13 RT 2000.) The gun was likely directly perpendicular to the car door when it was fired. (13 RT 2000-2001, 2018.) Christopher Florence's bullet wound was consistent with a bullet penetrating the driver's door from the outside. (13 RT 2002-2003, 2011-2012.) Two more bullets hit the outside driver's side of the vehicle, and penetrated to the interior, one just below the left rear window and another further to the rear above the gasoline tank filler. (13 RT 2001-2002, 2013, 2015, 2018.) Both appeared to have been shot from a slight angle from behind the car, in a back to front direction. (13 RT 2001-2002.) There was also bullet damage to the trunk area from left to right without penetration, as well as near the license plate frame, indicating the shooter was likely positioned in line with the rear of the car at some point, and then subsequently at a distance behind the car. (13 RT 2003-2004, 2009-2011, 2018.) The interior front passenger door reflected bullet damage that likely arose from a separate bullet which entered through a broken or open window. (14 RT 2004-2005.) Finally, the cushion of the driver's seat back was torn in two places with the fabric extending outward in a cone shape, consistent with the entry and exit of two bullets or bullet jackets. (13 RT 2006-2008, 2013-2014.) According to Higashi, given the varying angles of the gunshots, either one or

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[16] The firearm was also analyzed for fingerprints and none were recovered. (13 RT 2068-2069.)

both of the shooter and the Honda were moving at the time of the shots. (13 RT 2018-2019.)

Higashi further examined photographs of Michael Florence's Ford Mustang to reconstruct the gunshot damage and the trajectories of the bullets.[17] (13 RT 2020-2021.) Higashi noted four direct bullet impacts to the driver's side door of the Mustang. (13 RT 2022-2025.)

One bullet penetrated the left rear window of the car. (13 RT 2022-2023.) Higashi could not determine the trajectory of the bullet as there was no corresponding damage to the interior of the car. (13 RT 2023, 2029.) It was possible the bullet caused the death of Torry Florence, although Higashi opined it was also logical that the bullet that killed Torry entered through an open window. (13 RT 2029-2031.) Another bullet hit the metal frame on the door and did not penetrate the vehicle. (13 RT 2023-2024.) A third bullet did not enter the passenger compartment, but appeared to have been shot at the door at a left-to-right and slightly upward angle. (13 RT 2024.) A fourth bullet caused external damage just behind the driver's side door, and appeared to have been fired at a slightly downward angle. (13 RT 2024-2025.)

There was additional bullet damage to the interior passenger visor which could have resulted from the deflection of a bullet first hitting another object in the vehicle. (13 RT 2022, 2025.) Finally, a bullet caused damage to the front passenger window. (13 RT 2026.) Higashi could not conclude with certainty whether the bullet traveled through the passenger compartment of the car before exiting through the window, but the damage to the vehicle was not inconsistent with this theory. (13 RT 2026-2027.)

According to Higashi, the bullet that caused the death of Michael

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[17] Mr. Higashi did not examine the car itself. (13 RT 2032.)

Florence was likely fired through the partially open driver's side window from the side of the car while he was facing forward. (13 RT 2030, 2033, 2036-2037.) The autopsy photograph of the fatal wound was consistent with this conclusion. (13 RT 2030.) There was no other bullet damage in the car or passenger compartment that was compatible with the apparent trajectory of the bullet wound.[18] (13 RT 2030.)

An examination of rods placed in the bullet holes in the driver's side door reflected the gunshots were fired from different angles, including one from behind the Mustang, another further forward, and one directly even with the car. (13 RT 2031-2032.) Higashi concluded that if the Mustang remained in a relatively stationary position, the car carrying the shooter was moving.[19] (13 RT 2031, 2034.)

The Autopsies of Michael and Torry Florence

According to the medical examiner, Michael Florence died from a single gunshot wound to the head. (10 RT 1625-1627.) The bullet entered just below his left ear and was recovered from the right side of his head. (10 RT 1627-1628.) A gunshot graze wound was observed on the left side of the back of his neck or shoulder. (10 RT 1627; 13 RT 2045.) Toxicology tests were negative for the presence of drugs and alcohol. (10 RT 1629.)

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[18] On cross-examination, Higashi conceded that if Michael Florence was turned to his left and facing toward the rear of the car, the bullet that entered the left rear passenger window could have struck him on the shoulder and then hit his neck below the ear. (13 RT 2040-2041, 2046.) To accomplish this, however, the shooter's car would have necessarily been behind the Mustang and the gun aligned with the side of the car. (13 RT 2042, 2044.) Moreover, there was no corresponding bullet damage to the seat cushion or headrest. (13 RT 2043-2044.)

[19] On cross-examination, Higashi conceded that both cars could have been moving at different paces. (13 RT 2034.)

Torry Florence died from a single gunshot wound to the back of the head. (10 RT 1632-1634.) The bullet exited slightly behind his right ear. (10 RT 1633.) Toxicology tests were negative for the presence of drugs and alcohol. (10 RT 1634.)

The Offenses Committed Against Tyiska Webster and Camry Arana (Counts 6 through 11)

On May 1, 2002 Tyiska Webster was in the Los Angeles police department Wilshire Division witness protection program and was temporarily staying, along with her young daughter Camry Arana, at the Beverly Garland Hotel.[20] (11 RT 1651, 1713-1714.) She had been in the hotel since the middle of April while arrangements were underway by police to relocate her to a permanent home on Lankershim Boulevard. (11 RT 1714-1715; 14 RT 2118-2120.) Only Webster's father, younger brother, and grandmother knew of her location and phone number. (11 RT 1717, 1720-1721, 1727.) Webster was seven months pregnant. (11 RT 1663-1664.)

Webster's involvement in the witness program was not related to appellant or to the offenses he was charged with, although she knew appellant at the time and had communicated with him as well as provided him money while he was in jail. (11 RT 1651, 1665, 1687, 1726-1727, 1734.) According to Webster, she and appellant had a dating relationship for about one month,

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[20] According to Los Angeles police officer Frank Bolan, on April 13, 2002 Webster had identified her friend, Vonya Masson, as the killer of Shaneeka Foster two days earlier. (13 RT 2092-2094.) Officer Bolan eliminated Webster as a suspect in the murder and placed her in protective custody at the Beverly Garland hotel on April 19, 2002. (13 RT 2095-2096; 14 RT 2120-2122.) He told Webster not to reveal her location or phone number without conferring with him first. (14 RT 2116.)

between August and September of 2001. (11 RT 1665, 1687, 1734.) During that time, she loved him. (11 RT 1665.) As of May 1, 2002, Webster had not seen appellant since approximately February or March of that year, and had stopped communicating with him. (11 RT 1687.) According to Webster, appellant was a member of the Crenshaw Mafia gang and was known by the moniker "Juvenile." (11 RT 1688, 1691.)

At approximately 6:15 p.m. on May 1st, Webster answered a knock at her hotel door after a female voice announced she was from "housekeeping." (11 RT 1652, 1727.) When she opened the door, two males and two females rushed in and pushed Webster onto the bed. (11 RT 1652.) Webster recognized one of the males as Darrin Armstrong,[21] appellant's brother, as well as one of the females whom she knew from prior contacts as Jaimie Evans.[22] (11 RT 1652-1654, 1657, 1719-1722; 12 RT 1790.) Darrin was a member of the Crenshaw Mafia gang and was known by the moniker "Spider." (11 RT 1170.) Webster had never met the other male, who was later identified as Kevion Clark, or the second female, who was known as "Ebony." (11 RT 1652-1653, 1655-1656.)

After pushing her on the bed, Darrin put his knee into Webster's back and began asking her why she was in the witness protection program, whether she was "snitching" on his brother, and where she kept her money. (11 RT 1657; 12 RT 1783, 1807, 1817-1818, 1820-1821.) Webster explained that she

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[21] Webster told later told police that she had been present during a drug transaction between Masson and Darrin in early 2002. (11 RT 1722-1723; 12 RT 1796-1797.)

[22] Webster and Evans had lived together for a few weeks but the relationship ended when Evans assaulted Webster and the police were called. (11 RT 1720.)

was in the program for providing information to the police about a crime involving her former girlfriend, Vonya Masson, but Darrin did not believe her. (11 RT 1666, 1713, 1715-1716, 1728.)

Evans stripped the second bed and tied Webster with the sheets. (11 RT 1657.) Clark locked Webster's three-year old daughter, Camry Arana in the bathroom. (11 RT 1657.)

Darrin pulled out a nine-millimeter gun, and when Webster denied snitching on his brother, he hit her on the head with the weapon several times. (11 RT 1658-1659, 1728.) At some point, Webster was thrown to the floor and a pillow case placed over her head. (11 RT 1659.) She was kicked in the head and shoulders, and hit with the gun repeatedly. (11 RT 1659.) Webster fell in and out of consciousness two or three times. (11 RT 1659, 1674.)

During the assault, Darrin's cell phone rang and Webster heard him say to the caller, "We found her," and "What do you want me to do with her," or words to that effect. (11 RT 1659, 1723.) He also told the caller they had not found any money and further asked if they should "oop" her, which Webster understood to mean "kill" her. (11 RT 1660, 1724; 12 RT 1755.) Darrin then placed the phone next to Webster's ear, and she heard appellant's voice on the other end of the phone say, "What's up, Blood," and ask why she had not put money on his books. (11 RT 1600.) Webster responded that she would give him money if he told the people to leave. (11 RT 1660.) Appellant asked to speak again with Darrin. (11 RT 1660.) Webster was certain the voice on the telephone was that of appellant. (11 RT 1665.)

Darrin again asked appellant if they should shoot Webster, noting that a gunshot would be too loud. (11 RT 1660-1661, 1724-1725, 1729; 12 RT 1755-1756, 1798.) Clark said they should kill her, or words to that effect, and Ebony suggested placing three or four pillows over Webster's head. (11 RT

1660-1661, 1724-1725; 12 RT 1756, 1798.) At some point, Darrin ended the phone call stating they would "just beat her up some more." (11 RT 1661.) Ebony tore the telephone line from the wall and began to whip Webster's legs, hands, arms, and back. (11 RT 1661, 1664.) They then removed the candy from several suckers which Webster had bought for her daughter, lit the sticks, and burned Webster approximately 140 times on her legs, hands, face, beneath her ear and under her lip. (11 RT 1661-1662.)

After going through Webster's wallet and belongings and taking several items and documents, including an envelope noting her permanent relocation address on Lankershim, Webster was forced to hold three pillows to her head while Darrin loaded the gun. (11 RT 1662, 1666, 1696-1700, 1726; 13 RT 2104-2105.) Webster's daughter Camry was calling to her mother from the bathroom while Ebony and Evans tried to choke Webster with the telephone cord. (11 RT 1663, 1676-1677; 12 RT 1805.)

At some point, Webster was told to get up and clean the blood from the hotel carpeting. (11 RT 1666, 1671.) The suspects took the bloody sheets and Webster's bloody clothes, and before leaving told her not to tell anyone what had happened because they knew where her grandmother lived. (11 RT 1664, 1682, 1705.) The assault lasted approximately two hours. (11 RT 1683, 1723.)

After the suspects left, Webster went to the hotel front desk and called the police. (11 RT 1683.) On May 2, 2002, Darrin Armstrong was arrested without incident while driving his mother's Jeep Cheroke. (12 RT 1922-1924; 14 RT 2124-2125.) The car was impounded and searched. (12 RT 1924; 13 RT 1938.) Officers recovered two cell phones, the vehicle registration, and a letter. (13 RT 1938-1939.)

On May 16, 2002 Detective Lawler obtained a search warrant to search

appellant's cell. (14 RT 2262.) There he recovered a canteen receipt dated May 7, 2002 that reflected the address of 7247 Lankershim Boulevard in Studio City with apartment numbers noted. (14 RT 2263-2264; People's Exhibit No. 118.) The detective thereafter obtained a court order to monitor appellant's mail. (14 RT 2264.)

Webster's Statements to the Police Regarding Appellant's Crimes

Prior to the assault, Webster had not talked to the police about appellant's crimes although she was aware of some offenses which he had committed . (11 RT 1683-1684; 12 RT 1758.) The morning after the assault, while recovering at the hospital, she told police about two murders which she believed appellant was responsible for. (11 RT 1684.)

Webster told police that one morning she went to 10th Avenue in the Bottoms area to find appellant and instead ran into one of his home boys, Shaun,[23] who told her about a shooting the previous night.[24] (11 RT 1684, 1743.) Later that day, Webster asked appellant about the incident Shaun had described. (11 RT 1684-1685, 1743.) Appellant told her that he had done it, explaining that the car had been driving the wrong way on the one-way street. (11 RT 1685.) He believed it was the Hard Times Hustlers, a Crip gang, so he shot at the car. (11 RT 1685, 1744.) Appellant said it was known that Crips drive up the wrong way on a street when they are about to do a "drive-by." (11 RT 1685-1686.) He also showed Webster some broken glass in the street. (11 RT 1685-1686, 1744-1745; 12 RT 1783-1784.) Although Webster recalled that appellant said there was one person in the car, he referred to the car as

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[23] Shaun was known by the moniker "KB." (11 RT 1696; 12 RT 1758.)

[24] Webster could not recall the date. (11 RT 1684.)

containing "Crips" and referred to them as "the fools" who had shot at him. (11 RT 1686; 12 RT 1757, 1785-1786, 1808-1810.) He did not know whether the person in the car died and did not know about the subsequent crash because he left the scene right after the shooting. (12 RT 1788-1790, 1809-1810.) Webster did not question appellant about the shooting because she did not want to be involved or viewed as a potential snitch. (12 RT 1793-1995.)

After appellant told Webster about the shooting, she saw him the following night in the Bottoms area at approximately 9:00 or 10:00 p.m. (11 RT 1668, 1746.) While they were drinking with other members of the Crenshaw Mafia gang, one person received a cell phone call regarding someone "messing with" their home girls at a bar on Market Street. (11 RT 1668, 1747; 12 RT 1761.) The group got into their cars to drive to the bar to help. (11 RT 1668, 1691, 1746-1747; 12 RT 1761.) Webster's god- brother Donyae Moy, as well as appellant and Shaun, rode with Webster.[25] (11 RT 1717; 12 RT1759-1760, 1747.)

When they arrived at the bar, the girls were standing outside next to their car, a four-door red Ford. (11 RT 1691-1692.) After speaking for a few minutes, Craigen and Shaun got back into Webster's car and everyone in both cars drove to the 7-Eleven store. (11 RT 1692.) When they arrived, they saw several people standing around and Shaun asked appellant whether he was "heated" [carrying a gun]. (11 RT 1692.) Appellant responded, "What do you think?" (11 RT 1692.) While Webster and Donyae remained in the car, appellant and Shaun got out and appellant argued with and then punched a male who was standing outside the store. (11 RT 1692; 12 RT 1768-1769,

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[25] Webster had already told Donyae Moy about the murder which took place the previous night. (12 RT 1758-1759.)

1806.) After the male left, Shaun returned to Webster's car and appellant got into the back passenger seat of the red Ford with the females. (11 RT 1692; 12 RT 1772.) Shaun told Webster to drive back to the Bottoms, so she drove down Prairie Avenue to 104th Street and then drove around the area looking for appellant, who did not return. (11 RT 1693, 1708; 12 RT 1803.) She had not noticed that the red car appellant was riding in had turned left onto Century Boulevard. (11 RT 1693; 12 RT 1772.)

At some point while Webster was driving, she turned the car radio down and heard the sound of a single gunshot. (11 RT 1694; 12 RT 1772-1773.) She then drove to 10th Avenue where she saw appellant. (11 RT 1694; 12 RT 1760.) He got into Webster's car and said, "You're not going to believe what happened," mentioning something about having "banged on some Crips."[26] (11 RT 1695, 1710; 12 RT 1803-1804.) He directed Webster to drive on 10th Avenue, a one-way street, to 104th Street, then drive up Woodworth Avenue and turn left onto Century Boulevard. (11 RT 1695; 12 RT 1779-1780.)

On Century Boulevard Webster saw an ambulance, the police, and a black car that had crashed onto the sidewalk and was surrounded by police tape. (11 RT 1695; 12 RT 1779-1780.) Appellant told Webster, "I did that," explaining that he had rolled up alongside of the car and asked where they were from. (11 RT 1695; 12 RT 1781.) Webster did not know whether the people in the car had answered, but appellant said the driver called him "cuz" and they "banged" each other. (11 RT 1695, 1710; 12 RT 1781-1782.) Appellant told Webster they were Crips so he had to shoot them stating, "This

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[26] "Banging" refers to walking up to a gang member and throwing a gang sign. (14 RT 2172.)

is what happened to people when they gang-bang," or words to that effect. (11 RT 1695, 1710; 12 RT 1803.) He said he killed one person in the car but was not sure about the other. (11 RT 1706; 12 RT 1802.)

Appellant was arrested shortly after the Century Boulevard shooting. (11 RT 1705.) Webster continued to see him for about one month and did not tell anyone about the murders that he had admitted until after the assault the following May. (11 RT 1705-1706; 12 RT 1758.) While he was in jail, Webster wrote to appellant that she loved him, and that she wanted to be his wife and have a baby. (11 RT 1734-1735, 1740-1741.) When he did not answer her letter, Webster became upset and did not contact him again. (11 RT 1734-1735, 1741-1742.) She denied telling appellant that she was staying at the Beverly Garland Hotel. (11 RT 1736.) Webster told the police about appellant's statements regarding the shootings because she believed he was responsible for the incident in the hotel room. (11 RT 1742.)

Webster recalled that appellant frequently wore a red Johnny Blaze sweatshirt. (11 RT 1702, 1791.) She had never seen him in possession of a nine millimeter firearm, but had seen him with a .357. (11 RT 1748.)

Gang Expert Testimony

Detective Kerry Tripp testified as an expert on Inglewood gangs. (14 RT 2136.) Detective Tripp has gathered information regarding the local gangs by obtaining and reviewing intelligence and reports, as well as interviewing gang members while both in and out of custody, driving through the city and documenting the locations where gang members assemble, and noting the existence of new gang members and activities. (14 RT 2137-2138.)

The city of Inglewood has 50 gangs. (14 RT 2140.) Most of the gangs are comprised of African Americans and are primarily affiliated with the Bloods, including the Crenshaw Mafia Gangsters (CMG), one of the largest

gangs. (14 RT 2140.) There are a number of Crip gangs in the area. (14 RT 2141.) The Crips and the Bloods do not get along. (14 RT 2141.)

The CMG has approximately 400 members and its common color is red. (14 RT 2144.) The territory claimed by the gang includes neighborhoods south to Imperial Highway, east to Van Ness, north to Century Boulevard or Darby Park, and west to Prairie Avenue. (14 RT 2142.) The area of Arbor Vitae and Flower is claimed by the Crip gangs. (14 RT 2144.)

The CMG congregate in the area known by the community as "Darby Dixon," or as referred to by the gang, "the Bottoms." (14 RT 2145.) Specifically, the CMG assemble in front of apartment houses on the west side of 10th Avenue in an area bordered on the south by 104th Street, north by Bardton Avenue and to the west one block over by Woodworth Avenue. (14 RT 2145-2146.) Both 10th and Bardton Avenues are one-way streets. (14 RT 2168.) According to Detective Tripp, CMG members have reported that cars traveling the wrong way on a one-way street are assumed to be driven either by police or by rival gang members. (14 RT 2168.)

The CMG engage in criminal activities including murder, robbery, rape, narcotics and firearms transport and sales, and assaults. (14 RT 2144-2145.) They can be observed standing on corners displaying hand signs and drinking in public, and are know to intimidate and instill fear in the citizens of the community as well as potential witnesses against them. (14 RT 2144-2145.) Bruce Naivi, a CMG member, was convicted of several counts of robbery on February 16, 2000 [People's Exhibit No. 109]. (14 RT 2174-2175.) Bobby Montague, also a CMG member, was convicted on March 23, 2001 of felony first degree murder committed in 1999 [People's Exhibit No. 110]. (14 RT 2175.)

Based upon more than 50 contacts and 33 field interviews with

appellant over the years, Detective Tripp testified there is "no doubt" that he is a member of the CMG and is known by the moniker "Juvenile." (14 RT 2149-2150, 2157.) He has gang-related tattoos on his right forearm. (14 RT 2163-2164.) Detective Tripp has contacted appellant at the corners of 10th and Bardton Avenues on several occasions. (14 RT 2167.)

The detective has also field interviewed appellant's brother Darrin more than 20 times. (14 RT 2151.) Darrin is also a member of the CMG and is known by the moniker "Little Spider." (14 RT 2150.) Shaun Jones is a member of CMG with the monikers "Little Monster" and "Little KB." (14 RT 2151.) Appellant has associated and been photographed with Jones, as well as with Darryl Johnson ("Two Face") and Ikenna Ogauha ("Ike") and several other CMG members. (14 RT 2152-2156, 2161.) Randi Reddic also associates with the CMG. (14 RT 2164.)

Detective Tripp checked the Cal Gang computer system and field interview card files for any gang activity in which the Florence brothers may have engaged and found nothing. (14 RT 2165-2166.) Floyd Watson was documented as affiliated with some members of the the Queen Street gang, but he was not a member. (14 RT 2169.)

Defense Evidence

Appellant testified on his own behalf. (15 RT 2368-2600.) He was 23 years old at the time of trial. (15 RT 2368.) Appellant joined the Crenshaw Mafia Gangsters in 1994. He lived in Inglewood at the time and joined for survival. (15 RT 2369-2370.) His moniker is "Juvenile." (15 RT 2370.) In September of 2001 appellant was staying with his friend, Victoria Rollen, near 113th and Prairie Avenue. (15 RT 2368.) Appellant is friends with Rollen's brother, Eddie. (15 RT 2369.)

On the night of September 27, 2001, appellant was alone at his mother's

house with his eight-month-old son, Damarryea. (15 RT 2371, 2430.) Appellant later went to the "Bottoms" neighborhood and learned that the arrests of his close friends, Ike (Darryl Johnson) and Two-Face (Ikenna Ogauha), took place after the killing on 10th Avenue. (15 RT 2375-2376, 2432-2433.)

Appellant was friends with Tyiska Webster, but was not romantically involved with her. (15 RT 2376.) According to appellant, his brother Darrin was closer to Webster, and they continued to spend time together after appellant's arrest. (15 RT 2376-2377.)

Appellant denied telling Webster about the shooting of Christopher Florence or showing her glass in the street. (15 RT 2377.) He also did not tell her about shooting drivers who travel the wrong way on a one-way street. (15 RT 2377.) He was not aware of any shootings in the area of 10th Avenue and Bartdon in recent years and did not consider a wrong-way driver a problem. (15 RT 2377-2378.)

Appellant recalled that on the night of September 28 and the morning of September 29, 2001, he saw a gray truck or SUV containing two or three people driving slowly from Bardton to 10th Avenue. (15 RT 2378-2380, 2383.) The occupants looked strangely at appellant and his friends, and on the 29th, as the gray vehicle approached appellant and the others, one male in the car extended his hand out from the window and gestured as though he was holding a gun. (15 RT 2379.) Appellant got a good look at the male. (15 RT 2444.) He believed the people had returned to the neighborhood that morning to shoot at them. (15 RT 2380.)

Appellant denied having a gun on September 27, 2001. (15 RT 2381.) In the early evening of September 28, 2001, after learning that Ike and Two-Face had gone to jail, he retrieved the gun from a hiding place on 10th Avenue

where he, Darrin, Ike, and Two-Face stored it. (15 RT 2381-2382, 2432.) Appellant fully loaded the gun with bullets that were hidden in the same location. (15 RT 2382.) Although he was armed and thought the people in the gray truck were also armed on the morning of September 29th, he did not pull his gun out as they drove by. (15 RT 2380, 2382.)

On the night of September 29th, appellant and Webster bought some tequila and were drinking with friends at the Bottoms. (15 RT 2384-2385.) Appellant was wearing a red Johnny Blaze sweatshirt, gray pants, and red shoes. (15 RT 2387.) As they drank, a friend received a phone call from their "home girls." (15 RT 2385.) Appellant, Shaun, Donyae, and Webster got into Webster's car to go and help. (15 RT 2385-2386.) They drove to a club on Market and Nutwood, which was in Osage Legend Crip territory. (15 RT 2386-2387.) There they found that Tonesha, Randi, and Vanessa had been beat up by some males who had already left. (15 RT 2386.) Appellant told Webster to drive back to the Bottoms and he got into the girls' car, a red Contour, because they were still upset and mad. (15 RT 2388-2389.) Tonesha was driving, Randi was in the front passenger seat, Vanessa was in the backseat behind Tonesha, and appellant got into the backseat behind Randi. (15 RT 2389-2390.) They started to drive back to the Bottoms and took a short cut through the 7-Eleven parking lot on Prairie and Arbor Vitae. (15 RT 2390.)

Before parking the car, appellant noticed a male standing in front of the store wearing a red belt as though he was a Blood. (15 RT 2390-2391.) Because the 7-Eleven store was in the Osage Crip territory, appellant told Tonesha he wanted to let the male know it was not safe for him to be standing in front of the store with a red belt. (15 RT 2391-2392.) After Tonesha parked the car, appellant got out and asked the male where he was from. (15

RT 2392.) When the male told appellant he was from CMG, appellant believed it was either a setup or the male was just claiming his gang. (15 RT 2392.) The male then asked appellant where he was from, and appellant hit him in the face one time.[27] (15 RT 2393.) When the male ran, appellant went into the store. (15 RT 2394.) Appellant was carrying a gun, but he did not display it because the male did not appear to be armed. (15 RT 2394.)

After leaving the 7-Eleven, Tonesha drove down Prairie to Century Boulevard and turned left. (15 RT 2396.) When they got to the intersection of Century Boulevard and Doty Avenue, they stopped at the red light. (15 RT 2396.) The Contour was in the middle (number two) lane and no car was in front of them. (15 RT 2396.)

At some point while they were stopped, Vanessa said, "Those guys are staring over here." (15 RT 2397.) Appellant looked over and saw the driver of a black Mustang stopped at the light whom he thought he recognized as the person who had driven through the Bottoms earlier that day and stuck his hand out the window in the gesture of a gun. (15 RT 2397.) At first, appellant just kept his eye on the driver. (15 RT 2397.) When he saw the driver's window rolling down, appellant pulled out his gun and placed it on his lap. (15 RT 2397-2398.)

The driver looked at appellant and asked him if he was from the Crenshaw Mafia. (15 RT 2398.) When appellant nodded his head, he saw the driver point a black gun which he held in his right hand. (15 RT 2398-2399.) At that moment, the driver was turned to his left and facing appellant. (15 RT 2398.) According to appellant, the driver was in fact the same person he had

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[27] Appellant explained that if he told the male what gang he was from, then the male's cover would be blown and it was possible the male would act first. (15 RT 2393.)

seen driving through the Bottoms on the morning of September 29th. (15 RT 2444.)

When appellant saw the gun, instead of telling Tonesha to drive away, he ducked slightly and began shooting with his hand extended out of the window. (15 RT 2399-2400.) He shot out of fear of being killed himself. (15 RT 2399.) He was not aiming. (15 RT 2400.) Appellant was focused on the driver and did not see anyone other than the driver in the Mustang. (15 RT 2400.) By the time he began shooting, the Contour and the Mustang were side by side, or the Mustang was slightly ahead by one foot or two. (15 RT 2400.) The Contour then took off. (15 RT 2400-2401.) He did not know how many shots he fired, but he shot until they drove away. (15 RT 2402.) He was not sure whether the Contour was stationary when he fired the shots. (16 RT 2541.) Appellant did not believe the driver of the car was a rival gang member because a rival would not specifically ask him if he was from the Crenshaw Mafia. (15 RT 2401.)

After the shooting, they drove to the Bottoms and Tonesha dropped appellant off at 10th Avenue near Bardton. (15 RT 2402.) Webster was already there alone in her car waiting for him. (15 RT 2402-2403.) Appellant told her he could not believe what had just happened and directed her to drive to the scene of the shooting to show her what happened. (15 RT 2403-2404.) He denied telling Webster that the males were Crips who had banged him or that he banged back. (15 RT 2403-2404.) Appellant just told Webster that he had to shoot. (15 RT 2404.) He thought the driver had been hit, and he wanted to return to the scene to see if anyone had been killed. (15 RT 2404-2405.) Appellant did not tell Webster that he shot in self-defense after seeing a gun. (16 RT 2481-2481.)

They left the area of the incident and Webster drove appellant back to

the Bottoms where his brother Darrin picked him up in the Ford Escort. (15 RT 2405-2406.) Appellant was still carrying the nine millimeter gun and he placed it underneath the car seat. (15 RT 2406.) They drove to their mother's house in Downey and left the gun in the car out of respect. (15 RT 2406.)

Appellant was arrested on October 2, 2001 for the Century Boulevard shootings and has remained in custody since that date. (15 RT 2406.) When he was arrested, he was told it was for two murders. He did not learn about the shooting of Christopher Florence until several months later. (15 RT 2426-2427, 2430.)

While in jail, Webster visited appellant one time and put money on his books once or twice shortly after his arrest out of concern for his needs. (15 RT 2407-2409.) Appellant did not ask her for the money. (15 RT 2408.) His mother, step-father, and girlfriend were also putting money on his books at the time. (15 RT 2409.) Appellant called Webster a few times after his arrest using a phone in the cell that he shared with three other people. (15 RT 2408.) All of the calls from the jail had to be collect. (15 RT 2408.) Appellant also wrote three or four letters to Webster while in custody. (15 RT 2409.) He stopped writing to her when she wrote to him that she wanted to get married and have children. (15 RT 2410.)

In late April and early May of 2002 appellant did not know where Webster was living and he did not have an address for her. (15 RT 2412.) He was not concerned about where she lived or about her participation in the witness protection program. (15 RT 2413.) Appellant did not direct anyone to find or harm her. (15 RT 2413-2414.) He did not call Darrin on his cell phone from the county jail because collect calls cannot be made to cell

phones.[28] (15 RT 2413.)

Appellant explained that the canteen slip with the Lankershim address which was found in his cell were his own notes of an address for Webster which he received from his brother Darrin sometime in May. (15 RT 2415.) Darrin had asked appellant to write to Webster and persuade her not to press charges against him for the assault at the Beverly Garland Hotel. (15 RT 2415-2419, 2493.) Appellant did not write to Webster. (15 RT 2415.) He did not ask Darrin why he tortured Webster. (16 RT 2486-2488.)

Appellant testified the shooting on Century Boulevard was justified and that he did not do anything wrong. (16 RT 2483-2485.) He was certain he saw a gun in the Mustang. (16 RT 2532.) He did not go back and talk to the police about what happened because they would not have believed him, particularly since he was a gang member and was dressed in gang attire. (16 RT 2537-2538.) He did not know a Nicole or an Ebony. (16 RT 2593, 2600.) He had nothing to do with the killing of Christopher Florence. (16 RT 2596.) Appellant feels remorse and regrets that people died. (16 RT 2556.)

PENALTY PHASE

Prosecution Evidence

The Incident at the Hollywood Park Casino

On May 28, 2000, Gregory Held was the security manager of the Hollywood Park Casino. (19 RT 3109.) At approximately 3:00 a.m. on that date, two men entered the office and reported their car had been stolen from the parking lot. (19 RT 3109.) The owner of the car said the vehicle was

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[28] Appellant noted that a call to a cell phone could only be accomplished by executing a three-way call involving a third party. (15 RT 2413.) He denied having placed such a call and there was no evidence that such a call had been made. (15 RT 2413.)

equipped with the Low Jack security system. (19 RT 3110.) Inglewood police officers were summoned to the office and they initiated a broadcast for the missing car. (19 RT 3110.) The car was quickly located and pursued, and a suspect was taken into custody. (19 RT 3110-3111.) The owner of the car and his companion were separately transported for a field show-up. (19 RT 3111.)

While the owner of the car waited outside with Held for the police to return after the first field show-up, two men drove into the casino parking lot and stopped directly in front of them. (19 RT 3111.) The driver of the car was later identified as appellant and his passenger was identified as Eddie Rollen. (19 RT 3112, 3115.) Appellant and Rollen got out of their car and began speaking rapidly to the owner of the stolen car. (19 RT 3112.) Appellant asked him to not cooperate with the police in the investigation and also to not press charges against his brother, the suspect in the theft. (19 RT 3112, 3120.) Appellant offered to fix any damage which may have occurred to the car and said he would otherwise "make things right" if the owner did not work with the police. (19 RT 3112-3113.)

When the owner of the car refused to cooperate, appellant increased the pressure, repeatedly asking the theft victim, who was dressed in blue, where he was from. (19 RT 3113, 3120, 3125.) Mr. Held believed appellant was asking the victim what gang he was from. (19 RT 3113.) When the owner of the car denied being a member of a gang, appellant identified himself as a member of the Crenshaw Mafia Gangsters.[29] (19 RT 3113, 3118.) Mr. Held and an officer who was present told appellant and his companion to leave the

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[29] The owner of the car later admitted to being a member of the Palmer Courts Crip gang. (19 RT 3119.)

premises or face arrest for trespassing. (19 RT 3113.)

Shortly thereafter, the Inglewood police officers returned from the first field show-up and appellant and Rollen left. (19 RT 3114.) When the officers left with the owner of the car for the second field show-up a few minutes later, appellant and Rollen returned. (19 RT 3114-3115.) While Rollen waited in the car, appellant got out and forcefully threatened retaliation against the owner of the car and his friend if his brother was arrested. (19 RT 3115.) He used profanity and referred to "blasting" them. (19 RT 3115-3116, 3118.)

When the owner's friend responded, "Well if you're going to do it, then go ahead and do it," appellant walked to the rear of his car, opened the trunk, and began rummaging through it. (19 RT 3115-3116, 3118-3119, 3121.) Based upon these actions, the security officers believed that appellant was attempting to arm himself and they sought positions of cover in the event there was to be a gunfight. (19 RT 3116, 3118, 3124.) At that point, the police officers returned from the second field show-up. (19 RT 3116.) Appellant saw them, closed the trunk of his car, and attempted to drive away. (19 RT 3116-3117, 3123.) The officers stopped his car and conducted a search. (19 RT 3117.) No weapons were recovered. (19 RT 3117, 3122.)

The owner of the stolen car and his companion were escorted off the property while appellant and Rollen were detained to avoid a further conflict. (19 RT 3117.) The victims did not want to press charges. (19RT 3122.) After a field interview was conducted, appellant and Rollen were released. (19 RT 3117, 3119-3120, 3125.)

The Incident at the Annex Club

At approximately 12:20 a.m. on June 13, 2000, Alexis Moore was standing near the back stairway at the Annex Club in Inglewood. (19 RT 3126-3127, 3131.) According to Moore, the Annex Club is frequented by gay

men. (19 RT 3129.) Two males, one of whom Moore identified as appellant, approached him and repeatedly asked Moore where he was from and if he was gay. (19 RT 3127-3129.) Moore denied being gay and began to walk toward his car. (19 RT 3127.) Appellant followed Moore stating, "You are gay," and Moore admitted that he was. (19 RT 3127, 3135-3136.) Appellant then pulled the chain from Moore's neck and hit him. (19 RT 3127.) Moore swung back and when the two began fighting, Moore wrestled appellant to the ground. (19 RT 3127, 3131-3132.) Appellant and his companion kicked and hit Moore in the head. (19 RT 3127, 3132-3135.) They called him a "fag" and other names. (19 RT 3136.) At some point while Moore was trying to protect himself from the blows, his pager, pocket knife, and money were taken from his pockets. (19 RT 3128.) The assailants then ran away. (19 RT 3129.)

A bartender from the club, Jerry Dickerson, saw both males beating Moore and heard them yelling, "All faggots should be killed." (19 RT 3138-3139, 3141.) When the men left, Dickerson helped Moore back inside, closed the club doors, and called the police. (19 RT 3129, 3138-3139.) Moore remained standing near the back door and at some point saw appellant and his companion return and walk toward his car. (19 RT 3129-3130.) Believing they intended to damage his car, Moore ran outside. (19 RT 3129.) The police then arrived and the officers assisted Moore in making a citizen's arrest. (19 RT 3129.) Moore never recovered his property. (19 RT 3130.)

The Neighborhood Incident

Approximately two weeks before Christopher Florence died, Jacqueline Martinez was in her house looking out toward the street when she saw a young man and girl walk toward their parked car. (19 RT 3165, 3168-3170.) A couple of minutes after they entered the car, she saw appellant and a companion approach. (19 RT 3165.) Appellant threw a brick at the passenger

side of the car, shattering the window, and then walked away. (19 RT 3165-3167.) Martinez did not tell the police about the incident until after Christopher was killed. (19 RT 3168.)

The Incident at the Los Angeles County Jail

On October 5, 2003 Los Angeles County Sheriff's deputy Brandon Love was working in a high security module at the men's central jail. (19 RT 3144.) That afternoon shortly after 2:00, Love was transporting inmate Cedric Hood from the showers to his cell.[30] (19 RT 3145, 3173.) Hood was handcuffed. (19 RT 3145, 3173.) As Deputy Love and Hood passed by appellant's cell, appellant reached through the gate, grabbed Hood by his shirt with his left hand, and slashed Hood on the shoulder using a jail-made knife or shank. (19 RT 3145-3146, 3148, 3173-3174, 3176.) When appellant then attempted to slash Hood a second time, Love grabbed appellant's arm and wrestled with him through the bars until appellant's arm broke and went limp. (19 RT 3146.) Appellant and Hood had not exchanged any words prior to the assault. (19 RT 3151.)

Detective Lawler interviewed Hood on December 11, 2003. (19 RT 3207.) Hood said that he had previously observed a "kite" being passed from Darrin Armstrong's cell to appellant's cell. (19 RT 3207.) Hood also said he saw the attack by appellant coming. (19 RT 3208.) He had tried to avoid the blow by ducking down and protecting his throat. (19 RT 3208-3210.) When appellant tried to strike Hood a second time, Deputy Love intervened by grabbing appellant's arm. (19 RT 3208.) Hood asked appellant why he wanted to kill him, and appellant only smiled. (19 RT 3208.) Hood told the

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[30] Cedric Hood testified but his name as a witness is redacted from the record. (19 RT 3172.)

detective that believed the attack arose from an argument he previously had with appellant's brother. (19 RT 3208.)

According to Hood, approximately one month before the incident, he got into an argument with Darrin Armstrong at the jail. (19 RT 3175.) Darrin told Hood that he would "shoot a kite" to appellant. (19 RT 3175, 3182-3183.) Hood testified that appellant was not trying to kill him and that he had not talked to appellant since the assault. (19 RT 3174.)

Victim Impact Evidence

Brenda Florence

Brenda Florence was the mother of Christopher, Michael, Torry and Brian. (19 RT 3211.) Christopher and Brian lived at home with her. (19 RT 3212.) Torry sometimes stayed at the house after work rather than drive home to Fontana. (19 RT 3212.) At the time of the shootings, Brian was 18 years old, Christopher was 21 years old, Michael was 27 years old, and Torry was 29 years old. (19 RT 3211-3212.) All of the boys graduated from high school. (19 RT 3214.) Christopher was planning to go to West Los Angeles college in the fall to study computers. (19 RT 3214.)

Mrs. Florence arrived at home from work at about 5:45 p.m. the night Christopher was killed. (19 RT 3211-3121.) Christopher had just finished eating a snack and was watching TV. (19 RT 3212, 3215.) He hugged his mother and told her he had brought her some imported cookies from his job at Neiman-Marcus. (19 RT 3213, 3215.) He told her he was going out that evening but that he would be home early to watch ER with her on TV. (19 RT 3215-3217.) A young woman by the name of Jackie called Christopher, and after they talked, Christopher left. (19 RT 3217.) Before he left the house, Mrs. Florence complimented him about how handsome he looked. (19 RT 3217.) Shortly after Christopher left, Brian and Torry arrived separately at the

house. (19 RT 3219.) Torry and Mrs. Florence ate dinner and then watched a movie. (19 RT 3220-3221.) At some point Michael called to say hello. (19 RT 3221.) Mrs. Florence went to bed and instructed Brian and Torry to leave the stove light on for Christopher. (19 RT 3221.)

The following morning, Detectives Lawler and Steinhoff arrived at the house to tell Mrs. Florence that Christopher had been shot and killed. (19 RT 3222.) Torry called Michael and then went to Brian's room to wake him up and tell him what was happening. (19 RT 3223.)

The following evening on September 29, 2001, Mrs. Florence recalled when Michael, Brian, Torry and Floyd left the house. (19 RT 3233.) At some point, she heard the gunshots. (19 RT 3234.) She tried to call both Michael and Torry on their cell phones, leaving several messages for each, but none of her calls was returned. (19 RT 3234.) Mrs. Florence was lying on her bed when she was told her sons were dead. (19 RT 3234-3235.)

Mrs. Florence described Michael as having a big heart and as very conservative and serious. (19 RT 3224.) He worked two jobs as a security officer. (19 RT 3224.) He had been a volunteer Explorer with the Inglewood police department where he was given an award for being the "Most Improved Explorer." (19 RT 3225-3226.) Family was important to all of the boys. (19 RT 3224.)

Since the deaths of his brothers, Brian has had digestion problems. (19 RT 3235-3236.) Mrs. Florence cannot sleep or eat and must be occupied constantly. (19 RT 3236.) She has sought counseling help for herself and for Brian but they have not gotten any relief. (19 RT 3236.)

Barbara Bondoc

Barbara Bondoc was Michael Florence's fiancee. (19 RT 3163.) She described him as hard-headed and stubborn, but with a big heart. (19 RT

3163.) She and Michael planned to have a home and children, and grow old together. (19 RT 3163.)

Shandala Thomas

Shandala Thomas was Torry Florence's fiancee. (19 RT 3190.) She described him as initially a shy person, but playful and laid back once in familiar company. (19 RT 3191, 3196.) He was very clean and enjoyed nice cars. (19 RT 3196.) He had multiple jobs during the time Thomas knew him and was a good worker. (19 RT 3196-3197.) Torry and Thomas had a daughter, Tyra, who was three years old when Torry was killed. (19 RT 3191.) Torry called Tyra his "Little Mama" because she reminded him of his own mother. (19 RT 3192.) Tyra was close to Torry and she has not accepted his death. (19 RT 3193.) Tyra is also emotionally attached to Thomas and is fearful that she will leave her too. (19 RT 3193-3194.) Thomas's two older daughters viewed Torry as their father as well. (19 RT 3194-3195.) Torry was close with his brothers. (19 RT 3197-3198.) Thomas remembered Christopher as polite and outgoing. (19 RT 3198.)

Torry called Thomas earlier in the evening on the night he was killed. (19 RT 3199.) He talked about Christopher and how much he realized he wanted to change, including making their relationship "right" by getting married. (19 RT 3199-3200.) Torry promised to be at Thomas's house in Fontana by noon the next day, saying he wanted to get married right then. (19 RT 3200.)

Defense Evidence

Jennifer Armstrong

Jennifer Armstrong, appellant's mother, testified that appellant is her first-born son from June 2, 1981. (20 RT 3251.) There were complications at the time of his birth and he was purple in color when he was born. (20 RT

3251.) There were no lasting effects from the condition. (20 RT 3252.) Mrs. Armstrong was 21 years old at that time and was married to Leslie Armstrong, Jr., who was 30 years old. (20 RT 3252.) Mr. Armstrong was a good father. (20 RT 3253-3254.) Appellant looked up to his father and they appeared to love each other. (20 RT 3254.) Appellant was a happy and independent child who liked to do things on his own. (20 RT 3254.) He could be quiet and he also liked to play outside in the yard. (20 RT 3255.) Appellant started preschool in Inglewood at two years old and adapted well. (20 RT 3257-3258.)

While appellant was in elementary school, his parents separated and then reunited several times. (20 RT 3258.) The difficulties caused appellant to move and attend multiple schools. (20 RT 3258.) Still, appellant was a good student and played football every year. (20 RT 3259.) Darrin Armstrong was born on May 6, 1983. (20 RT 3262.) The boys were close as children and remained close as adults. (20 RT 3263.)

The Armstrong's marital difficulties involved domestic violence which began early in the marriage and continued after the boys were born. (20 RT 3263-3264.) Mr. Armstrong, who frequently smoked marijuana and was often high, would beat Mrs. Armstrong with his fists every week. (20 RT 3263-3264, 3273.) She frequently had black eyes and one time suffered a broken jaw. (20 RT 3264.) Appellant was fearful when his father would become violent and he would hide. (20 RT 3264-3265.) He also wet himself and his bed frequently. (20 RT 3265.) The beatings continued until Mrs. Armstrong left her husband. (20 RT 3265.) Mrs. Armstrong did not seek counseling for appellant, but she believed in God and had faith that things would change in her marriage. (20 RT 3266.) She consoled appellant and tried to explain to him why she had to leave his father. (20 RT 3265.) Mr. Armstrong was

arrested twice for domestic violence offenses, but he did not spend any time in custody. (20 RT 3266.)

Mrs. Armstrong left her husband permanently on one evening when she decided to protect herself from her husband's anger and obtained a knife from the kitchen. (20 RT 3267.) She placed the knife at her side on the couch and when Mr. Armstrong approached and hit her, she stabbed him in his side. (20 RT 3267-3268.) Appellant, who was six or seven years old at the time, was present and saw the incident. (20 RT 3268.) The police came and determined that one of the boys should stay with his mother and one with his father. (20 RT 3268.) Appellant went to live with his father in Inglewood for one year. (20 RT 3268-3270.) According to Mrs. Armstrong, appellant was happy but also seemed confused when his father would tell him that it was his mother who had left him. (20 RT 3269.) When Mr. Armstrong met another woman, appellant went back to live with his mother. (20 RT 3270.) He was then nine years old. (20 RT 3270.)

Appellant continued to visit his father, whose new girlfriend had three sons. (20 RT 3271.) At some point, when appellant was 13 or 14 years old, Mr. Armstrong relocated to Riverside but the number he gave to Mrs. Armstrong and the boys was disconnected. (20 RT 3272-3273.) They had no address for him and Mr. Armstrong never contacted his family again. (20 RT 3272-3273.)

Mrs. Armstrong noticed that after his father disappeared, appellant's demeanor changed. (20 RT 3274.) He became quiet and closed-up. (20 RT 3274.) She began to notice gang-related items in the home, such as red bandanas and red tee-shirts. (20 RT 3274.) When Mrs. Armstrong asked, appellant denied being in a gang. (20 RT 3274.) She learned that an older male with whom appellant spent time was from a neighborhood gang, and she

told appellant that he should not associate with him. (20 RT 3274.)

At some point, Mrs. Armstrong realized that appellant was in a gang when he started carrying weapons and getting arrested. (20 RT 3275.) She talked and prayed with him, trying to lead him in a different direction through the church. (20 RT 3275-3276.)

Mrs. Armstrong married attorney Earl Broady when appellant was 18 years old. (20 RT 3281.) Mr. Broady showed interest in appellant and attempted to help him. (20 RT 3281.)

Mrs. Armstrong sings in her church choir. (20 RT 3276.) She still loves appellant very much. (20 RT 3276-3277.) He has been a good father to his son, Damarryea Alon Armstrong, when he can be with him. (20 RT 3277-3278.) Damarryea was born on January 20, 2001. (20 RT 3278.)

Darrin is currently doing a life sentence in state prison. (20 RT 3281.) Mrs. Armstrong visits both of her sons in custody. (20 RT 3281-3282.) She will continue to visit appellant in prison and will be devastated if he is executed. (20 RT 3282.)

Eric Jackson

Eric Jackson, appellant's uncle, is a minister. (20 RT 3285.) Mr. Jackson, who is Jennifer Armstrong's brother, also works for Los Angeles county department of education. (20 RT 3285.) He saw appellant often as he grew up and participated in his upbringing. (20 RT 3286.) Mr. Jackson described appellant as a quiet, cerebral child who was warm and loving toward his brother and his family. (20 RT 3287.) Appellant was a member of Mr. Jackson's church until he reached middle school. (20 RT 3287.) He went to Bible school and service on Sundays. (20 RT 3287.)

Mr. Jackson knew that appellant's father was violent with his sister. (20 RT 3287-3288.) He was also aware that Mr. Armstrong had a history of

abuse in his previous relationships, and had a pattern of dating younger women, having children with them, and then leaving. (20 RT 3288.) Mr. Jackson knew Mr. Armstrong began beating appellant's mother right after they were married. (20 RT 3289.) He personally observed physical injuries to her jaw and arms. (20 RT 3289.) Mr. Jackson frequently saw Mr. Armstrong smoking marijuana and becoming high. (20 RT 3290.) He recalled that Mr. Armstrong threatened appellant's grandmother, Betty George, with a gun at a church Christmas function. (20 RT 3292.) When Mr. Jackson tried to become involved in appellant's life and discipline him, it caused problems with his sister's marriage, so he stopped when appellant was a pre-teen. (20 RT 3291-3292.)

Mr. Jackson tried to counsel appellant. (20 RT 3293.) Appellant was always respectful and listened. (20 RT 3293.) When appellant was expecting his son, Mr. Jackson talked to him about taking care of his family and being a man. (20 RT 3294.) He described appellant as a smart, loving, and brilliant man who got caught up in a very prevalent problem in the city. (20 RT 3294-3295.) Mr. Jackson loves his nephew and does not want him to be executed. (20 RT 3294, 3296.)

Betty George

Betty George is Jennifer Armstrong's mother and appellant's grandmother. (20 RT 3297.) She and her husband, now deceased, participated in appellant's upbringing from the time of his birth. (20 RT 3297-3298.) Mrs. George did not like her son-in-law, Leslie Armstrong, who had a history of wife beating. (20 RT 3298.) She realized that Mr. Armstrong was beating her daughter about six months after they were married. (20 RT 3299.) She observed injuries to her arms and jaw. (20 RT 3299.) According to Mrs. George, Mr. Armstrong beat her daughter while she was pregnant with both

boys. (20 RT 3299.) She last saw Mr. Armstrong one evening at a family Christmas dinner. (20 RT 3301.) He and appellant's mother got into a fight and Mrs. George asked him to leave. (20 RT 3301.) Mr. Amrstrong pulled out a gun and pointed it at Mrs. George. (20 RT 3301.) Mrs. George recalled that appellant ran from the truck where he was waiting and ran to her and hugged her. (20 RT 3301.) Mrs. George pressed charges and testified in court against Mr. Armstrong. (20 RT 3301-3302.)

Mrs. George babysat appellant while his mother worked up until he went into a Christian day care school. (20 RT 3300.) She described him as a quiet boy who enjoyed playing alone. (20 RT 3300.) Mrs. George maintains a loving relationship with appellant. (20 RT 3302.) She receives letters and cards from him and she frequently writes to him. (20 RT 3302.) He has always respected her as his grandmother. (20 RT 3304.) Mrs. George does not want her grandson to be executed. (20 RT 3304.)

Stipulations

The parties stipulated that appellant was adjudicated in juvenile court for a robbery on June 24, 1998 in case number YJ11806. (19 RT 3242.)

The parties further stipulated that appellant pled guilty to a civil rights violation arising from the incident at the Annex Club on October 31, 2001 in case number YA045118. (19 RT 3242-3243.)

The parties finally stipulated that in September of 2001, the time of the instant offenses, appellant was out on bail on the Annex Club case. (19 RT 3243.)

GUILT PHASE ISSUES

ARGUMENT

I.

BY DENYING SEVERANCE AND ALLOWING THE WEAKER CHRISTOPHER FLORENCE MURDER CHARGE AS WELL AS THE NON-HOMICIDE TYISKA WEBSTER ASSAULT, BURGLARY, ROBBERY, AND TORTURE CHARGES TO BE TRIED WITH THE MICHAEL AND TORRY FLORENCE MURDER AND BRIAN FLORENCE AND FLOYD WATSON ATTEMPTED MURDER CHARGES, THE TRIAL COURT PREJUDICIALLY VIOLATED CALIFORNIA LAW AND APPELLANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Introduction

The evidence against appellant was weak on the charge that he murdered Christopher Florence on September 27, 2001 (Count 5). The sole witness against him on the charge was Tyiska Webster, who reported to law enforcement that appellant told her he had shot at a car on a one-way street in the "Bottoms" neighborhood on a previous evening. She did not recall the date and there was no eyewitness to the shooting.

The evidence against appellant was stronger as to his involvement in the murders of Michael and Torry Florence, and the attempted murders of Brian Florence and Floyd Watson on Century Boulevard on September 30, 2001 (Counts 1 through 4). As to those offenses, appellant was identified by Brian Florence and Floyd Watson as being the male in the back seat of the red Contour who shot at the Mustang. The primary evidence against appellant on the charges of first degree murder and attempted murder, however, was again, the statements by Webster to law enforcement that appellant told her he shot at the Mustang on Century Boulevard because the occupants of the car

"banged" on him.

Webster's report of appellant's purported involvement in the shootings was made only after she was assaulted and tortured by appellant's brother Darrin Armstrong and his companions. Since Webster believed that appellant was behind his brother's attack on her, she retaliated by telling the police that appellant had confessed the shooting crimes to her.

The evidence against appellant as to his aiding and abetting his brother in the assault on Tyiska Webster and her daughter the following year on May 1, 2002, was weakest. (Counts 6 through 11). Appellant was not present at the time of the attack. The only circumstance connecting appellant to the scene was a cellular telephone call which Darrin Armstrong purportedly received during the incident. According to Webster, she recognized appellant's voice when Darrin handed the cell phone to her to speak to the caller. Appellant was in custody at the time. Moreover, no evidence corroborated that appellant made any calls from the jail during this period.

The prosecutor sought to try the charges against appellant together, undoubtedly aware of this virtual certainty: that the weaker Webster and Christopher Florence charges would be lent enhanced credibility by their association with the stronger September 30, 2001 shooting counts. (See 4 CT 903-912 [eleven count amended Information]). Similarly, the joinder of all of the offenses, a clear statement that the District Attorney and law enforcement believed he committed all of the crimes, created an unfair advantage and lessened the burden of proof on the prosecution. Given the seriousness of the allegations, it was nearly certain the jury would view appellant as a dangerous person who habitually committed crimes. As well, the circumstances underlying the assault and torture of Webster would surely inflame the jury. In other words, the jury would not be able to avoid concluding that if he

committed any one of the three sets of crimes, then he probably committed them all.

Appellant moved to sever the six counts comprising the attack on Tyiska Webster on May 1, 2001 from the single murder count against Christopher Florence committed on September 27, 2001, and to sever all of these counts from those alleging the murders and attempted murders committed against the Florence brothers and Floyd Watson on September 30, 2001. He contended that trial of the three sets of charges together would violate his rights under state law, since the three sets of charges arose from separate and distinct events and were unconnected in their commission. (2 CT 340-349.) Acknowledging that Penal Code section 954 is a permissive joinder statute, and that the offenses charged were of the same class of crimes, appellant moved that the counts should be severed in the interests of justice and in order to protect appellant's right to a fair trial. (2 CT 340-349; 2 RT 26-27.) He observed that at the very least, two juries could be empaneled if the court was inclined to sever the Webster offenses from the homicide-related counts, but to try all of the murder counts together to compensate for any overlaps in the evidence. (2 RT 28.)

The court denied the motion without prejudice.[31] (2 RT-30.) The court exercised its discretion in favor of the victim, Ms.Webster, noting that with a severance of counts, she would be obligated to testify twice in two separate trials. (2 RT 28-29.) Defense counsel pointed out that Ms. Webster was

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[31] The motion was brought before Judge John V. Meigs, in Department Southwest O in Inglewood. Judge Meigs presided over several months of pretrial proceedings before the case was relocated to Department 101, to be heard before Judge William R. Pounders, in the downtown Los Angeles Criminal Courts Building. (2 CT 403-404; 3 CT 1RT 22-34; 2 RT 121-141.)

already testifying on multiple occasions, including two preliminary hearing proceedings as well as the trial against appellant's brother, Darrin Armstrong. (2 RT 29.) The court rejected this point, observing that the prosecution likely could not have legally joined appellant's case with that of his brother , and noting that Ms. Webster would not be called upon to testify twice in "this court." (2 RT 29-30.) The court also rejected the suggestion of empaneling multiple juries to hear the case. (2 RT 29-30.)

Appellant renewed the severance motion later when the prosecutor requested to consolidate the charge against appellant for an attempted murder he allegedly committed against Cedric Hood while in jail with the 11 counts already filed against him.[32] (3 CT 648-661 [Prosecutor's Motion]; 3 CT 631-647 [Defense Opposition].) The prosecutor withdrew the motion for consolidation prior to obtaining the trial court's ruling, but in its opposition to the joinder, appellant again argued for severance of the capital crimes from the non-capital crimes as to the three sets of offenses already joined. (2 RT 152-153, 157.) The trial judge denied the renewed motion, stating that "the three incidents can and should be tried together." (2 RT 157-158.)

The trial courts' rulings were prejudicially erroneous. Under this Court's precedents, and under federal constitutional law, the inflammatory and unrelated noncapital Webster assault and torture counts should not have been tried with the weaker Christopher Florence murder count or the double murder and attempted murder counts committed a few days later. Because the denial of severance likely affected the verdict and deprived appellant of a fair trial,

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[32] At the time of this proceeding, the case had been transferred to Department 101 in the Los Angeles Superior Court before the Honorable Judge William Pounders, where the matter was ultimately tried. (2 RT 121.)

the judgment must be reversed.

The Trial Court Abused its Discretion In Denying Severence

The trial court's denial of a severance motion is reviewed for an abuse of discretion. (*People v. Smith* (2007) 40 Cal.4th 483, 510, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 408.) On appeal, the court considers whether a "gross unfairness" took place which denied the defendant due process and a fair trial. (*People v. Smith, supra,* at p. 510, citing *People v. Cleveland* (2004) 32 Cal.4th 704, 726.)

Joinder of charges is generally permissible under the broad and general terms of Penal Code section 954. But even when two or more charges are joined under that statute, joinder may be improper. As this Court explained in *People v. Gutierrez* (2002) 28 Cal.4th 1083:

> "'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.'"

(*People v. Gutierrez, supra*, 28 Cal.4th at p.1120, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1315; See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1128-1129.) Joinder is error where prejudice is clearly shown. (*People v. Scott* (2011) 52 Cal.4th 452, 469; *People v. Hartsch* (2010) 49 Cal.4th 472, 493.)

> "'The burden of demonstrating that . . . denial of severance was a prejudicial abuse of discretion is upon him who asserts it . . . .' (*Ibid.*) A party seeking severance must 'clearly establish that there is a substantial danger of prejudice requiring that the

charges be separately tried.'" (*Frank v. Superior Court*, *supra*, 48 Cal.3d at p. 640.)

People v. Davis (1995) 10 Cal.4th 463, 508.

In this case, each of the factors weighs in favor of severance. Collectively, they compel the conclusion that the trial court abused its discretion in failing to sever the six Webster torture and assault counts from the capital murder counts, and the Christopher Florence shooting on September 27, 2001 from the double murders and attempted murders on September 30, 2001.

Because this Court examines the trial court's severance ruling "on the record in which it was made," the argument in this section is based on the record as it stood when the trial judges made their rulings, including the preliminary hearing transcript. (*People v. Davis, supra*, 10 Cal.4th at p. 508; *People v. Scott, supra,* 52 Cal.4th at p. 469.)

None of the Evidence Pertinent to the Offenses Was Cross-Admissible

The initial step in reviewing whether a trial court has abused its discretion by denying severance is to consider the cross-admissibility of evidence. If the evidence underlying the offenses would be cross-admissible in separate trials, prejudice is dispelled. (*Alcala v. Superior Court* (2008) 43 Cal.4th1025, 1221.)

Here, evidence on each of the joined sets of crimes would not have been admissible in a separate trial of the other crimes. The evidence regarding the murder of Christopher Florence as he drove down a one-way street in the "Bottoms" neighborhood would not have been admissible to prove any facts about the capital murders and attempted murder of Michael, Torry, and Brian Florence, as well as Floyd Watson, shot at while their car rested at a signal on busy Century Boulevard, in a separate trial. And the evidence of the capital

homicide offenses committed in 2001 would not have been admissible in a separate trial of the Webster assault and torture offenses committed in 2002. None of these highly prejudicial circumstances would have come before jury in separate trials of the charges sought to be severed, because none had any legitimate relevance to any fact in dispute in the trials of the other charges.

Under Evidence Code section 1101, evidence of a person's conduct on one specified occasion is inadmissible to prove he acted in character by his conduct on another specific occasion. In enacting this statute, the Legislature sought to prevent, among other things, the introduction of evidence of criminal propensity. But section 1101 does not prohibit the admission of evidence that a person committed a crime when it is relevant to proof of "some fact . . . other than his or her disposition to commit such an act."

When evidence is offered under Evidence Code section 1101, subdivision (b), the degree of similarity required for cross-admissibility is highest for identity, is also high to prove a common plan, and is lowest for intent. (*People v. Lynch* (2010) 50 Cal.4th 693, 736; *People v. Soper* (2009) 45 Cal.4th 759, 776.) This Court has spoken to the admissibility of improper propensity evidence in cases where identity is at issue. In *People v. Ewoldt* (1994) 7 Cal.4th 380, 406, the Court set forth this analysis:

> "For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged

> to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (Emphasis added.)

For identity to be established, the offenses must share common features that are so distinctive a to support an inference that the same person committed them. (*People v. Scott, supra,* 52 Cal.4th 452, 472-473, citing *People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Lynch, supra*, 50 Cal.4th at p. 736.)

In this case, it was beyond dispute that the three murders, the attempted murders, and the assault and torture of Webster took place; the primary issue to be determined at trial was whether appellant committed these crimes. Here, evidence of another crime could only be admissible, if at all, to prove the disputed issue of identity. In a companion case to *Ewoldt*, this Court explained that:

> "(T)he use of evidence of uncharged misconduct to demonstrate a common design or plan differs from the use of such evidence to prove *identity*. 'Evidence of identity is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator.' (*People v. Ewoldt, supra, ante*, p. 394, fn. 2, italics in original.) In order for evidence of an uncharged offense to be relevant for this purpose, it must share with the charged offense characteristics that are '"so unusual and distinctive as to be like a signature" [Citation.]' (*Id.* at p. 403.) The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense."

(*People v. Balcom* (1994) 7 Cal.4th 414, 424-425; accord, *People v. Kipp* (1998) 18 Cal.4th 349, 370.)

Moreover, under this Court's holding in *Ewoldt*, evidence of other

crimes is inadmissible to prove a common design or plan unless the facts are so distinctive they constitute a "signature." The murder of Christopher Florence was not so distinctive or unique as to show a common plan or scheme that included the murders of two of his brothers, or the attempted murder of another brother and his friend. Nor was evidence of appellant's alleged responsibility for the capital crimes sufficient to show a common plan that included the Webster offenses. The facts and circumstances of the offenses are unconnected in all respects but one: the *a priori* assumption that appellant was responsible.

The shooting crimes committed on September 27, 2001 and September 30, 2001 in this case lack an unusual, distinctive signature – indeed, they lack a common signature entirely. There is nothing particularly unusual about shooting at an unfamiliar vehicle driving in a neighborhood claimed by a gang. Indeed, there was evidence before the trial court that the Crenshaw Mafia gang was comprised of approximately 400 members, and that it was common for a driver, suspected of belonging to a rival gang, and who traveled the wrong way on 10th Street, a one-way street in the midst of the gang's territory, to be in danger of violence. (1 CT 284, 287-288.)

There are some commonalities between the Christopher Florence murder and the murders and attempted murders committed three days later, but none amount to characteristics so unusual and distinctive as to be like a signature. Ballistics examinations of the casings recovered from both scenes reflected that the bullets were fired from the same gun. (1 CT 50.) The gun, however, was not traced back to appellant. In fact, the gun was recovered from the vehicle belonging to Darrin Armstrong, appellant's brother. (1 CT 50.) And it is true that the offenses were committed against members of the same family, but there was no evidence that appellant and the Florence

brothers were acquainted with each other, or that the shooter harbored any motive to specifically target the Florence family.

The Webster assault and torture offenses committed on May 1, 2002 not only lack a common signature from the murder offenses committed the previous September, they are materially dissimilar in several important ways. First, the Webster offenses were not committed by appellant. He was not present at the scene of the crimes. Second, the Webster crimes were not committed, or charged as committed, in association with or to benefit a criminal street gang. Third, Webster was falsely imprisoned, assaulted, robbed, and tortured. While these offenses admittedly are crimes of violence, they are not capital crimes and were not homicide-related. The Webster crimes were not related to the capital crimes of murder and their joinder provided no evidence of identity, modus operandi, intent, or motive as to the murders and attempted murders committed nearly nine months earlier.

Thus, under the standards this Court set forth in *Ewoldt* and *Balcom*, assessed on the record as it existed at the time the trial court decided the severance motion, the evidence that defendant committed the Christopher Florence murder on September 27, 2001 would not have been admissible at a separate trial of the murders and attempted murders on September 30,2001, and the evidence that defendant committed all of the capital offense would likewise have been inadmissible at a separate trial of the Webster assault and torture counts.

Even assuming arguendo that appellant is wrong and the Court determines that evidence that defendant committed one murder is not barred by section 1101 at a trial of defendant on charges arising from the double murders and attempted murders three days later, the cross-admissibility issue would nevertheless have to be resolved in appellant's favor.

Evidence Code section 1101, subdivision (b) does not itself authorize the admission of any evidence. It merely makes the prohibition of propensity evidence under subdivision (a) inapplicable when the evidence is proffered for some purpose "other than . . . disposition." The evidence may be inadmissible for some other reason. Thus, this Court has held that even when evidence of other crimes is otherwise admissible under Evidence Code section 1101, subdivision (b), it is nevertheless subject to exclusion under Evidence Code section 352:

> "Although the evidence of defendant's uncharged criminal conduct in this case is relevant to establish a common design or plan, to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]' (*People v. Thompson, supra*, 45 Cal.3d at p. 109.) We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (Evid. Code, § 352.)

(*People v. Balcom, supra*,7 Cal.4th at pp. 426-427; see *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 586-587.) Other crimes evidence is "inadmissible if not relevant to an issue expressly in dispute." *People v. Alcala* (1984) 36 Cal.3d 604, 631-632.) Moreover, the introduction of evidence that is so unduly prejudicial that it renders the trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

Here, even assuming for the purposes of analysis that some evidence of each murder would be admissible to demonstrate identity or common plan in separate trials for the other murders and attempted murders, or for the Webster crimes, the admission of the evidence should have been prohibited as more

prejudicial than probative under section 352, and irrelevant and unduly prejudicial under the Due Process Clause.

This is true of all the "other crimes" evidence, but it is particularly pertinent to the most inflammatory evidence on each charge:

In a separate trial of the Christopher Florence murder, the evidence that the defendant shot and killed two of his brothers and attempted to murder two passengers in the same vehicle would have been excluded under section 352 and the due process clause. This is because the evidence of the September 30, 2001 shooting had no relevance to any fact to be disputed at a separate trial of the Christopher Florence killing. The prejudicial potential of this evidence vastly outweighs its probative value -- which is nil, since the only disputed issue at a trial of the Christopher Florence killing would be identity. Evidence of the multiple homicides and attempted homicides committed three days later would simply be inflammatory, and subject to exclusion at a separate trial of the Christopher Florence count.

Similarly, there was no evidence that any of the murders committed in September of 2001 bore any relevance to the Webster assault, robbery and torture committed in May of 2002 by appellant's brother and his companions. Likewise, there was no evidence that the assault offenses bore any relevance to the murders the previous September. That is, evidence that Darrin Armstrong and others assaulted, tortured, and falsely imprisoned Tyiska Webster had no relevance to any material fact in dispute as to the earlier murders. But it is extremely prejudicial. It too would have to have been excluded under due process and section 352 objections at a separate trial of the

The evidence -- and certainly, the most inflammatory and condemnatory evidence -- was not cross-admissible. This factor counts strongly against consolidation of the charges.

The Evidence was Inflammatory

The second factor in determining whether the trial court abused its discretion in refusing to sever the counts is whether "certain of the charges are unusually likely to inflame the jury against the defendant." (*People v. Gutierrez, supra*, 28 Cal.4th at p.1120.) In analyzing this factor, the Court has focused on the specific evidence and not the general nature of the charges. (*People v. Ochoa* (2001) 26 Cal.4th 398, 425).

Here, the most blatantly inadmissible "other crimes" evidence on the Webster assault and torture charges – that she was attacked, beaten, burned, robbed, and that she and her daughter were falsely imprisoned – would certainly be inflammatory in a separate trial of the murder and attempted murder offenses. The jury would likely view these acts against Webster -- which were, again, not relevant to any disputed issue of fact on the murder and attempted murder counts -- as exhibiting great disregard for others.

Similarly, the most obviously inadmissible "other crimes" evidence on a separate trial of the Christopher Florence killing – that the perpetrator of the later murders and attempted murders shot two of the victims through the head – though not relevant to any contested fact regarding the Christopher Florence crime, would be virtually guaranteed to inflame the jurors against the defendant.

Because the non-cross-admissible evidence included evidence of inflammatory acts, this factor also weighs heavily in favor of severance.

The Prosecution Evidence Against Appellant was Substantially Stronger on the Century Boulevard Multiple Murder Counts than on the Christopher Florence Charge or on the Tyiska Webster Offenses

The third factor the Court considers in assessing severance is the relative strength of the evidence on the counts sought to be severed from each

other. Viewed on the record as it existed at the time the trial court denied the severance motion, the evidence against appellant on the Century Boulevard charges was much stronger than the evidence against him on the Christopher Florence shooting or the Webster counts.

Indeed, the evidence against appellant on the Christopher Florence shooting was far from compelling. There were no eyewitnesses to the Christopher Florence shooting. The sole evidence against appellant as to his commission of the offense was the representation by Tyiska Webster that appellant told her he shot at the car traveling in the wrong direction on a one-way street in the "Bottoms" neighborhood on a previous evening. (1 CT 130-133.) Webster, however, did not tell anyone about appellant's admission to her until after Darrin Armstrong and his companions attacked Webster in her hotel room, an incident which Webster believed was instigated by appellant. (1 CT 176-177.) Further, as noted above, ballistics examinations of the casings found at the scene of the Christopher Florence shooting were found to have been fired from the same gun as those recovered from the scene of the Century Boulevard shootings. (1 CT 276.) The gun, however, was recovered from the vehicle driven by appellant's brother. (1 CT 276.) No evidence was before the trial court which personally connected appellant to the gun in the Christopher Florence shooting.

The evidence against appellant on the less-serious non-capital Webster crimes was even weaker. The sole evidence connecting appellant with these offenses was Webster's representation that appellant was on the other end of a cellular telephone call made to Darrin Armstrong during the course of the incident. (1 CT 168-170.) The purpose of the phone call could only be speculated. According to Webster, when Darrin answered the phone, he stated that they had "found her" and that they were "right here." (1 CT 168.) Among

a series of "yes" and "no" answers, Darrin also said to the caller that he had not found any money. (1 CT 169.) When the phone was placed next to Webster's ear, appellant only asked Webster why she was lying and why she had not put any money on his books. (1 CT 169.) There was no reference to the assault on Webster, or any discussion about torture, false imprisonment, or robbery. There was simply no evidence that appellant was behind the attack or that he knew what Darrin and the others were doing in Webster's hotel room.

Conversely, the evidence that appellant may have been the shooter in the Century Boulevard shootings was stronger. Eyewitnesses quickly identified appellant's photograph from a series of photographs presented to them on a computer screen at the police station. Thus, the primary evidence against appellant as to these crimes, which was before the court at the time of the motion, was the identifications made by Brian Florence and Floyd Watson indicating appellant was the male in the red Ford Contour who had shot at the Mustang. (1 CT 232, 234-237, 247-249, 265-267.)

The lack of parity in the strength of the prosecution evidence on the Webster charges, the Christopher Florence killing, as compared with the Century Boulevard shootings was undeniable.

The Florence Brother Murders Carried the Death Penalty

The fourth factor, whether "'any one of the charges carries the death penalty or joinder of them turns the matter into a capital case,'" (*People v. Gutierrez, supra*, 28 Cal.4th at p.1120), is plainly met: Appellant faced the death penalty for the Christopher Florence murder, as well as for the subsequent murders of Michael and Torry Florence.

Severance was Necessary

All four factors in this case favored severance, as shown above. This

is a capital case, and thus all doubts should have been resolved in favor of severance. The non-cross admissible evidence was inflammatory.

As this Court stated in *People v. Ochoa* (2000) 26 Cal.4th 398, 423:

> "Even where the People present capital charges, joinder is proper so long as evidence of each charge *is so strong* that consolidation is unlikely to affect the verdict. (*People v. Arias* (1996) 13 Cal.4th 92, 130, fn. 11 (*Arias*); *People v. Lucky* (1988) 45 Cal.3d 259, 277-278 (*Lucky*).)" (Emphasis added.)

Here, the evidence on the capital charge as to Christopher Florence was far weaker than the evidence of the Century Boulevard counts, as demonstrated above. The evidence of the non-capital counts charged against appellant for the Webster offenses was extremely weak. This is just the sort of situation in which consolidation is "likely to affect the verdict." In *People v. Alcala, supra,* 36 Cal.3d at pp. 630-631, the Court explained:

> "The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647.) Such evidence 'is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much.*' Inevitably, it tempts 'the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.' (*Id.*, at p. 646; quoted in *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6.)"

(Emphasis and brackets in original.) (Accord, *Old Chief v. United States* (1997) 519 U.S. 172, 181.)

Here, there was real danger of unfair prejudice with regard to the Christopher Florence charge: a danger that lay jurors would infer that, because appellant "did it three days later" [the Century Boulevard shootings] he must have "done it the first time," and thus deserved conviction on the Christopher

Florence count, despite the weakness of the evidence on that offense. There was an even greater danger of unfair prejudice arising from the inflammatory torture and robbery of Tyiska Webster. The evidence of appellant's participation in these offenses was weak. The joinder of these offenses with the murders served only to confuse the jury and to make appellant look like a dangerous person without regard for others.

The trial court abused its discretion by refusing severance.

The Trial Court's Failure to Sever the Three Sets of Counts Violated Due Process and Resulted in an Unfair Trial.

The federal due process standard differs from the state law standard that is used to assess abuse of discretion. As this Court stated in *People v. Mendoza* (2000) 24 Cal.4th 130, 162:

> "Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Arias, supra*, 13 Cal.4th at p. 127.)

While the trial court's decision are reviewed for abuse of discretion under California law "'in light of the showings then made and the facts then known'" at the time of the court's pretrial ruling, the federal due process inquiry, by contrast, looks to unfairness as it resulted at trial, based on the trial record. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162 fn. 3.) And even when the evidence is cross-admissible, joinder of charges may nevertheless violate due process:

> "We have recognized that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible. See *United States v. Lewis*,

> 787 F.2d 1318, 1322 (9th Cir. 1986). Undue prejudice may also arise from the joinder of a strong evidentiary case with a weaker one. See *id.*; *Bean*, 163 F.3d at 1085. The reason there is danger in both situations is that it is difficult for a jury to compartmentalize the damaging information. See *Bean*, 163 F.3d at 1084."

Sandoval v. Calderon (9th Cir. 2000) 241 F.3d 765, 772.

The United States Supreme Court has made clear that misjoinder rises to the level of a constitutional violation when it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8; see *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083 [joinder of strong and weak murder charges rendered trial fundamentally unfair], cert. denied *sub nom.*, *Calderon v. Bean* (1999) 528 U.S. 922.)

Here, the trial court's refusal to sever the three sets of charges resulted in a denial of appellant's right to a fair trial.

Joinder of the Christopher Florence count with the Century Boulevard charges deprived appellant of a fundamentally fair trial on the Christopher Florence charge in particular. Consolidation of the relatively weak Christopher Florence case with the stronger double murder Century Boulevard charges in a single trial violated appellant's right to due process by leading the jury to infer criminal propensity. This impermissible inference, in turn, allowed the jury to rely upon the Century Boulevard double murder evidence to strengthen the otherwise weak case against him for the earlier Christopher Florence murder. Further, the joinder of the non-capital offenses committed against Tyiska Webster, which were wholly unrelated and irrelevant to the murder charges, inflamed the jury, and invited it to view those offenses as improper propensity evidence to further muddy appellant's character.

The factors considered in determining whether an appellant's due process rights have been violated by a failure to sever counts overlap in part those factors considered under the state law analysis. They include whether the evidence on the charges sought to be severed was cross-admissible, whether the evidence is inflammatory, whether there is a disparity in the strength of the cases that were joined, the effect of the particular limiting instructions given by the trial court, if any, whether the record reflects that the jurors "compartmentalized" the evidence, and whether the evidence on the separate charges was "simple and distinct." (See *Bean v. Calderon, supra*, 163 F.3d 1073, 1085.)

Although joinder may violate due process even when evidence on the charges is cross-admissible, as shown above, the evidence against appellant on the Christopher Florence murder count would not have been cross-admissible in a separate trial of the Century Boulevard counts, and vice-versa, and neither of these would have been cross-admissible in a trial on the Webster charges. There is "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." (*United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.)

There was non-cross-admissible evidence that was inflammatory, as also explained above. The evidence that appellant participated in the torture and robbery of Tyiska Webster, and the false imprisonment of her daughter, is precisely the sort of factual detail "'uniquely tend[ing] to evoke an emotional bias . . . which has very little effect on the issues.'" (*People v. Garceau* (1993) 6 Cal.4th 140, 178.)

There was a wide disparity in the strength of the evidence against appellant on the Christopher Florence shooting and the Tyiska Webster

offenses, as compared with the double murder charges on Century Boulevard, as demonstrated above.

The significance of this factor cannot be underestimated. The Ninth Circuit has given considerable weight to the disparity in evidentiary strength in the due process analysis:

> "This substantial disparity between the Schatz evidence and the Fox evidence prompts us to conclude that the strong evidence of Bean's guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses. See *Lucero v. Kerby*, 133 F.3d 1299, 1315 (10th Cir.) ('Courts have recognized that the joinder of offenses in a single trial may be prejudicial when there is a great disparity in the amount of evidence underlying the joined offenses. One danger in joining offenses with a disparity of evidence is that the State may be joining a strong evidentiary case with a weaker one in the hope that an overlapping consideration of the evidence [will] lead to convictions on both.') (alteration in original) (citation omitted), cert. denied, 140 L.Ed.2d 821, 118 S.Ct. 1684 (1998); see also *Lewis*, 787 F.2d at 1322 (considering relative strength of evidence underlying joined charges as factor showing undue prejudice). This creates 'the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again.'" *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985.)

(*Bean v. Calderon, supra*, 163 F.3d 1073, 1085.) The same reasoning applies here: the much stronger evidence of appellant's guilt of the double murder offenses on Century Boulevard tainted the jury's consideration of the Christopher Florence murder, for which the evidence was comparatively weak, leading the jury to draw the understandably human, but impermissible, conclusion that because he did it once, it was likely he did it multiple times.

The danger was particularly acute in this case because the evidence of the murder offenses, while not cross-admissible, was - - from the perspective of a reasonable lay juror -- similar enough to unavoidably invite the inference

of criminal propensity. All of the murder crimes involved the shooting of a firearm into another car, and the weapon used for all of the offenses was found in appellant's brother's car. As explained in *People v. Grant* (2003) 113 Cal.App.4th 579, 593:

> "Prejudice does not arise from joinder when the evidence of each crime is 'simple and distinct, even in the absence of cross-admissibility.' [Citation.] Here, however, prejudice is highly probable because the evidence on counts 1 and 2 improperly bolstered the strength of the evidence on the other count."

It is also noteworthy that the trial court did not give limiting instructions that could effectively prevent any impermissible inference of criminal propensity. The instruction given in this case was:

> "Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the offenses charged. Your findings as to each Count must be stated in a separate verdict."

(18 RT 2887; 4 CT 1101 (CALJIC 17.02). This instruction was essentially identical to the instruction given in *Bean v. Calderon, supra*:

> "Each count charges a distinct offense. You must decide each count separately. The defendant must be found guilty or not guilty of any or all of the offenses charged. Your findings as to each count must be stated in a separate verdict."

(*Bean v. Calderon, supra*, 163 F.3d at p. 1083.) The federal appellate court held that this instruction was inadequate to assure a fair trial:

> "We have expressed our skepticism about the efficacy of such instructions on at least one prior occasion: 'To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities.' *Lewis*, 787 F.2d at 1323 (quoting *United States v. Daniels*, 248 U.S. App. D.C. 198, 770 F.2d

> 1111, 1118 (D.C. Cir. 1985)). Apart from the intrinsic shortcomings of such instructions, however, the instructions here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other."

(*Bean v. Calderon, supra*, 163 F.3d at p. 1084.) The essentially identical instruction here is similarly inadequate to cure the constitutional error. Morever, here, as in *Bean*, the jury received the instruction "in the waning moments of the trial," a factor that further diminished any potential impact. (*Ibid.*; 18 RT 2887.) And also like *Bean*, "[T]his is not a case where acquittal on one joined charge establishes that the jury successfully compartmentalized the evidence." (*Bean v. Calderon, supra*, 163 F.3d at p. 1085.)

It is noteworthy that during a discussion of the correction of the firearm charges as alleged in the Second Amended Information, the trial judge admonished the prosecutor for significantly overcharging the case and making the jury's task harder than necessary. (18 RT 2778.) The court noted, for example, the multiple charges regarding the Webster matter that even if found true, would not amount to anything in sentencing. As the court stated,

> "It looks like you look at every different possibility that it could be and charge them all, and the effect of that is to confuse the jury and to make them wonder what's happening. ¶ I think it's a very bad tactic, and the gun allegations are basically the same kind of thing. How much more can you want out of the case with all of the extra charges? You make the jury work extra hard and wonder again what is the effect of what they're doing."

(18 RT 2778-2779.) Taking the court's point one step further, it is clear the prosecutor charged the Webster offenses for purposes of inflaming the jury and to attempt to display appellant as a person who not only kills for his gang, but who also is a cruel man who would torture his girlfriend in order to protect

himself and meet his own needs.

Appellant Suffered Prejudice

When a trial court has abused its discretion by denying severance, under state law the verdict must be reversed if it is reasonably probable that a result more favorable to the defendant would have been reached if there had been separate trials.

In this case, the elements of abuse of discretion also demonstrate the trial court's ruling was prejudicial. As demonstrated above, the evidence of the three sets of crimes was not cross-admissible to show common design or identity. The evidence of the "other crimes" impermissibly led the jury to a virtually unavoidable inference of criminal propensity. Some of the non-cross-admissible evidence was clearly inflammatory – such as the evidence that Tyiska Webster was assaulted, robbed and tortured at the hands of appellant's brother and his companions. The evidence against appellant was considerably stronger on the double murder counts than on the Christopher Florence charge. And no effective instruction limiting the jury's use of the evidence to infer criminal propensity was given. In view of all this, and considering that the case against appellant, especially as to the Christopher Florence murder and the Webster offenses, was far from overwhelming, it must be concluded that the denial of severance was prejudicial under state law.

As to the violation of appellant's federal due process right to a fair trial, further demonstration of error is likely unnecessary. As the court observed in *United States. v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 906, concerning a denial of severance from a codefendant's trial:

> "In light of our finding that the failure to sever the trials actually prejudiced Mayfield and denied him a fair trial, we see no need in asking whether the error was harmless. . . . . We think it is clear that our holding that Mayfield has shown 'clear, manifest,

> or undue prejudice resulting from a joint trial,' *Arias-Villanueva*, 998 F.2d at 1506, necessarily means that the error was not harmless."

If another standard of prejudice does apply, it is that of *Chapman v. California* (1967) 386 U.S. 18, 24, under which it is the respondent's burden to demonstrate, beyond a reasonable doubt, that the constitutional error did not contribute to the verdict. In this case, for the reasons discussed above in connection with prejudice under California law, respondent will not be able to meet its burden.

Because the trial court abused its discretion in denying severance, and as a result appellant's right to a fair trial was violated, the judgment must be reversed.

II.

BY IMPROPERLY DISMISSING JUROR #5 FOR PURPORTED MISCONDUCT, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RELATED RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

Introduction

It is a violation of Constitutional magnitude to dismiss a juror without good cause. After less than two days of deliberations, and following an extensive read-back of appellant's testimony during the afternoon, the jury foreperson, Juror #4, reported that the jury was deadlocked on all counts. The trial court indicated its astonishment privately to counsel, as well as its suspicion that under the circumstances, it appeared one juror was likely not deliberating. The court assembled the jury and ordered it to continue deliberating, informing it that it was to soon and there was too much evidence to review for the deliberations to be declared at a permanent impasse. The court advised the jury that it may request read-back of testimony, clarification

of the law, or additional argument by the lawyers if any of those would be of assistance as it proceeded.

The following court day, the court and counsel conferred out of the jury's presence regarding several jury notes which had been submitted to the court late on the previous court day, as well as one additional note delivered to the court that morning. The first note from the previous day was from Juror #12, requesting to speak to the court out of the presence of the attorneys or other jurors. The second note was from Juror #5, who reported that Juror #12 had told Juror #5 and Juror #6 that he knew appellant's cousin, and the cousin had told him that appellant was a cold, heartless killer and an active criminal. The third note was from Juror #4, the foreperson, who reported that a majority of the panel believed that one juror was not fulfilling her obligation to consider all of the evidence, and that the juror may not have been truthful during voir dire in disclosing her biases concerning gang members and the police. The final note, submitted that morning by a juror who wished to remain anonymous, but was believed by the clerk to be Juror #12, complained about Juror #5, alleging that she refused to listen to the other jurors, that she read her book and did things with her cell phone instead of deliberating, that she commented about her own experiences with gangsters and the police, and that ultimately she was the reason for the deadlock. The last note also indicated that other jurors were anxious to return to their work and they needed help.

After interviewing all of the jurors involved in the exchange of notes, the trial court excused Juror #5 for misconduct over the defense objection, and also excused Juror #12 at the urging of the defense and out of an abundance of caution. Juror #6 remained on the jury without objection. The court denied the defense motion for a mistrial as to Juror #12's statements based upon the likelihood they infected the entire jury, and despite the trial court's failure to

inquire of the other jurors as to whether they heard Juror #12's statements. The court simply opined that Juror #5 was not credible in her comments about Juror #12. Two alternate jurors were ordered to take the dismissed jurors' places. Unanimous verdicts were reached on the day the newly constituted jury heard additional argument from counsel.

In context, it appears that the misconduct ruling as to Juror #5 was merely a vehicle for dismissing a holdout juror rather than an appropriate sanction for an actual transgression. The trial court was predisposed to the dismissal upon hearing of the deadlock, surmising that it was likely a juror misconduct matter that was causing the premature impasse. The trial court's error in improperly dismissing a sitting juror for misconduct compels reversal of all of appellant's convictions.

Special caution is required when the juror is dismissed during deliberations. Even greater appellate scrutiny is required when the dismissed juror is a holdout juror. Here, both of those conditions existed. Nevertheless, the causes for dismissal of Juror #5 cited by the trial judge were either unsupported by the evidence or dismissal was vastly out of proportion to the juror's purported improper activities during deliberation. Further, the investigation undertaken by the trial judge was deficient in critical respects: the judge failed to inquire of the full jury as to their observations as to Juror #5, and the court failed re-advise the offending juror of her duty to deliberate and to refrain from engaging in distracted behaviors (using her cell phone and opening her book) before dismissing her. Instead, the trial judge simply "presumed the worst" regarding the allegations other jurors made about Juror #5 and acceded to their demands that she be dismissed, clearly to alleviate the deadlock and so that they may return to their jobs and their vacation schedules. Under these circumstances, the trial court abused its discretion by improperly

dismissing a deliberating juror.

The trial court also erred in failing to inquire of the entire jury as to whether it heard a statement made by Juror #12, repeating the inflammatory comments made by appellant's cousin. Merely dismissing Juror #12 did not fully cure the misconduct by that juror. It was the court's responsibility to ascertain whether Juror #12 provided outside condemnatory information about appellant to the jury which biased their perspective of him and prevented their fair and due consideration of the case.

The errors compel reversal of all of appellant's convictions.

Factual Background

The Juror Notes

The jury began its deliberations at 2:15 p.m. on August 18, 2004. (4 CT 1005; 18 RT 2897.)

On the following day, the jury deliberated from 9:30 a.m. until 4:00 p.m. (4 CT 1013.) At some point that day, Juror #5 sent the court a note asking if the jurors could take their notes and their copy of the jury instructions home in the evening for review. (4 CT 1012.) The court responded that the jurors could take the materials home, but cautioned the case could not be discussed with anyone. (4 CT 1011; 18 RT 2908.)

On the next day, August 20, 2004, Juror #5 sent a second note to the court. (4 CT 1017; 18 RT 2908.) The note suggested the juror was interested in attending law school, and inquired whether the juror could properly contact the attorneys about "this case, any case or their profession in general." (4 CT 1017; 18 RT 2908.) Upon conferring with the attorneys, the court responded that the juror should wait until the end of the trial. (4 CT 1017; 18 RT 2908-2909.)

Subsequently, on the afternoon of August 20, 2004, the jury requested

the court to provide a read-back of appellant's testimony on both direct and cross-examination as to his assertion of self-defense, his recollection of the position of the cars at the intersection, and when he began to shoot during the incident on Century Boulevard and Doty Avenue. (4 CT 1016; 18 RT 2904-2906.) Counsel conferred about the appropriate testimony to be provided and the read-back commenced on the same day. (4 CT 1018; 18 RT 2908.)

Thereafter, on the same afternoon, the foreperson, Juror #4, sent a note to the court which stated:

> After much work and extensive review of the evidence we are deadlocked on all counts.

(4 CT 1015; 18 RT 2909.)

Out of the jury's presence, the court expressed its astonishment, noting that after nine days of testimony, 38 witnesses, and 130 items of evidence, the deliberations could not be at an end after just two days. (18 RT 2909-2910.) It suggested offering the jury three options including further clarification of the law, additional read-back of testimony, or identifying issues for which additional argument might be beneficial. (18 RT 2909.)

Defense counsel (Mr. Peters) countered that giving the jury such choices was premature. (18 RT 2909-2910.) Counsel pointed out that the heart of the case was the credibility of appellant, and where jurors may have decided that question differently, the process of giving the them a number of options would be in and of itself coercive. (18 RT 2911.)

The court disagreed and pointed out its prior experience with a deadlocked case which resolved itself following such options, adding that:

> "...[n]ot in any case that I've ever seen in two days can a jury say there's nothing more that can be done. We're finished. ¶ That happens only when a juror is not really deliberating, when a juror simply basically says I don't care what you say, I'm not

> going to believe such and such and they put their feet down and really won't deliberate."

(18 RT 2911-2912.)

Defense counsel observed that there was no indication in the foreperson's note that a juror was not participating. (18 RT 1912-2913.) The court responded:

> Then we're in agreement. What I'm saying is the only time I could believe that two days of deliberations is all that can be had is when a juror is not deliberating. Basically says nothing about the case and will not exchange views or change a position even if shown it's wrong, so given the fact that you and I agree, the only result is to continue deliberations, meaning that nobody is so entrenched that they cannot listen to reason and be persuaded.
>
> * * *
>
> ... I have to tell you that this decision that was just sent out by Juror No. 4 shocks me. It is an absolute travesty to come to this conclusion after two days.

(18 RT 2913.)

Defense counsel expressed concern that the jury would feel that the court was upset with it for sending out a note indicating a deadlock, characterizing the court's response as "flabbergasted." (18 RT 2914.) The court agreed with the description, and reiterated its disbelief that the jury could be deadlocked after two days of deliberations on the case. (18 RT 2915-2916.)

Thereafter, the jury was summoned to the courtroom and the judge advised the jury as to the options available to assist it in its deliberations. (18 RT 2917-2919.) The judge told the jury that it must continue deliberating. (18 RT 2919.) The jury retired to continue its deliberations at 3:48 p.m. (18 RT 2919.)

The following court day, Monday morning August 23, the court and counsel convened to discuss four additional notes submitted by the jury late on the previous Friday afternoon. (18 RT 2920-2921.) The first note was submitted by Juror #12 stating:

> I would like to speak with the judge privately without knowledge of the lawyers or the jurors.

(4 CT 1021; 18 RT 2921.) The court indicated it had instructed the court clerk to orally respond to the juror that the court could not talk to jurors without counsel present. (18 RT 2921.)

The next note was from Juror #5. (4 CT 1020; 18 RT 2921.) The juror wrote:

> Something has been bothering me. Juror #12 told me (Juror #5) and Juror #6 that he saw the defendants [sic] mother and his family out shopping one day. This is when he realized that he is close friends with the defendant's cousin. And these friends told him the defendant was a cold heartless killer, and an active criminal. I believe that this information may be influencing this Jurors [sic] opinion of this case. I had forgotten about this omission until we began deliberations, and some of the things Juror #12 is saying leaves me to believe that this information stuck with him. Thank you for your time. Juror #5

(4 CT 1020; 18 RT 2921-2922.)

The court received the third note from the foreperson, Juror #4, who wrote:

> A majority of this panel believes that one juror is not fullfilling [sic] her obligation to objectively consider all the evidence. Furthermore, some panel members wonder whether this juror honestly and accurately disclosed on her questionnaire [sic] and during voir dire, her experiences., associations and possible biases with regard to gang members and the police.

(4 CT 1024; 18 RT 2922.)

The fourth note signed "A Concerned Juror" was submitted. (4 CT 1022-1023; 18 RT 2922.) The clerk indicated the author was Juror #12. (18 RT 2924.) The note stated:

> "Dear Judge Founders [sic] ¶ I'm writting [sic] to let you know that we (11 other jurors) are having a problem with Juror #5. She is the reason we are a hung jury right now, She refuses to listen to the other jurors points on why they are voting the way they are. She either does something on her cell phone or reads her book. She cannot and refuses to show how the evidence or testimony has led her to vote the way she has. Instead she's made comments such as 'put your eleven heads together and convince me.' Other jurors have asked 'how if they may be able to persuade her?' Her response was 'I don't know, I'm not psychic.' She's also made numerous comments stating she used to stay close to the 'Bottoms,' she has lots of friends who are gangsters and other statements saying how corrupt police officers are. The way things are now we will not be able to come back with a verdict other than 'hung jury.' Other jurors have given up on trying to persuade a person who believes all the witnesses are lying, when the evidence suggests otherwise. A lot of them are in a hurry to get back to work. If there is something you can do it would be greatly appreciated. Also if you can instruct the group to go through all of the pieces of evidence and-or have the attorneys give their arguments again would also appreciated [sic]. I wish to remain anonymous because I don't want to go over the foreman or any other juror's head. Thank you. A concerned juror."

(4 CT 1022-1023; 18 RT 2922-2924.)

The Juror Interviews

Juror No. 4

The court determined it was necessary to individually question the jurors involved in the note exchanges. Based upon the order of the notes, the court first questioned the foreperson, Juror #4, who had written that one person in the group was not objectively considering the evidence and appeared to

some to harbor bias in her approach to the case. (4 CT 1024; 18 RT 2926-2927.) The court told the juror that its primary interest was in the "conduct" of the jurors and deliberations, not about the specific discussions about the evidence. (18 RT 2927.) The exchange was as follows:

> **JUROR NO. 4 (THE FOREPERSON):** Okay. Well, when we first started last Wednesday, I kind of let - - well, I got kind of picked randomly as far as being a foreman. I said I'd be willing, what not, and I just kind of let everybody run as far as their comments goes.
>
> Everybody seemed really eager to talk about anything, so I figured everybody had to kind of get all that energy out and then start to be more focused, and it seemed to be so as we started going on Thursday some more.
>
> Conversations were going very nicely, dialogue, we were testing evidence, we were looking into possibilities, and then it seemed Juror No. [5] .. we started to not get so much input from her so much. We would start to feel sort of a consensus going and then we would somehow just try to integrate her into the conversation some more, and then just seemed a little less open minded for something and then maybe not being able to weigh so much evidence in a more objective fashion to accept anything.
>
> I wouldn't say she's passive or anything like that, but just not willing to make a larger decision. .. Not willing to make the big decisions, so to speak. When it came down to making a call on a specific piece of evidence, she would get choked up by too many possibilities it seemed that she would think of.
>
> And then so Thursday as we went, we kind of got to the big crux of the matter, and we've got a very intelligent group here, and so we figured we stalled on this so we'd try to work another count, and so then we were working through with that, and then it seemed like it would take itself back to the first count, and then it came down to the crux of that impacting other counts, and as we tried to work on other counts, it kept coming back to the main problem I guess - - well, not problem, but just

difference of perception, I guess, and it seemed, okay, we kept trying more so to explore other means to introduce points of view.

We would come up with a theory, we'd test it, we'd test the testing procedures or something like that, and it seems as though at that point she just really didn't even participate. She just kind of sat there.

And even during a lot of the procedures here, her phone would go off and she would be checking text messages. Even in closing arguments she was checking her phone, and during the reread as well, and I thought that was pretty disrespectful and just not professional.

So coupled with that and I don't know, I tried to be, you know, somewhat - - I didn't want to single her out in this whole thing. I didn't want to take any votes or anything like that until I knew we were coming out here, and I think that's when Martha spoke that, you know, we should at least take a vote because you perhaps might ask for some numbers or something like that.

So that's been the only case where she has been singled out in that fashion. ...

So I wouldn't say - - I'd say maybe some of the jurors are getting frustrated, but I tried not to[.] Look, this is just the process, okay. There have been hung juries in the past. I know it's been a lot of work for us and may seem to not have any closure, but this is what happens.

She has her feelings, this is the way she looks at things. We've tried to change her mind, not so much change it, but help her make - - I don't know. It seems like she brought in a lot of preconceptions. I sense some bias in her, so the other jurors are more concerned with that it seems, and so they're starting to speak to me about maybe speaking up about it, so that's where we come from.

THE COURT: What did you mean by preconceptions?

JUROR NO 4 (THE FOREPERSON): I guess her association with some gang members. She comes up with a lot of possibilities and says things in large general terms that anything is possible and any person can do anything, and sure, that's a possible thing, but then she doesn't really grasp on to what can be probable.

Also with regard to the police, she made mention that, you know, the police use language and just like say in a shooting where they're like fearing for their lives, they always come up with a defense, oh, I was fearing for my life so I had to shoot, so, you know, we felt that that was kind of out of nowhere.

It had nowhere that the police really impacted this case so much as the defendant's own comments and the physical evidence that was just collected so that was kind of out of line we felt.

THE COURT: When Juror No. 5 seemed not to be participating, did you do anything to encourage her participation?

JUROR NO. 4 (THE FOREPERSON): I think the whole group tried, not me personally. I tried to make a statement last Thursday as to - - I wouldn't speak to her eye to eye or nothing, but I had the room's attention at that point, and I made comments to allude that this is not an easy process and to look at the evidence objectively and to weigh things as things being possible and things being probable. It's not going to be easy to make those decisions, but you have to make them at a certain point, and I was hoping that she'd take that to heart.

She did share that she took her notes home and took the jurors instructions home and they went over everything. She did a lot of praying and what not, but it just seems our discussions don't hold any water with her as well as our different means to determine the truth in this. She won't - - there is a point where she doesn't even look anymore. .. She doesn't observe, she doesn't participate at all. She maybe looks at her book. .. She has textbooks all the time or she'll just look at her notes or something like that. Or sometimes she'll like when I was

talking last Friday, she just had her phone open and was doing some sort of text message or something.

THE COURT: During deliberations?

JUROR NO. 4 (THE FOREPERSON): Yes.

THE COURT: How often does that happen that she's using that cell phone?

JUROR NO. 4 (THE FOREPERSON): I don't think really at all that much. Like I said, I didn't notice it, somebody else brought that up to me and said, hey, you know, when you were talking the other day, she like had her phone open. But I'd say when she is animated and engaging with all of us, she's very articulate. She seems bright.

THE COURT: Did she mention any particular association with gang members?

JUROR NO. 4 (THE FOREPERSON): Not any particular ones, just in general.

(18 RT 2927-2932.)

Out of Juror #4's presence, the prosecutor (Mr. Hassett) requested the court to inquire further into Juror No. 4's perspective on Juror #5's appearance of bias and the suggestion in the note that Juror #5 was not forthcoming during on her questionnaire and during the voir dire proceedings. (18 RT 2933.) The court asked the juror about the those final points made in the note and the juror explained that another juror, Juror #11, had authored those observations and that she personally had not been present when Juror #5 had answered questions during the voir dire proceedings and did not know what Juror #5 had said. (18 RT 2934-2935.)

On further suggestion of the prosecutor, the court asked Juror #4

whether Juror #5 made "any statements during deliberations or once the case was given to the jury that would indicate a bias with regard to gang members or the police, for or against either group." (18 RT 2935-2936.) The juror responded, "No direct comments. You get more of a feeling, I suppose." (18 RT 2936.)

Juror No. 12

The court then interviewed Juror #12. (18 RT 2937.) Juror #12 told the court that he was friends with appellant's cousin. (18 RT 2937.) He first told the court that he realized the friend was a family member of appellant's when, on one occasion, he appeared in the courtroom and sat with appellant's family during the later part of the trial. (18 RT 2937-2939.) They spoke afterward. (18 RT 2938.) The cousin told the juror that he had heard about appellant's trial but did not know much about any of appellant's criminal activities. (18 RT 2938.) Juror #12 denied forming an opinion that appellant was a killer and an active criminal based on information received from others. (18 RT 2940.)

Juror #12 also had seen appellant's mother at a store and recognized her from the trial. (18 RT 2940.) He did not speak to her. (18 RT 2941.) At the same time, Juror #12 ran into his friend who was at the store with his mother and his son. (18 RT 2941-2942.) His friend's mother spoke to appellant's mother. (18 RT 2942.) Juror #12 told his friend that appellant's mother was part of the case on which he was a juror and that he had to leave. (18 RT 2942.)

The following Monday was the day his friend, appellant's cousin, appeared in the courtroom and sat with appellant's family. (18 RT 2942-2943.) Later, his friend called him on the telephone and said he was appellant's cousin. (18 RT 2942.) Juror #12 said that he did not discuss the case with his friend. (18 RT 2943.) He stated that the relationship with his

friend, and knowing he was appellant's cousin, would not affect his ability to be fair in the case. (18 RT 2943-2944.)

Juror #6

Juror #6 recalled being present when Juror #12 told Juror #6 and Juror # 5 about his friendship with appellant's cousin. (18 RT 2945-2946, 2950.) The conversation took place in the courtroom hallway later during the trial. (18 RT 2945-2946.) Juror #12 said that he found out that his friend and appellant were related but that the information would not affect his decision. (18 RT 2946, 2950.)

Juror #6 also recalled that Juror #5 had "one or two times" used her cell phone or looked at her book for "just a few minutes" during the deliberations. (18 RT 2946-2947.) Juror #6 also recalled that during deliberations, Juror #5 said that she was "acquainted with some gang members and that the police do sometimes - - are not trustworthy [sic]." (18 RT 2947, 2950-2951.) Juror #5 also said that she knew some gang members so "she kind of knew how they thought," and that she once lived in the "Bottoms" area. (18 RT 2948.)

Juror #6 told the court that Juror #5 was participating in the deliberations, but that the juror "already made a conclusion." (18 RT 2951.) Once Juror #5 reached a conclusion, she was not participating further. (18 RT 2951.)

Juror #5

The court first asked Juror #5 about her note concerning Juror #12, and then questioned her about her participation in the jury deliberations. The discussion was as follows:

> **"THE COURT:** We have been talking with a lot of the jurors about concerns that they might have expressed, and we're talking with as many as we can accommodate, I guess.

I had wanted to ask you about the note that you sent out indicating something about Juror No. 12, a discussion about being a friend of the defendant's cousin.

JUROR NO. 5: Uh-huh.

THE COURT: Can you tell us about that, when it happened and what was said.

JUROR NO. 5: About a week ago, early last week or at the end of the week before that, he came up to me and Juror No. 6 and says you're not going to believe what happened. He was out shopping and he saw two of his close friends and he had already seen the defendant's mother earlier that day, and so he said I'm on jury duty, and the defendant's mother happens to be here.

So he pointed her out to them, and it turns out that they were all related, and he says that the - - his close friends that he knew ended up being the defendant's cousin, so that's what they said, and that they told him that the defendant was like a real bad criminal, like a cold-blooded killer, he was heartless and all these other bad things like that, and so he told me and her that and that was basically it.

THE COURT: And did he say anything about how that might affect his ability to be fair?

JUROR NO. 5: Well, he said, well, you know, that he did it then, because even his own cousins are saying that about him, well, you know that he must have did this.

THE COURT: And who was present during the time he was making this statement?

JUROR NO. 5: To me? Me and Angela.

THE COURT: Anyone else close?

JUROR NO. 5: Not that I remember.

THE COURT: And Angela being Juror No. 6?

JUROR NO. 5: Yes.

THE COURT: Do you know whether he repeated that statement to any other jurors?

JUROR NO. 5: It's possible, but I wasn't there

THE COURT: That's all I'm asking, is whether you were there.

JUROR NO. 5: No.

THE COURT: Would that or did that statement that he made have any influence on your ability to be fair in this case?

JUROR NO. 5: No."

(18 RT 2952-2953.)

The court then inquired of Juror #5 as to whether she was attending classes at Cal State Long Beach and if she had been looking at a textbook she might have had with her while in court. (18 RT 2954.) Juror #5 responded that classes were resuming the following Monday and that she had been carrying a book that was not related to any courses she would be taking. (18 RT 2954.) When the court asked Juror #5 if she had been reading the book "during deliberations," she responded that she had been reading it "on our breaks." (18 RT 2954.) Juror #5 said she was not reading the book during conversations about the evidence and the law. (18 RT 2955.)

The court then asked Juror #5 about her cell phone. The conversation continued:

"THE COURT: Do you have a cell phone?

JUROR NO. 5: Yes.

THE COURT: Have you been referring to that during deliberations?

JUROR NO. 5: No, only on our breaks.

THE COURT: Okay.

JUROR NO. 5: Or maybe I'll look at the time, but I won't call in or text messaging, I look at the time sometimes because it's right in front of me, but that's it.

THE COURT: What did you say about text messages?

JUROR NO. 5: I say I won't be using the text messages during the deliberations.

THE COURT: Okay. Did you hear me tell the jurors to turn off the cell phones during deliberations so that you don't get any text messages or phone calls?

JUROR NO. 5: No.

THE COURT: The area where the - - well, part of the alleged crimes were supposed to have taken place called the Bottoms, have you had prior acquaintance with that area?

JUROR NO. 5: Not the Bottoms itself, but I did used to live - - about ten years ago I used to live on 104th and Crenshaw, but I never went to the Bottoms or around the Bottoms.

THE COURT: Never went to the Bottoms?

JUROR NO. 5: No.

THE COURT: So you've never associated with anybody at the Bottoms?

JUROR NO. 5: No. Because I was about nine or ten at the time, so I pretty much stayed at home.

THE COURT: How about your feeling about gang members and the police. Do you feel that there's anything you should tell us about that, about whether you have any concerns or biases about gang members or the police for or against either group?

JUROR NO. 5: No.

THE COURT: Now, you mentioned in the questionnaire, and I talked to you at the time of jury selection about whether you witnessed any gang activity you indicated gang fights, drive-by shootings and vandalism.

I can't recall now whether - - did you attach that to any particular gang?

JUROR NO. 5: Yeah, I did. See when I was in school it was different. Hoover Street Gangs, Rollin 60s, East Coast Crip, Grape Street Crip. That's about it that I can remember right now.

THE COURT: Okay. An never - - no contact then with the Crenshaw Mafia Gang or the Hard Time Hustlers?

JUROR NO. 5: No. I've heard about them like in conversations about it, but I've never met one or experienced anybody from those gangs personally.

THE COURT: Now, what do you think about your ability to deliberate in this trial? Have you formed such opinions about it that you're not willing to discuss the evidence and the law with the other jurors?

JUROR NO. 5: No.

THE COURT: Do you feel that you're freely discussing with them, analyzing what they say and trying to respond to what they say and make points that you feel are accurate?

JUROR NO. 5: Yes."

(18 RT 2955-2957.)

Following a sidebar with counsel about further inquiries, the court continued with Juror #5:

> "**THE COURT:** With regard to Juror No. 12 and the information that he provided about his contact or his acquaintance with the defendant's cousin, you've indicated that you felt or you were concerned that that was affecting him in some manner, influencing him with regard to the case. How do you feel about that? What did you mean?
>
> **JUROR NO. 5:** Oh, because when we're in deliberations and someone will bring up a point about the self-defense case or theory, he'll say something like, well, he's a gang member, so you know he's done some other stuff or you know that he couldn't have been scared so, you know, look at him, just look at him.
>
> He won't come around and say what he had heard before from the two guys, but he'll say stuff like that. So you know that he's done stuff before, you know he's done stuff before.
>
> **THE COURT:** Okay. Any other - - oh I guess one - - when you sent out this note about Juror No. 12 and that conversation with him saying that you had forgotten about the omission, any reason why it didn't stay in your mind before the time you sent the note out?
>
> **JUROR NO. 5:** Well, because we had been talking about - - we grew up - - well, he grew up in a neighborhood that I had, I don't know, up in or close to, so we had usually always talked about gangs and different things like that about the different neighborhoods, and it - - really just he told us. It wasn't even a five minute conversation and that was just it.
>
> We were at lunch and I never really thought about it again and it never really bothered me until when he started staying the things that he was saying in deliberations."

(18 RT 2958-2960.)

Juror #11

Following the discussion with Juror #5, the court then summoned Juror #11. (18 RT 2960.) The inquiry was as follows:

> **"THE COURT:** The question I have for you deals with during deliberations or at any time whether a juror has expressed possible biases with regard to gang members or the police or both and positive or negative bias in favor of or against gang members or police in general.
>
> **JUROR NO. 11:** Yes.
>
> **THE COURT:** And what was that? What was said or indicated?
>
> **JUROR NO. 11:** I've heard from one juror what I interpret as being a distrust or suspicion of police officers, and also a statement regarding associations or friendships with gang members.
>
> **THE COURT:** Okay. Now, did this occur during deliberations or at some other time?
>
> **JUROR NO. 11:** Deliberations.
>
> **THE COURT:** And about the distrust of police, what was said about that?
>
> **JUROR NO. 11:** Don't quote me verbatim, but I think it was to the effect that the police can coach witnesses to say what's consistent with their theory of the case and that testimony can be - - can be moved in one direction or another by putting ideas and words in witness' mouths, that sort of thing. Or that police could manufacture or tamper with crime scenes or evidence.
>
> **THE COURT:** And then was it the same person that mentioned association with gang members?

JUROR NO. 11: Yes.

THE COURT: What was the association that was mentioned?

JUROR NO. 11: I think the statement was I have or I had a lot of friends who are or were gang members.

THE COURT: Was there an indication as to which way that would cause the juror to lean, the bias meaning for or against gang members?

JUROR NO. 11: For.

THE COURT: How was that expressed?

JUROR NO. 11: I think in terms of how a gang member perceives threats, how a gang member reacts to perceived threats.

THE COURT: Okay. And what juror was it that made these statements?

JUROR NO. 11: Juror No. 5."

(18 RT 2961-2962.) After a brief sidebar with counsel about further inquiry, the court asked the juror whether the statements made by the juror about distrusting police, coaching witnesses, and manufacturing evidence were made in general or whether they were connected with some of the evidence in the case. The juror responded:

> "I think it was in connection with this case, although there was no specific, you know, claim that a particular piece of evidence or - - was planted or removed, but with regard to witness' testimony particularly I would say Brian and Floyd's, the sense that I got was the one reason their testimony may be consistent is that the police, you know, gave them the information they needed to have consistent testimony."

(18 RT 2964-2965.)

The Dismissal of Jurors No. 5 and 12 and the Denial of the Mistrial Motion

Following the juror interviews, the court and counsel conferred to resolve the matter. Defense counsel (Mr. Peters) first expressed concern about Juror #12 and the likelihood that his comments had "polluted" the jury. (18 RT 2966.) In particular, defense counsel pointed to his comments, as related by Juror #5, about the unavailability of a claim of self-defense by a gang member apparently made during the course of the deliberations. (18 RT 2966.) Defense counsel further noted that the juror had a friend who was related to one of the parties in the case, had engaged in at least two conversations with the friend, and had failed to inform the court. (18 RT 2966-2967.) Counsel finally expressed concern that the juror's friend had characterized appellant as a "hard-nosed killer," and that these descriptions had been reported to at least two of other jurors. (18 RT 2967-2968.) Counsel stated that the juror lacked credibility. (18 RT 2967.)

The prosecutor (Mr. Hassett) expressed concern about the credibility of Juror #5. (18 RT 2968.) He noted that several jurors had reported "a little something" about Juror #5, and that Juror #5 had denied everything, including reading her book and using her cell phone during deliberations. (18 RT 2968.) The prosecutor also pointed out that Juror #6 and Juror #12 were consistent in relating the discussion about Juror #12's friend, and that Juror #5's report of the discussion between the three of them was quite different. (18 RT 2968-2969.) The prosecutor also noted that according to her own statements, Juror #5 had known about the alleged bias against appellant on the part of Juror #12 for at least a week, and had failed to report it because it had "slipped her mind." (18 RT 2969-2970.) The prosecutor told the court that one of the jurors was lying, and suggested it was Juror #5, whom he characterized as "disingenuous." (18

RT 2970-2971.) The prosecutor also suggested that the jury was hung on an 11 to one vote, although the court observed there was nothing concrete to indicate this. (18 RT 2970.)

Defense counsel countered that Juror #5 reported to the court that she was in fact deliberating. Counsel opined that it appeared she had simply reached a different conclusion from that of a majority, at least, of the other jurors. (18 RT 2972.) Defense counsel also pointed out that Juror #5 did not deny looking at her cell phone, but explained she had just been interested in knowing the time. (18 RT 2972.)

The court responded that a juror had reported that Juror #5 did more than look at the time, but in fact had sent a text message, noting it was a violation of the court's express instructions to the jury to turn off their cell phones during deliberations.[33] (18 RT 2973-2974.) The court also reminded counsel that Juror #5 said she had not heard or listened to the court's instruction to refrain from using cell phones in the jury room. (18 RT 2974-2975.)

Defense counsel observed that Juror #5 had stated she only used the cell phone during the breaks. (18 RT 2975.) Counsel then told the court:

> "To me - - to me the crucial question is whether or not she's participating and deliberating with the other jurors. And what's telling to me is that it appears at least from everybody we questioned that she deliberated and participated for a considerable period of time, and it looks like she deliberated until she reached a counter conclusion that the other jurors, and it appears that at that point the other jurors have turned against her and expressed their dissatisfaction with her, so it begs the

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[33] The court cited *People v. Fauber* (1992) 2 Cal.4th 792, 837 as a basis for the instruction to turn off their cell phones in the jury room. (18 RT 2973-2974.)

> question whether that's based upon the majority just disagreeing with her and now singling her out because of that disagreement or whether she's truly not participating.
>
> She's indicated that she's participated all along. I think it was, I can't remember which juror it was, I think it was the foreman indicated she's been very expressive and well spoken, so apparently she's been participating in that regard, so that's my take on it."

(18 RT 2975.)

The court agreed that Juror #5 "was deliberating," but stated the problem was "the inability to continue deliberations." (18 RT 2976.) The court cited language from two cases, stating, "'[T]hat it cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to correspond the evidence and the judge's instructions and to finally come to a conclusion and vote. ¶ In sum, this court is concluding that the juror participated to some extent in their discussions, expressed the reasons for his decision and remained willing and able to vote concerning a verdict. It's not possible to say the Supreme Court requires, in order to discharge a juror, that the record shows there is a demonstrable reality that he was unable to perform as a juror.' ¶ I may have misread that." (18 RT 2976.)

The court cited two cases[34] and explained that "[Basically the discussion there is that when a juror deliberates and finally forms a conclusion and indicates that further discussions will not change that conclusion but will listen to the views of the others and continue to deliberate, that that is not a reason to excuse the juror." (18 RT 2976-2977.) The court continued:

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[34] *People v. Bowers* (2001) 87 Cal.App.4th 722, 735 and *People v. Karapetyan* (2003) 106 Cal.App.4th 609, 617.

> "The issue we have here is that apparently juror No. 5 did deliberate, but even according to what I would call a friend, an acquaintance at least, a close companion Juror No. 6, that she did arrive at a conclusion and is no longer participating, which is consistent with the view of Juror No. 4, that she's looking at the book that she's carrying, even though not a textbook for college, and that she's checking text messages and has done so even I guess during the argument phase of the case, but at least a couple of times during the deliberations, which is an indication physically that she's not willing to participate in the deliberation process further.
>
> One comment was made about eleven to one, and I don't know that we've got any indication that it's eleven to one. We might draw that conclusion based on the fact that she is the focal point of a lot of these messages, but that can well be the concern that she's not deliberating further, that she has concealed a bias and for whatever reason is not further deliberating, which is also consistent with Juror No. 6's view."

(18 RT 2977-2978.)

The court then noted that Juror #5 was returning to college classes the following week and questioned the impact of that if the deliberations were ongoing. (18 RT 2978.) After discussing other scheduling concerns,[35] the court stated, "[S]o the issue is what we're doing. It sounds like the defense is asking for Juror No. 12 to be excused and the prosecution asking for Juror No. 5 to be excused." (18 RT 2978.) The court pointed out that an issue may still exist as to whether Juror #12 expressed anything during the deliberations, as

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[35] In addition to Juror #5's return to school, the court also pointed out that there were three days remaining in the current week for continued deliberations, that "the 26th and 27th" were a vacation period for Juror #9 and the deliberations would be halted on those days, and the court's own vacation, which was scheduled for the next week after that, might be interrupted. (18 RT 2978.)

described by Juror #5's note, concerning criticism of gang members. (18 RT 2978-2979.)

Defense counsel (Mr. Jacke) stated that Juror #12's encounters with his friend, appellant's cousin, and having been told by him that appellant was a "heartless killer," was tantamount to receiving character evidence about appellant outside of the courtroom. (18 RT 2979.) Counsel opined that such information must have influenced the juror to some degree. (18 RT 2979.)

The court agreed that the juror should have told the court about his relationship with appellant's cousin. (18 RT 2979.) The court, however, indicated it "personally" believed the juror's representation that the circumstances did not affect his ability to be fair. (18 RT 2979.) Still, the court stated that the situation of the encounter and relationship, and the juror's failure to immediately report it to the court, was a reason to discharge the juror for "implied bias." (18 RT 2979-2980.) The court continued that the statement attributed to him by Juror #5 was not remembered by Juror #6, so indications were that the discussion about appellant being a heartless killer did not take place during the deliberations. (18 RT 2980.) The court concluded:

> "My conclusion is that as Juror No. 6 says, Juror No. 5 has already reached a conclusion and is not deliberating further, and that is, as I said, corroborated by the report from Juror No. 4 that she has on a couple of occasions at least looked at the textbook and checked text messages, leaving her cell phone on, which is in direct contravention of the court's instruction that I just read to you right at the beginning of the trial, not during jury selection but when I was going over the summation of taking notes and things like that.
>
> And the implied, as we've heard also, the implied bias from Juror No. 11, a lot of friends who are or were gang members would tend to suggest a bias. I'm not so convinced by that alone, but more by the conclusion of Juror No. 6 and the report

> that I believe, contrary to what Juror No. 5 said, is that that's what she'd been doing.
>
> It makes no sense to me that she would stare at a cell phone to see what the time is when that only takes a moment, and other jurors have concluded she's looking at that. And how can you guess that she's looking at a book. The book has to be open. The book should not be open during deliberations."

(18 RT 2980-2981.)

The court then asked if there was any further discussion on the matter of excusing Juror #12. (18 RT 2981.) The prosecutor (Mr. Hassett) reiterated concern that Juror #12 would be in a very difficult position if he was to be asked to impose the death penalty on the family member of a friend. (18 RT 2981.) The prosecutor expressed concern that the friend might contact Juror #12 and ask him on behalf of appellant's family to refrain from imposing a verdict of death. (18 RT 2981-2982.)

The court ultimately agreed, noting that the views were consistent with the defense's concerns. (18 RT 2982.) The court stated, "[H]e may well be able to make a fair decision, aside from that acquaintance, but I think it puts him in an intolerable situation and he should be excused because of it, that there is no way to have a reliable decision made by somebody who is that acquainted with someone who has been here in court and who he has acknowledged as being a close friend of the defendant." (18 RT 2982-2983.)

The court then ruled:

> "Okay. Well, unless there's something else, my conclusion is based on what we've heard, the testimony we've taken, that both jurors should be excused. No. 12 for the reasons I've just stated about his acquaintance with the defendant's cousin and his failure to represent - - tell us about it, and ... Juror No. 5, who although she has deliberated with the other jurors, is now of a fixed opinion, is not deliberating further, is - - and is involved

> in taking time outs with the cell phone and the book, references even for brief periods of time acknowledging her lack of participation in the deliberation process.
>
> And then in addition, but separately, and the first two reasons being the basis for my decision, but also in considering the statements of Juror No. 11 indicating that she has said that she does have or has had a lot of friends who are or were gang members, and that is expressing a bias on her part that she did not relate to us during voir dire."

(18 RT 2983.)

Defense counsel pointed out that Juror #5 had mentioned her gang member acquaintances during the voir dire proceedings. (18 RT 2984.) The court responded:

> "I don't think she mentioned that many, a lot of them, a lot of friends? The four questions that I ask in the questionnaire don't really go into that significantly.
>
> She mentioned being a witness to gang fights, drive-by shootings and vandalism, and I asked her about the gangs that were involved in that, but she never - - that's basically looking at it, seeing it happen, not being a friend of gang members, so I don't recall her relating that to us specifically.
>
> But what I'm saying is that's the way it's expressed here from Juror No. 11, it expresses a bias that she did not tell us about. That seems to be the major concern that the jurors are expressing, that she has a bias that she's not able to overcome."

(18 RT 2984.)[36]

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[36] During the voir dire proceedings, the prosecutor asked Juror #5 if she had any friends that are gang members, to which the juror answered, "No." (4 RT 439.) The juror went on to explain that she went to high school with a number of students whom she knew to be members of various gangs. (4 RT 439.)

The prosecutor (Mr. Hassett) also recalled that during voir dire, when asked by the prosecution (Mr. Anger) about her job as a baggage screener possibly leading into a career in law enforcement, Juror #5 said no. (18 RT 2984.) When asked if she had anything against police officer, she had said she did not, but only that the job was too hard.[37] (18 RT 2984.)

The court finally stated:

> I do conclude as to Juror No. 5 that she is unable to perform her duty pursuant to Penal Code section 1089. And I do have to note that I do not believe her statements given to us here. Where there's a contest between Juror 5 and 12 on credibility, I do not believe her, I do believe him.
>
> I'm still excusing him for the reasons I've stated, but not because I feel that he has - - I'll leave it at that. I think he would be a fair juror to both sides, but I do not - - I cannot allow him to remain when he's got that relationship that has to affect anyone reasonably in arriving at a conclusion in a death penalty case as to guilt and penalty.

(18 RT 2985.)

Defense counsel (Mr. Peters) then stated, "The excusal of No. 5, Your Honor, obviously is over defense objection." (18 RT 2985.)

Then, prior to the dismissal of Juror #12, both defense counsel told the court that after listening to Jurors #5, #12, and #6, it was the defense's position that some of the comments made by Juror #12, specifically with regard to the unavailability of self-defense to a gang member, may have infected the other 11 jurors and that a mistrial was in order. (18 RT 2989-2990.)

The court referred to the defense reasoning as "guesswork," and denied the motion. The court stated:

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[37] In fact, Juror #5 stated she was not interested in a law enforcement career because it was "too dangerous" for her. (3 RT 438.)

> "Okay. I'm going to deny that request based on the idea that you're talking about general comments about gang members as opposed to something specific from his background or something like that where he's trying to persuade others.
>
> The point that was made by Juror 5 was that he had said that he was a close friend of the defendant's cousin, and these friends told him that the defendant was a cold, heartless killer and an active criminal. She doesn't mention anything there about him saying things about the gang members themselves, and comments about gangs obviously, unless it's based on some type of specific bias, would come from the allegation of gang activity and the defendant's own admission of being a gang member."

(18 RT 2990.)

Defense counsel urged that where a belief has been expressed that a gang member, solely due to his gang membership, is not credible, then it leaves no consideration of his testimony at all due to his status as a gang member. (18 RT 2990.) Counsel distinguished that circumstance from a situation where there is a general discussion of the evidence and a particular gang member is not believed, as opposed to disbelieving gang members in general. (18 RT 2990-2991.)

The court responded:

> "Juror 5's statement to us was that he would say, 'He's a gang member, so you know.' That's what she said, a quote that I copied down as she was talking about Juror No. 12. That doesn't tell us a whole lot. She's basically saying he is a gang member, and in this case the allegation is he's a gang member.
>
> He fired on what he thought were perhaps rival gang members, but what I'm saying is that's different from the complaints that we were exploring, which was whether there was a bias being expressed based, for instance, on what Juror No. 12 knew about the defendant and his family, and then to the extent that statements are made about gang activity, Juror No. 11 attributed

to Juror 5 that she had or did have - - does have or did have a lot of friends who are or were gang members, and the comment itself comes to show a bias on the part of the individual.

This is just a statement of attitude about it, not a bias coming from knowing gang members, knowing the defendant's family, hearing things from the outside.

So what I'm getting at is you're talking about two different things, and to some extent they're argument about the strength of the evidence that does not come from a bias, is content that we cannot go into.

The Supreme Court in the first case that I cited talks about going into conduct, not content. The conduct that explains a bias like having friends who are gang members is something we can explore.

My only concern was whether this information from Juror 12 had been passed on to other jurors, and even Juror No. 6 did not remember it, so she didn't remember it from the conversation out in the hall, and obviously if it had been prompted in her mind in jury deliberations, she would have been able to remember that, but she did not recall it in any detail other than the general comment.

So anyway, motion for mistrial is denied."

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"One of the problems is the credibility of Juror 5, and she's not credible in my view. She gave us some information which we explored that turned out to be true, but her denial of so many of the things caused me to believe that she was not being truthful when she talked to us about the use of the cell phone and the - - and had she remembered the admonition of the court, she might have been more persuasive on the idea that, gee, she didn't use it except during breaks, but actually my admonition was don't use it at all. Once deliberations start, it's over, turn them off, and she didn't do that.

> It was only during the trial itself when they're back there during breaks that they could use a cell phone, and maybe the Supreme Court is telling us even that's not appropriate, but I don't know what you do with 12 jurors that have 12 cell phones, whether we collect them as they go in and they get them as they come out. It's pretty extreme."

(18 RT 2991-2993.)

Thereafter, the court excused Juror #12 and Juror #5 and two alternate jurors were randomly selected to take the excused jurors' seats on the jury. (18 RT 2994-2996.) The court instructed the jury to begin its deliberations anew. (18 RT 2997-2998.) Two jurors asked the court about the vacation time they had planned beginning the following week. (18 RT 2998.) The court asked the jurors to prepare notes with the time concerns, submit them to the court, and that the court would confer with the attorneys and respond. (18 RT 2998-2999.) At 1:51 p.m., the newly constituted panel retired to begin deliberations. (18 RT 2999; 4 CT 1025-1026.)

The trial court prejudicially erred in excusing Juror #5 from the panel. It was clear that the juror had deliberated with the rest of the panel and that she had reached a conclusion about the case, as apparently had the rest of the jurors. It was also clear that Juror #5 was a holdout juror and, according to Juror #12, was the reason for the impasse at that point in the deliberations. (4 CT 1022.) The trial court expressed its belief upon first receiving the jury notes about the deadlock that one juror was not deliberating. (18 RT 2911-2913.) Thus, the court was already predisposed to finding that one juror was causing the stalemate and frustrating the rest of the panel from submitting its verdicts.

The trial court also expressed disbelief that a jury could have fully and properly reviewed the extensive evidence, including nine days of testimony,

38 witnesses, and more than 130 exhibits, within the short time of two days of deliberations. (18 RT 2909-2910.) The newly constituted jury, however, reached unanimous verdicts after requesting and hearing additional arguments, and after barely three days of deliberations. (4 CT1025-1028, 1030-1031, 1036-1037.)

The dismissal of Juror #5 over the defense objection was error. Reversal of appellant's convictions is required.

Applicable Law

Standard of Review

The standard of review is whether the trial court abused its discretion in substituting an alternate for a sitting juror during deliberations. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1409.) A juror's inability to perform as a juror must be shown as a "demonstrable reality" which requires a "stronger evidentiary showing than mere substantial evidence." (*People v. Wilson* (2011) 44 Cal.4th 758, 821, quoting *People v. Cleveland* (2001) 25 Cal.4th 466, 474, 488; *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71; *People v.Lomax* (2010) 49 Cal.4th 530, 589 [basis for discharge involves more comprehensive and less deferential review than determination of whether substantial evidence supports the court's decision]; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 ["the heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury].)

The trial court's discretion, however, is not unlimited. (*People v. Roberts* (1992) 2 Cal.4th 271, 324 - 325.) "Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." (*United States v. Hernandez* (2nd Cir. 1988) 862 F.2d 17, 23.)

Therefore, it is especially critical that the court make a full inquiry into the facts before it determines that they constitute good cause for discharge of a juror that appears to favor the defense. (Cf. *People v. McNeal* (1979) 90 Cal.App. 3d 830, 840 [trial court's failure to conduct a more extensive hearing before concluding that the deliberating juror *could* render an impartial and unbiased verdict entitled defendant to reversal].)

Federal Standards

The Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, guarantees 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 US. 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.) 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.) The Sixth Amendment does not allow a trial judge to discharge a juror on account of his views as to the merits of the case. (*Williams v. Cavazos* (2011) 646 F.3d 626, 642-643; *Duncan v. Louisiana, supra,* 391 U.S. at p. 156.)

In deciding whether to discharge a juror during the midst of deliberations, the critical Sixth Amendment questions are whether, after a proper limited inquiry, it appears there is no reasonable possibility that the

juror's discharge stems from his view of the merits; and whether the grounds relied upon are valid and constitutional. (*United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596; *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1085, 1087.)

California Law

Under California law, Penal Code section 1089[38] and Code of Civil Procedure section 233 (former Pen. Code, § 1123[39]) permit a trial court to dismiss a juror before the jury returns its verdict if the juror becomes ill or upon a showing of good cause is found unable to perform his or her duty. (*People v. Burgener* (1986) 41 Cal.3d 505, 519 [disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 749].) Of course the court has some discretion in this area, but that discretion is not unlimited. (*People v. Roberts* (1992) 2 Cal.4th 271, 324 - 325.)

The court must make a determination whether good cause exists to discharge the juror and the reasons for discharge must appear in the record.

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[38] In pertinent part, Penal Code section 1089 states: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, ... the court may order him to be discharged and draw the name of an alternate...."

[39] As here relevant, section 233 provides: "If before the jury has returned its verdict to the court, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, the court may order him to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If ... there is no alternate juror..., the jury shall be discharged and a new jury then or afterwards impaneled and the cause may be tried again. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew."

(*People v. Roberts, supra,* 2 Cal.4th at p. 324-325.) In this regard, the inability to perform the juror's functions must appear as a "demonstrable reality." (*Ibid.*; *People v. Collins* (1976) 17 Cal.3d 687, 696.) In *People v. Cleveland*, *supra*, 25 Cal.4th 466, Justice Werdegar explained that because of the need for additional protection of an accused's constitutional right to a jury trial, "we more accurately have explained that, to affirm a trial court's decision to discharge a sitting juror, "[the] juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.' " [Citations.] Such language indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror.

Therefore, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate. (*People v. Cleveland*, *supra*, 25 Cal.4th at pp. 487-489 (conc. opn. of Werdegar, J.)

Thus, "[t]he trial court has at most a limited discretion to determine that the acts show an inability to perform the functions of a juror." (*People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Collins* (1976) 17 Cal.3d 687, 696.) A trial court's ruling will be reversed if it "cannot withstand scrutiny under the precise language of section[] 1089." (*People v. Compton, supra*, 6 Cal.3d at p. 60.) Accordingly, the purported good cause must be such that it "actually renders [the juror] 'unable to perform his duty.'" (*Id.* at p. 59.) Perhaps more significantly,"The court must not presume the worst." (*People v. Franklin* (1976) 56 Cal.App.3d 18, 26.)

In determining whether misconduct occurred, an appellate court must accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. Nevertheless, whether prejudice arose from juror misconduct, is a mixed question of law and fact

subject to an appellate court's independent determination. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

The Trial Court Lacked Good Cause To Discharge Juror No. 5

There is no statutory definition of 'good cause' for removal of a deliberating juror. Certainly juror misconduct would be cause for removal, but the misconduct must be serious and wilful. *(People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) Further, juror bias may not be presumed but must appear as a demonstrable reality on the record. (*People v. Williams* (1997) 16 Cal.4th 153, 232; *People v. Cleveland, supra,* 25 Cal.4th at pp. 474, 488.)

In *People v. Daniels* (1991) 52 Cal.3d 815, 864 this court noted that a juror may be removed for serious and wilful misconduct even if this misconduct is "neutral" as between the parties and does not suggest bias toward either side. Moreover, discussing the case with persons outside the jury would constitute serious misconduct. *(People v. Halsey* (1993) 12 Cal.App.4th 885, 982-893.)

In *People v. Cleveland, supra,* 25 Cal.4th 466 [*Cleveland*], the California Supreme Court addressed the appropriate procedures a trial court should employ when investigating the possibility of juror misconduct during deliberation. In *Cleveland*, the court cited approvingly decisions which "recognized the need to protect the sanctity of jury deliberations" and to "assure the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." (*People v. Cleveland, supra*, 25 Cal.4th at p. 475, quoting *In re Hamilton* (1999) 20 Cal.4th 273,294, fn. 17.)

Cleveland noted the prohibition in Evidence Code section 1150 of attempting to impeach a verdict with evidence of the jurors' thought processes. (Id. at p. 475.) The court found the policy considerations underlying this rule

"apply even more strongly where such inquiries are conducted during deliberations." (Id. at p, 476.)

In contrast, the court acknowledged situations in which a trial court might err by failing to inquire sufficiently into suggestions of jury misconduct. In this context, the court referred to *People v. Burgener, supra,* 41 Cal.3d at p. 518, which held the trial court erred in failing to conduct a hearing to determine whether a juror was impaired due to drug use, and *People v. Keenan* (1988) 46 Cal.3d. 478, 528, which addressed the need to conduct a hearing during penalty phase deliberations once informed that a juror could not morally apply the death penalty.

The court in *Cleveland* ruled that if a trial court is put on notice that there may be grounds to discharge a juror during deliberations, the court should reinstruct the jurors as to their duties, and if the problem persists the trial court should conduct "whatever inquiry is reasonably necessary to determine whether such grounds exist." (*Id.* at p. 480.)

The court noted that inquiry into possible grounds for discharge should be as limited in scope as possible, and should focus on the conduct of the jurors, rather than on the content of their deliberations. (*Id.* at p. 480.) Questioning the jurors as to the content of the deliberations could have a "chilling" effect on the deliberations. Citing *People v. Hedgecock* (1990) 51 Cal.3d 395, 418, the court found the circumstances would be "rare" in which a statement by a juror during deliberations may itself be an act of misconduct. (*Id.* at p. 485.)

In *People v. Williams* (2001) 25 Cal.4th 441, a companion case to *Cleveland*, the court found that a juror's stated refusal to follow the law rendered him unable to perform his duty as a juror under Penal Code section 1089, and constituted good cause for his discharge. Justice Kennard,

concurring in the opinion, wrote separately on the manner in which the court should investigate such an allegation of misconduct. Justice Kennard found the inquiry should be limited to the allegedly offending juror. The trial court should initially inform the juror that it does not wish to know whether the juror is voting to convict or acquit, or the reasons for the vote. (*Id.* at p. 464.) The court should then state it wants to know only whether the juror is willing to abide by the oath to decide the case "according only to the evidence presented.. . and . . . the instructions of the court" (Code of Civil Procedure, section 232, subd. (a)) to which the juror should respond "yes" or "no. " (*Ibid.*)

If the juror's answer is "yes," the trial court should simply order the jury to resume deliberations. (*Ibid.*) If the answer is "no," the court should discharge the juror in question. (*Ibid.*) If the juror's answer is equivocal, the trial court may have to inquire further. (*Ibid.*) "In doing so, however, the court should be mindful of the words of warning: 'Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret deliberations, we are compelled to err in favor of the lesser of two evils - protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.'" (*Ibid*, citing *United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 623 .)

Nevertheless, California reviewing courts have found a number of things to constitute good cause showing a juror is unable to perform his or her duty. Sometimes a finding of good cause is based in part on the juror's admission that the matter in question would effect his or her ability to perform his or her duty as a juror. For example, in *People v. Marshall* (1996) 13 Cal.4th 799, 845-846, the court learned during trial that the juror had appeared in municipal court on a speeding ticket and was going to have a hearing on the ticket the next week. The juror stated that under his employer's rules this ticket,

which was his fifth, would result in the loss of his job, and the juror acknowledged this situation would affect his ability to serve as a juror and focus on the trial in which he was serving as a juror. In *People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1100, the juror initially said that anxiety about a new job she was about to begin would not affect her ability to perform her duties. After speaking to her employer, however, she said it would. The Supreme Court found that this change supported a finding of good cause to discharge the juror. In *People v. Collins, supra*, 17 Cal.3d 687, 690-691, 696, the juror asked to be excused, stating that she was unable to follow the court's instructions, felt she was emotionally involved in the case, was unable to cope with the experience of being a juror, and thought she was not able to make a decision based on the evidence or the law. This Court found that these facts supported a finding of good cause to discharge the juror. (See also *People v. Hacker* (1990) 219 Cal.App.3d 1238, 1242-1245 [defendant joined the juror's church during the trial and the juror was unable to give any assurances she would decide the case without reference to this].)

In other cases, while there was no admission by the juror of inability to perform his or her duties, there was plain evidence of that inability. The most common example is cases of illness. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 539-541 [juror with severe high blood pressure discharged when she collapsed for the second time during trial, requiring emergency medical treatment from paramedics; on the first occasion she stopped breathing and the court clerk resuscitated her with mouth-to-mouth resuscitation]; *People v. Roberts* (1992) 2 Cal.4th 271, 323-325 [juror ill with a sore throat and high blood pressure stated she might be able to resume her duties as a juror in three days]; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 354-356 [juror had arthritis, was unable to raise her arm, dress herself, or drive a car, and was

feeling sick to her stomach and was fainting because of medication she had taken].) Another good cause to discharge a juror is concealment or misrepresentation of information of prior criminal charges or arrests. (*People v. Johnson* (1993) 6 Cal.4th 1, 21-22; *People v. Price* (1991) 1 Cal.4th 324, 399-401; *People v. Farris* (1977) 66 Cal.App.3d 376, 385-387.) Yet another good cause is that the juror has fallen asleep during the trial. (*People v. Johnson, supra*, 6 Cal.4th at pp. 21-22.) Good cause also may be found when the juror requests discharge because of the death of a close relative, since the grief which accompanies such a loss would make it difficult for the juror to perform his or her duties. *(People v. Ashmus* (1991) 54 Cal.3d 932, 986-987; disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [death of juror's mother]; *In re Mendes* (1979) 23 Cal.3d 847, 852 [death of juror's brother].) In addition, good cause also can consist of a juror having contact with members of the defendant's family and then falsely denying such contact, thereby showing the loss of impartiality and the inability to perform the duty of a juror. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1010-1012.)

The most sensitive and controversial context for a finding of good cause relates to matters arising during deliberations. Certainly the trial court can discharge a juror for good cause that manifests itself during deliberations. This power flows from the language of section 1089, which authorizes discharge "at any time", including "after final submission of the case to the jury." Nevertheless, the court's power to act "becomes more limited once the jury has begun to deliberate. Once the jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important -- safeguarding the secrecy of jury deliberations." *(United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618; see also *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232, fn. 1.) The

conflict is especially pronounced when the alleged misbehavior is a purposeful disregard of the law -- a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken. (*Ibid.*) There is great tension between the need to discharge a juror who is unable to perform his or her duties and the need to safeguard the secrecy of jury deliberations.

In *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780-1781, for example, the discharged juror was mentally unable to comprehend simple concepts, to remember events or to follow the law. In *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1434-1437, the discharged juror was unwilling to participate in the jury discussions, refused to explain her thoughts, stated that she had already made up her mind and was not going to change it even with respect to issues which the jury had not yet discussed, and stated she had prejudged the credibility of police officers. In *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1332-1333, the discharged juror did not answer questions which the other jurors posed, did not sit at the table with the other jurors, acted as if he had made up his mind before hearing the whole case, did not look at the two victims in the courtroom, disobeyed the court's instruction not to take home juror notes during trial and did not cooperate with the other jurors. In *People v. Warren* (1986) 176 Cal.App.3d 324, 325-327, the juror informed the court she felt intimidated by the other jurors and stated she could not comply with an instruction that she did not have to vote a certain way because a majority of jurors favor such a decision.

Nevertheless, in *People v. Cleveland, supra*, 25 Cal.4th 466 this court concluded that the trial court abused its discretion in excusing a juror because the record did not establish "as a demonstrable reality" that the juror refused to deliberate. In *Cleveland*, the other jurors complained that the excused juror considered irrelevant matters and adopted unreasonable opinions. This court

concluded, however, that even if the juror's logic was faulty and his conclusions "incorrect," he participated in the deliberative process. He was not articulate in explaining that he believed the evidence was insufficient to support the conviction, and he was not sympathetic when listening to the others. While this was frustrating to the others, nevertheless, it did not rise to the level of refusing to deliberate. This court then explained the circumstances which do and which do not constitute a refusal to deliberate:

> "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views."

(*Id* at p. 485.)

In *U.S. v. Symington, supra,* 195 F.3d 1080 the court faced a set of circumstances similar to the instant case. After eight days of deliberations, the court received a jury note stating that " '[o]ne juror has stated their [*sic*] final opinion prior to review of all counts.' " (*Id.* at p. 1083.) The court returned a note reminding the jury "of their duty to participate in deliberations with each

other, but emphasizing also that each juror should make up his or her own mind on the charges." Several days later, the court received another jury note stating that one juror "cannot properly participate in the discussion" for the following stated reasons: "Inability to maintain a focus on the subject of discussion. [¶¶] Inability to recall topics under discussion. [¶¶] Refusal to discuss views with other jurors. [¶¶] All information must be repeated two to three times to be understood, discussed, or voted on. Immediately following a vote, the juror cannot tell us what was voted. [¶¶] We question the ability to comprehend and focus on the information discussed."

The court then questioned the jurors individually. Every juror (except the one that was the subject of the complaint) stated that one juror, "appeared confused and unfocused during deliberations" (*Ibid.*), gave rambling answers to questions, and refused to explain her views, stating she did not "have to explain herself to anybody." (*Id.* at p. 1084.)

The *Symington* court observed:

> "The statements of some jurors indicated that their frustration with [the juror] may have derived more from their disagreement with her on the merits of the case, or at least from their dissatisfaction with her defense of her views. 'The juror' stated that she was prepared to continue deliberating. She noted that the other jurors' frustration with her might be because 'I can't agree with the majority all the time ....' The court discharged the juror, 'because she was "either unwilling or unable to deliberate with her colleagues."'"

(*Ibid.*) The Ninth Circuit reversed the conviction, concluding that "there was a reasonable possibility that [the juror]'s views on the merits of the case provided the impetus for her removal." (*Id.* at p. 1088.)

Another case dealing with a similar circumstance is *People v. Bowers, supra,* 87 Cal.App.4th 722, a case that predated *Cleveland*. In *Bowers*, while

there was some evidence that a juror was inattentive at times during deliberations and did not participate as fully as others, the record showed this conduct was simply a manifestation of the fact that he did not agree with the majority's evaluation of the evidence. There was no demonstrable reality that he was unable to perform his function and he did not engage in willful misconduct. The facts of *Bowers* are particularly close to the facts of the instant case, so appellant will set them out in greater detail.

In *Bowers,* the jury foreman believed that juror # 4 was not deliberating and so informed the judge. The judge then reread the instructions relating to jury deliberation to the entire jury. Subsequently, the jury foreman informed the court that juror #4 was still not deliberating. The court's questioning of the jury foreman revealed that juror #4 stated that he heard everything that the other jurors said, but he was not convinced that the other jurors were right nor could he convince the other jurors that they were wrong. (*Id.* at p. 726.) Further inquiry revealed that Juror No # 4 participated in deliberations at times, but sometimes sat alone in a corner. (*Id.* at p. 726.) Based in this preliminary assessment by the jury foreman, the trial court examined all the other jurors. (*Id.* at p. 726.) The results of that examination showed that some jurors believed juror #4 participated in deliberations, others said that he made up his mind at the beginning of their deliberations and refused to participate in any meaningful way thereafter. (*Id.* at p. 726.)

When juror #4 was questioned, he said that after closing arguments he was "kind of 50/50." Nevertheless, he admitted that he had come to a preliminary decision. (*Id.* at p. 727.) After initially reviewing the evidence with the other jurors he came to the conclusion that he simply did not believe certain prosecution witnesses. (*Id.* at p. 727.) More importantly, after he told the other jurors he did not agree with their views, he did not discuss his

reasoning or argue with the other jurors because "[t]hat's their belief. That's what they heard. And I stayed with what I think is right." ([Emphasis added) *Id.* at p. 727.)

When discussing the trial court's dismissal of juror #4, the Court of Appeal quoted the trial court's reasoning at length. Because the ruling of the trial court in *Bowers* is similar to the ruling of the trial court in the instant case, appellant will also quote it at length:

> "In short, the consistent statements of all the jurors is that [Juror No. 4] refused to engage in meaningful deliberations. The Court notes [*People v. Johnson* (1993) 6 Cal.4th 1 [23 Cal.Rptr.2d 593, 859 P.2d 673]], which indicated that the Court may remove a juror for good cause, if that juror is not paying attention. In this case we have ... statements from jurors that he fell asleep, that he walked around and crossed his arms and that he refused to respond when the other jurors attempted to get him to participate. It even appears they came close to begging him. The Court recalls the different jurors indicating that they explained to him that they could not do their deliberations unless he would explain to them the basis for his reasoning for the position that he had taken. And that he actually refused to do so."
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> [¶¶] ... [¶¶]
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> "The Court believes that based on the record before it, there is substantial evidence and demonstrable reality that this juror, Juror Number 4, ... did not enter into meaningful deliberations. That either he made up his mind here in the courtroom after having heard the first witness, which is what he apparently told his fellow jurors or once he got in the jury room after he initially and almost immediately indicated his position and refused to meaningfully discuss that position with the other jurors or to meaningfully consider the statements and the evidence as they attempted to discuss with him. And that he refused to participate with them even after their numerous efforts to advise him of his duty and to attempt to elicit cooperation."

> "The Court notes it was probabl[y] a very uncomfortable circumstance in the jury room due to the level of frustration. However, one of the jurors made an interesting statement when that juror stated to the Court that it appeared ... [Juror No. 4] ... had committed what the Court cautioned the jurors not to do, that is, to state an opinion early and have a sense of pride to prevent them from further considering the evidence. [¶¶] ... That Juror Number 4 had fallen into that particular trap of pride. Whatever the reasons, it appears to the Court that the Court has good cause to excuse [Juror No. 4]."
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> (*Id.* at pp. 727-728.)

Noting that a trial court's discretion to dismiss a sitting juror is at best a limited one, the appellate court reversed. The appellate court observed that although Juror #4 may have been inattentive during portions of the deliberations and did not participate as fully as others, his conduct did not manifest an inability to perform his function as a "demonstrable reality," nor did he engage in serious and willful misconduct. (*Id.* at p. 730.)

Inability to Perform Juror Functions Was Not A Demonstrable Reality Here

In this case, the trial judge gave three reasons for dismissing Juror #5: that Juror #5 was opening a book and using her cell phone in violation of the court's instructions; that she started deliberating but then refused to deliberate after reaching her conclusion about the case; and that she was biased because she told the jurors that she had friends who were gang members. (18 RT 2980-2981, 2983.) While the trial court conceded that Juror #5 had provided "some information which [was] explored and turned out to be true," the court found that Juror #5's denial "of so many things" led the court to believe she was being untruthful about her use of her cell phone, among other things. (See 18 RT 2992-2993.) As discussed below, none of these reasons will support dismissal of Juror #5 and at least two are not supported by substantial

evidence.

Refusal to Deliberate

The first and most important ground for the trial court's decision to dismiss Juror #5 was her purported refusal to deliberate. (18 RT 2980-2981.) In the court's view, Juror #5 was not permitted to take a position and refuse to discuss it with other jurors.

The trial court's finding was not supported by the evidence and was inadequate as a matter of law to support its dismissal of Juror #5. Although the three jurors interviewed by the court stated that Juror #5 had made up her mind and refused to deliberate, close questioning revealed that she did deliberate and reached a decision, but would not change her mind.

The jury foreperson, Juror #4, explicitly stated that Juror #5 had engaged with the jurors, was quite articulate, and was very bright. (18 RT 2932.) Juror #6 told the court that Juror #5 was participating in the deliberations, but that she had reached conclusions about the case and was not expressing her opinion further. (18 RT 2951.)

There was no indication from Juror #5 that she was refusing to deliberate. First, Juror #5 had requested to take her jury notes and the jury instructions home, presumably so that she could work on the case on her own time. This circumstance indicated Juror #5's extreme interest in the case and her desire to consider the facts and apply them to the law.

The court questioned Juror #5 about her participation in the deliberations. (18 RT 2957.) The court did not tell Juror #5 that other jurors were frustrated by her refusal to deliberate. The court merely asked the juror if she had "formed such opinions" about the case such that she was "not willing to discuss the evidence and the law with the other jurors." (18 RT 2957.) When Juror #5 responded that she had not, the court then followed up

by asking her whether she was freely discussing the case with the other jurors, analyzing their points of view, and trying to respond with her own perspectives as to what is accurate. (18 RT 2957.) The juror responded that she was doing so. (18 RT 2957.) Juror #5 was not provided with any information that the court was calling into question her inability to deliberate.

There also seems to have been a clash of personalities in the jury room during deliberations. Based on the comments of the interviewed jurors, it appeared that Juror #5 did not believe the prosecution's witnesses and did not believe that the state carried its burden of proof. Recognizing that further debate was useless in the sense that she could not persuade the majority and the majority could not persuade her, she remained silent. She reached a good faith decision about the case, and was not required to repeatedly address the disagreements of the majority after participating actively in the deliberations for one and one-half days. (See 18 RT 2897; 4 CT 1005-1006, 1013, 1018.)

Because she purportedly refused to continue to debate the majority as to her conclusions, three jurors accused her of refusing to deliberate. This is the classic case of a holdout juror refusing to cave in under pressure from the majority. The critical facts here are similar to the facts of the *Cleveland* case such that reversal is required.

The initial written complaints submitted by Juror #5 and Juror #12, epitomized the clash in the jury room. As previously noted, Juror #5 wrote to inform the court of Juror #12's relationship with a member of appellant's family, and to report that the friend had characterized appellant as a cold, heartless killer and an active criminal. (See 4 CT 1020.) Juror #5 also reported that the information apparently was affecting Juror #12's deliberations, based upon comments Juror #12 was making in the jury room. (4 CT 1020.)

On the same day, Juror #12 submitted a note to the court indicating that Juror #5 was refusing to listen to the viewpoints of other jurors, that she was doing "something" on her cell phone and reading a book, that she was telling the other 11 jurors to put their heads together and "convince" her, and made numerous comments that she once lived close to the "Bottoms" area and had "lots of friends who are gangsters." (4 CT 1022-1023.) Juror #12 also told the court that a lot of the other jurors "are in a hurry to get back to work" and that it would be "greatly appreciated" if there was something the court could do. (4 CT 1022-1023.)

That the clash appeared to be between Juror #5 and Juror #12 was demonstrated by the more credible reports of Juror #4, the jury foreman, and Juror #6. When the jury foreman first reported Juror #5's behavior to the court, the juror complained that Juror #5 was not objectively considering all of the evidence. (4 CT 1024.) The foreman admitted to the court, however, that Juror #5 had deliberated quite actively, but that she had reached her conclusion about the case and at that point, declined to participate further in the deliberations. (18 RT 2932.)

When a juror disagrees with the majority concerning what the evidence shows, or how deliberations should be conducted, this does not constitute a refusal to deliberate and is not a ground for discharge. (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.) Additionally, a juror who participates in deliberations for a reasonable period of time may not be discharged for refusing to deliberate further simply because the juror believes that additional discussion will not change his or her conclusions. (*Ibid.*, *People v. Barnwell, supra,* 41 Cal.4th at p. 1051.) Here, the jurors admitted that Juror #5 fully participated in deliberations at the beginning and continued to participate in deliberations for a substantial period of time.

As Juror #6 explained, "I think that she's been participating ... but I think also [she] decided on what [she] wants to do already." (18 RT 2951.) Juror #6 acknowledged that after making up her mind, Juror #5 was not participating further. (18 RT 2951.)

This is similar to the problem the majority jurors had with the holdout in *Symington* (cited with approval *in Cleveland*). The holdout juror simply refused to debate her views stating that she did not "'have to explain herself to anybody.'" *(U.S. v. Symington, supra* 195 F.3d at p. 1084, quoted in *People v. Cleveland, supra*, 25 Cal.4th at p. 484.) In *Cleveland* this court found that similar conduct was perfectly appropriate and necessary to maintain the integrity of the jury trial process. (*Id.*, at pp. 485-486.)

In sum, the record did not reflect a "demonstrable reality" that Juror #5 refused or was unable to participate in the deliberations. What was clear is that Juror #5 was a holdout juror who had deliberated, made up her mind, and refused to allow the efforts of the other jurors pressure her into joining the majority.

It is significant that Juror #12 reported to the court that Juror #5 was the reason the jury was deadlocked. (4 CT 1022-1023; 18 RT 2922-2924.) To be sure, the jury foreperson had already submitted a note to the court explaining that the jury was hopelessly deadlocked after "much work and extensive review of the evidence." (4 CT 1015; 18 RT 2909.) Juror #12 also reported to the court that the other jurors had "given up" on Juror #5 whose view of the evidence differed from theirs, and that "a lot" of the jurors were "in a hurry to get back to work" and thus needed guidance from the court. (4CT 1022-1023; 18 RT 2922-2923.)

Based upon the foreperson's note to the court about a deadlock after less than two days of discussion, it is clear that had Juror #5 surrendered and

joined the majority, there may have been a conviction within that same time frame. The complaints of the other jurors did not demonstrate an inability or refusal to deliberate on the part of Juror #5; to the contrary, the complaints showed a disagreement on how to view the evidence and conduct the deliberations.

To illustrate, the jury foreman told the court that when the deliberations began the previous Wednesday, everyone eagerly discussed the case. (18 RT 2927.) On Thursday, the jury participated fully and began testing the evidence. (18 RT 2927-2928.) At some point, Juror #5 grew quieter and slightly less open-minded. (18 RT 2928.) As the foreperson described it, Juror #5 was not passive, but instead perceived "too many possibilities" underlying specific pieces of evidence which rendered her unwilling to make a "larger decision." (18 RT 2928.) The foreperson described a "difference of perception" as to the evidence and specific counts, and Juror #5's progressive refraining from actively participating in the other jurors' evaluations of the evidence. (18 RT 2929.)

Despite the note submitted by Juror #12 and the comments made by the foreperson, Juror #4, the court barely touched on the issue when interviewing Juror #5. The court did not let Juror #5 know that the other jurors had questioned her manner of deliberations. Instead, the court simply asked the juror if she had "formed such opinions about [the case] such that [she was] not willing to discuss the evidence and the law with the other jurors," to which Juror #5 answered "no." (18 RT 2957.) Juror #5 responded affirmatively when the court inquired whether she was "freely discussing" with the other jurors and if she was "analyzing" what the other jurors said while responding with points that she believed were accurate. (18 RT 2957.)

Based upon these circumstances, Juror #5's inability or refusal to

perform as a juror was not a "demonstrable reality." (*People v. Wilson*, *supra,* 44 Cal.4th at p. 821; *People v. Cleveland, supra*, 25 Cal.4th at p. 474.) As the court in *Cleveland* explained, "A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland, supra,* at p. 485.)

Dismissal of the jury under these circumstances was reversible error.

No Bias on the Part of Juror #5 was Demonstrated

The next reason the court cited for excusing Juror #5 was that she harbored an "implied bias" against the police, and for gangs through having friends who are or were gang members. (18 RT 2980-2981.) The court referenced Juror #11's comments in support of these observations. (18 RT 2980.) Juror # 11's comments about Juror #5 were, however, vague and arose from the juror's own interpretation of Juror #5's discussion. Moreover, the comments made by Juror #11 failed to pinpoint any direct evidence that Juror #5 was improperly considering the evidence due to bias. It is noteworthy, as well, that the court interviewed Juror #11 *after* it interviewed Juror #5. (18 RT 2955-2960 [Interview with Juror #5]; 2960-2965 [Interview with Juror #11].) Thus, Juror #5 was not given an opportunity to refute the accusations made against her by Juror #11. In fact, Juror #5 was never informed that any juror was complaining about her participation in the deliberations.

Juror #11 was the final juror to be interviewed by the court. Juror #11 told the court that she "interpreted" a comment by Juror #5 during deliberations to suggest that the juror harbored distrust or suspicion with regard to law enforcement. (18 RT 2961.) According to Juror #11, Juror #5 said something "to the effect" that police could improperly guide witnesses by words and ideas in order to "move" testimony in a certain direction, or that

police could tamper with crime scenes or evidence. (18 RT 2961.) Juror #11 conceded that Juror #5 did not specifically make any claims about the evidence in the instant case. Juror #11 explained she only got "the sense" that Juror #5 believed that Brian Florence's and Floyd Watson's testimonies in court may have been consistent due to information provided to one or both of them by the police. (18 RT 2964-2965.)

Juror #11 also told the court that Juror #5 said that she had friends who either were, or are, gang members. (18 RT 2961-2962.) The juror explained that this information was expressed by Juror #5 in terms of understanding how a gang member might interpret, or react to, a perceived threat. (18 RT 2962.) In light of this, the court asked Juror #11 whether Juror #5's "bias [was] for or against gang members?" (18 RT 2962.) Juror #11 responded that Juror #5 leaned "for" the gangs. (18 RT 2962.)

The record did not otherwise affirmatively reflect any additional evidence that Juror #5 harbored bias either for gangs or against the police. As set forth above, in an initial note to the court thought to have been submitted by Juror #12, a juror reported that Juror #5 told the jurors that she used to "stay close to the 'Bottoms,'" that she had "lots of friends who are gangsters," and mentioned how "corrupt police officers are." (4 CT 1022-1023; 18 RT 2922-2924.) During the trial court's interview with Juror #12, however, it did not inquire at all about these points. (18 RT 2937-2944.)

As well, the jury foreman (Juror #4) told the court that Juror #5 had not made any direct comments which indicated she had any bias for gang members or against the police, but that the foreperson only got "a feeling" or "sensed" bias from Juror #5. (18 RT 2936.) The foreman opined that "it seemed" as though Juror #5 came into the deliberations with preconceptions from her associations with gang members which tended to bother the other jurors when

they could not persuade Juror #5 to change her mind. (18 RT 2930.)

As for a bias toward the police, the foreperson explained that Juror #5 "mentioned" during deliberations that police excuse their own shootings by claiming self defense. (18 RT 2930-2931.) But the foreman also explained that police conduct did not have substantial impact on the instant case, as compared with the physical evidence and that of appellant's own statements. (18 RT 2931.) Thus, the reference to the police by Juror #5 was viewed as "out of nowhere" by the other jurors. (18 RT 2931.)

The court's discussion with Juror #5 did not reveal bias. During the court's interview with the juror, it asked her if she had a "prior acquaintance" with the Bottoms area. (18 RT 2955.) She responded that she had lived in the area of 104th Avenue and Crenshaw Boulevard when she was ten years old and so she knew of the "Bottoms" neighborhood but did not go there. (18 RT 2955.) She stated that she had witnessed gang activity by several gangs, specifically naming the East Coast Crip, Hoover Street, Rollin 60's, and the Grape Street gangs. (18 RT 2956.) She denied having any acquaintances in the Hard Time Hustlers or the Crenshaw Mafia gang, although she acknowledged having heard about the gangs. (18 RT 2956.) She denied harboring any biases about gang members or the police. (18 RT 2956.) It is noteworthy that this information was consistent with the answers given by Juror #5 during the prosecutor's questioning of her on the topic of gangs during the voir dire proceedings.[40] (3 RT 439.) At that time, Juror #5

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[40] The jury foreperson indicated in an earlier note to the court that Juror #5 may have been less than forthcoming during the voir dire proceedings or on her juror questionnaire as to her associations or biases toward gang members or the police. (4 CT 1024; 18 RT 2922.) The foreperson, however, told the court during her interview that she was not present during the voir dire of Juror #5 and that it was Juror #11 who had

indicated that she attended school with students who were gang members, specifically noting the same groups, and stated that they were not her friends. (3 RT 439.)

None of the statements by any of the jurors demonstrated that Juror #5 was biased for gangs or against the police in such a way that inhibited her ability to perform her duty as a juror. "A jury's verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters." (*People v. Wilson, supra,* 44 Cal.4th at p. 829, quoting *People v. Leonard, supra*, 40 Cal.4th at p. 1414.) "A juror commits misconduct if the juror conducts an independent investigation of the facts [citation], brings outside evidence into the jury room [citation], injects the juror's own expertise into the deliberations [citation], or engages in an experiment that produces new evidence [citation]." (*People v. Wilson, supra,* 44 Cal.4th at p. 829.) "Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*Ibid.*, quoting *People v. Nesler* (1997) 16 Cal.4th 561, 578.)

Jurors' views of the evidence, however, are informed by their own life experiences. (*People v. Wilson, supra,* 44 Cal.4th at p. 830, citing *In re Malone* (1996) 12 Cal.4th 935, 963.) "'A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting "an opinion explicitly based on specialized information obtained from outside sources," which we have described as misconduct.'" (*Ibid.*,

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made the suggestion. (18 RT 2934-2935.) When the court interviewed Juror #11, it did not inquire about or allude to any concealment on behalf of Juror #5. (18 RT 2960-2965.) It also did not ask Juror #5 about concealment. (18 RT 2952-2960.)

quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1266.) "'[T]he jury is a "fundamentally human" institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution.'" (*Ibid.*, quoting *In re Hamilton* (1999) 20 Cal.4th 273, 296.)

"The demonstrable reality test 'requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. ... [T]he reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 712; emphasis in original.) The reviewing court considers not only the evidence itself, but also the reasons that the trial court provides. (*Ibid.*) It does not reweigh the evidence. (*Ibid.*)

Juror #5 did not commit misconduct in any of the ways noted above. Out of the vague observations set forth by her fellow jurors, one could surmise that Juror #5 found credence in appellant's claim of self defense which seemed logical due to his gang affiliation and experiences. As well, since the evidence against appellant included de minimis involvement by the police, even if Juror #5 believed from her own experience or observations that law enforcement was able to minimize its own blame for shootings in other cases, it would not have affected the outcome here. Since appellant testified that he in fact committed the shootings on Century Boulevard in an act of self defense, the admissions negated any argument that the identification of appellant by Brian Florence or Floyd Watson were faulty or the result of improper police interference as suggested by Juror #11.

In sum, the juror bias cited by the trial court as supporting its decision to dismiss Juror #5 was unsupported. None of the comments made by the

jurors indicated that Juror #5's inability to effectively deliberate in this case was a demonstrable reality. A juror's inability to perform his or her function must appear in the record as a "demonstrable reality" and bias may not be presumed. (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.)

Juror #5's Cell Phone and Book Activity Was DeMinimis

In the note submitted to the court by Juror #12, it was stated that Juror #5 did "something on her cell phone" or read a book during deliberations. (4CT 1022-1023.) The court did not question Juror #12 about these accusations during the court's interview with that juror. (18 RT 2937-2944.)

The jury foreman, however, told the court that Juror #5's cell phone "would go off" and that she had checked text messages during the closing arguments, during a read-back, and during deliberations. (18 RT 2920.) The foreperson also said that while she had been speaking to the jurors during the previous Friday's deliberations, Juror #5 "had her phone open and was doing some sort of text message or something." (18 RT 2932.) Then the foreperson conceded that she had not actually seen Juror #5 using her cell phone on that occasion and when asked how often Juror #5 used her phone, she told the court that Juror #5 did not bring out her phone "at all that much." (18 RT 2932.) The foreperson also mentioned that Juror #5 had textbooks with her, and she commented that during deliberations Juror #5 "maybe looks at her book" or "she'll look at her notes or something like that." (18 RT 2932.)

Finally, Juror #6 reported that Juror #5 had looked at her cell phone or her book "one or two times "for a few minutes" during deliberations. (18 RT 2947.)

Juror #5 told the court that she only used her cell phone to send and receive text messages during the breaks, and to check the time during deliberations. (18 RT 2955.) When the court asked whether Juror #5 heard

the court instruct the jurors to turn off their cell phones during deliberations so as to not receive messages or phone calls, Juror #5 said she had not.[41] (18 RT 2955.) Juror #5 also denied reading her book during discussions about the evidence and the law and stated she only read during the breaks. (18 RT 2954-2955.) The trial court did not advise Juror #5 that other jurors had reported that she was using her cell phone or reading her book during any of the trial proceedings or deliberations. It also did not make any effort to remind the juror that use of a cell phone during deliberations was improper.

These instances of cell phone use did not support the trial court's decision to dismiss Juror #5. The minimal conduct described, that is, Juror #5's viewing of her cell phone, whether it be for the time or to read a text message, "one or two times" for "a few minutes" (Juror #6) did not reflect egregious conduct which established to "demonstrable reality" that she was

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[41] On July 28, 2004 immediately following the jury selection proceedings and the swearing of the jurors and alternate jurors, the trial court encouraged the jurors to bring reading material to enjoy during breaks and to pass the time while waiting in the jury room for the trial to resume . (7 RT 1154.) The court also cautioned the jury about the use of cell phones: "Let me mention something also about cell phones. So many people have them today that I recognize you probably will have one with you. You cannot use them back in the jury room, for the simple reason that that might indicate someone else outside is influencing what you're doing here, so when you go back in that jury room, you should turn them off. ¶ When you're deliberating, they should be turned off. During the break time I guess until we get to deliberations it's not a problem, but the main thing is that someone talking to you during the day may influence your ability to be fair during the trial, so I would say minimize your use of the cell phones in the jury room, and once you're in deliberations, turn them off. Don't receive phone calls or messages or anything else." (7RT 1154-1155.) The court also mentioned to the jurors that the Supreme Court "has said you shouldn't even have a cell phone back in the jury room, so that's something to be cautious about." (7 RT 1155.)

unable to fulfill her duty as a juror on the case. There was no evidence to suggest that Juror #5 used the cell phone for an improper purpose. (See *People v. Fauber, supra,* 2 Cal.4th at p. 837 [juror brought cell phone into jury room with belief it was permitted and no evidence demonstrated it was used for an improper purpose or that it distracted other jurors].) Here, there was no suggestion that Juror #5 actually made or received a telephone call on her cell phone. The most that was implicated here was that Juror #5 may have received or sent a text message.

It is true that the trial court addressed the use of cell phones immediately after the jury was empaneled. (See 7 RT 1154-1155.) This was several weeks prior to the deliberations, however, and no reminder was given by the court before the deliberations began. Moreover, the court's admonishment did not convey a message that the presence of a cell phone was forbidden in the jury room. The court advised that the phones should be turned off in order to minimize the opportunity for improper influences on the deliberation process. If Juror #5 read a text message or checked her cell phone for the time, such did not establish that outside factors affected Juror #5's decision or ability to effectively deliberate.

Further, the reporting jurors never established that Juror #5 spent any appreciable time looking at a book during deliberations. The jury foreperson explained that Juror #5 looked at her book or her notes during deliberations. Juror #6 said only that Juror #5 used her cell phone or looked at her book only one or two times. Nothing in the juror interviews supported a conclusion that Juror #5's conduct was prolonged or that it constituted misconduct sufficient to resort to the remedy of Juror #5's dismissal. Moreover, to the extent Juror #5 was improperly distracted by checking her phone or glancing at her book, a reminder by the court that such conduct was not appropriate during the

deliberation process would have easily and efficiently cured the problem. Dismissing the juror on this basis was extreme and unwarranted. The trial court erred in concluding Juror #5's inability to deliberate was a demonstrative reality based upon these minimal distractions.

Appellant was Prejudiced by the Court's Error

Jury service is a protected right for every citizen to participate in the democratic process and it cannot be abridged except under the most compelling circumstances. (Cf. *Powers v. Ohio* (1991) 499 U.S. 400, 406-407.) Excusing an empaneled juror without good cause deprives a criminal defendant of his right to a fair trial under the Fifth and Fourteenth Amendment Due Process clauses as well as the Sixth Amendment right to trial by jury. (Cf. *Crist v. Bretz* (1978) 437 U.S. 28, 35-36; *Downum* v. *United States* (1963) 372 U.S. 734, 736.) Indeed, the right to a trial by jury in criminal cases is such a fundamental feature of the justice system that it is protected against state action by the Due Process clause of the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158.) It also violates the Eighth and Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (Cf. *Beck v. Alabama* (1980) 447 U.S. 625, 638, 643.)

Moreover, fundamental due process, and the right to a fair and impartial jury entitles a criminal defendant to be tried by the jury originally selected to determine his guilt or innocence. (Cf. *Downum v. United States*, *supra*, 372 U.S. at p. 736.) Because this "valued right" is so fundamental (*Ibid.*), reversal may be required where the trial court excuses a juror without good cause. (Cf. *People v. Hamilton* (1963) 60 Cal.2d 105, 122-126 [disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 649], see also *People v. Armendariz* (1984) 37 Cal.3d 573, 584; *People v. Wheeler* (1978) 22 Cal.3d

258, 283; both quoting *People v. Riggins* (1910) 159 Cal. 113, 120.)[42]

Indeed, "[T]he essential feature of a jury ... lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen ...." (*Williams v. Florida* (1970) 399 U.S. 78, 100.) "[T]he interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him" lies at the heart of the right to trial by jury. (See *Apodaca v. Oregon* (1972) 406 U.S. 404.)

Based on the foregoing, the court's dismissal of Juror #5 after two days of deliberations, without letting her know that other jurors were challenging her deliberative conduct, and without giving the juror an opportunity to resume deliberations under the advisement that she must participate actively in the deliberations and refrain from using her cell phone or reading her book during the proceedings, significantly departed from the statute's requirement of good cause for discharge. Because the record fails to show as a demonstrative reality Juror # 5's inability to fulfill her duties as a juror, her discharge violated appellant's right to a full and fair trial by an impartial and unanimous jury as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Arbitrary deprivation of the right to a unanimous verdict guaranteed by California law similarly deprived appellant of his right to due process of law as guaranteed by the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980)

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[42] In *People v. Riggins, supra*, 159 Cal. 113, the court stated: "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (*Id.*, at p. 120.)

447 U.S. 343 [arbitrary deprivation of state guaranties constitutes a federal due process violation].)

For these reasons, appellant's convictions must be reversed and his sentence set aside.

III.

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO SUA SPONTE HOLD A HEARING AND INQUIRE OF THE ENTIRE JURY PANEL AS TO WHETHER JUROR #12 TOLD THE OTHER JURORS THAT HE KNEW APPELLANT'S COUSIN, ABOUT THE COUSIN'S INFLAMMATORY COMMENTS TO HIM CONCERNING APPELLANT'S CHARACTER, AND REGARDING HIS OPINION THAT THE DEFENSE OF SELF-DEFENSE DOES NOT APPLY TO GANG MEMBERS.

Introduction and Proceedings Below

As noted above, during the course of deliberations Juror #5 submitted a note to the court through which she advised that Juror #12 told both her and Juror #6 that he was close friends with appellant's cousin, who recently told him that appellant was a "cold heartless killer" and an "active criminal." (4 CT 1020; 18 RT 2921-2922.)

Based on this information, during its interview with Juror #12 the court inquired about the juror's friendship with appellant's cousin. (18 RT 2937-2944.) Juror #12 told the court that he ran into his friend at a store one Saturday during the latter part of the trial. (18 RT 2941-2942.) While they talked, Juror #12 saw appellant's mother at the same store and when his friend's mother began talking to her, Juror #12 left. (18 RT 2940, 2942.) Juror #12 realized that his friend was related to appellant when he arrived in the courtroom the following Monday and sat with appellant's

family. (18 RT 2937-2938, 2943.) The juror explained that a day or two following his friend's appearance in the courtroom, they spoke on the telephone and his friend told him that appellant was his cousin.[43] (18 RT 2942.)

Juror #12 denied receiving information which caused him to form an opinion that appellant was a killer and an active criminal. (18 RT 2940.) He said that his friend understood that he [Juror #12] could not talk about the case and that they did not talk about anything concerning the trial at all. (18 RT 2943.) Juror #12 assured the court that knowing his friend was appellant's cousin would not impact his ability to be fair in his deliberations. (18 RT 2943.)

The court then interviewed Juror #6. Juror #6 recalled the conversation where Juror #12 mentioned he was friends with appellant's cousin. (18 RT 2945-2946, 2950.) The conversation was late in the trial, but before deliberations began. (18 RT 2945.) The discussion had taken place in the court hallway and only Juror #5 was also present. (18 RT 2946.) According to Juror #6, who did not fully recall the conversation, Juror #12 said he did not know that his friend was related to appellant until he recognized him during the trial. (18 RT 2946, 2950.) Juror #12 said the friendship would not affect his verdict. (18 RT 2946, 2950.) Juror #6 was not aware as to whether Juror #12 told any of the other jurors about appellant's cousin. (18 RT 2950.)

During her interview with the court, which took place after those of Juror #12 and Juror #6, Juror #5 reiterated the circumstances under which she had learned about Juror #12's friendship with appellant's cousin. He told Juror

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[43] Juror #12's friend initiated the telephone call. (18 RT 2942.)

#5 and Juror #6 that he had run into his friend while shopping and that he learned that his friend was also appellant's cousin. (18 RT 2952-2953.) Juror #12 said that both his friend, and another cousin of appellant's, told him that appellant was a "cold-blooded killer" and that he was "heartless." (18 RT 2952-2953.) Juror #5 told the court that Juror #12 said, "... [W]ell, you know that he did it then, because even his own cousins are saying that about him, well, you know that he must have did this." (18 RT 2953.) Juror #5 said it was possible that Juror #12 repeated the comments to other jurors, although if he did, she was not there.

Juror #5 further reported to the court that Juror #12 told other jurors during deliberations that because appellant was a gang member, he could not have been scared on the night of the double shootings. (18 RT 2958-2959.) Although he did not mention the specific comments made by appellant's two cousins during deliberations, Juror #12 told other jurors that appellant has "done stuff before." (18 RT 2958-2959.) According to Juror #5, Juror #12 did not seem to think a gang member could act in self defense stating, "Just look at him." (18 RT 2958-2959.)

When the court asked why Juror #5 had not previously reported Juror #12's statements about his friendship with appellant's cousin, Juror #5 told the court that the comments arose during a casual conversation about their living in similar neighborhoods as children and that she did not think about it again until Juror #12 started making the comments about appellant's gang status during deliberations. (18 RT 2959-2960.)

Following the court's interviews with the jurors, it conferred with the lawyers about the juror's responses. With regard to Juror #12, defense counsel [Peters] suggested that Juror #12 may have "polluted the entire jury" with his comments during deliberations about self-defense and how it does not apply

to gang members. (18 RT 2966.) Counsel also pointed out that even though Juror #6 did not recall the specifics of the conversation with Juror #12, it was clear that she recalled that the conversation about appellant's cousin indeed took place. (18 RT 2968.)

The court pointed out that if Jurors #5 and #12 were excused, the court was still faced with the question of whether Juror #12 had expressed anything in deliberations consistent with what Juror #5 had indicated in her note. (18 RT 2978-2979.) The court indicated, however, that since Juror #6 did not remember any of the negative comments attributed to Juror #12, it was apparent they were not repeated during the deliberations. (18 RT 2979-2980.) The court finally indicated that it believed Juror #12 and thought he would be a fair juror. (18 RT 2981.) Despite this, the court concluded that Juror #12's acquaintance with appellant's cousin, and his failure to bring it to the court's attention, demonstrated sufficient cause to excuse the juror for implied bias. (18 RT 2981-2983.)

Defense counsel thereafter moved the court for a mistrial on the ground that Juror #12 may have infected the whole jury panel with his sentiments regarding gang members not being afforded the defense of self-defense. (18 RT 2989-2990.) Characterizing counsel's conclusion as "guesswork," the court denied the motion. (18 RT 2990.)

The court opined that general comments about gang members arose from the allegation of gang activity and appellant's own admission about being a gang member. (18 RT 2990.) The court found no indication that Juror #12 harbored any specific personal bias from which he tried to persuade the other jurors. (18 RT 2990-2993.) The court distinguished between a juror having an "attitude" about gang members, as opposed to an actual bias arising from knowing gang members, knowing the defendant's family, or from hearing

things from outside the courtroom. (18 RT 2991.)

The court reiterated that its only concern was whether the information from Juror #12 was passed on to the other jurors, but concluded this was not the case since Juror #6, who did not fully recall the conversation held privately, was apparently not reminded of it by any statements made by Juror #12 during deliberations. (18 RT 2992.) Thus, the court determined that Juror #12 had not improperly discussed the information about appellant with the other jurors during the jury's deliberative discussions and denied the defense motion for a mistrial.

Finally, after the verdicts were reached, appellant filed a motion for a new trial. (13 CT 3644-3677.) In the motion, he argued the court erred in failing to examine the remaining jurors to determine whether Juror #12 had contaminated the jury with information about his friendship with appellant's cousin and the negative comments made concerning appellant's character as a "cold-blooded killer." (13 CT 3661-3665.) He further asserted the trial court was required to hold an evidentiary hearing to question all of the jurors since jury contamination was likely. (13 CT 3665-3667.) Finally, he argued the court's failure to sua sponte conduct an inquiry of the entire panel violated appellant's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. (13 CT 3663-3665.) The court denied the motion, reiterating its reasoning set forth at the time of the dismissal, and noting that counsel had not requested a hearing despite being provided with multiple opportunities to do so. (21 RT 3476-3477.)

Standard of Review

Generally, a trial court's decision regarding jury incidents is reviewed for abuse of discretion. (*United States v. Beard* (9th Cir. 1998) 161 F.3d 1190, 1193; *United States v. Olano* (9th Cir. 1995) 62 F.3d 1180, 1192. The trial

court's decision not to excuse a juror is also reviewed for an abuse of discretion. (*United States v. Miguel* (9th Cir. 1997) 111 F.3d 666, 673; *United States v. Alexander* (9th Cir. 1995) 48 F.3d 1477, 1484-1485.) The presence of a biased juror, however, cannot be harmless. The error requires a new trial without the showing of prejudice. (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 n. 2 (en banc).) The court's factual findings relating to the issue of juror misconduct are reviewed for clear error. (*United States v. Matta-Ballesteros* (9th Cir. 1995) 71 F.3d 754, 766.)

The Trial Court's Failure to Conduct An Inquiry into Juror Misconduct Violated Appellant's 5th, 6th, and 14th Amendment Rights to Due Process and a Fair Trial

A defendant has a constitutional right to be tried by an unbiased, impartial jury. (U.S. Const., 6th and 14th Amendments; Cal. Const., Art. I, § 16; *In re Hamilton* (1999) 20 Cal.4th 273, 293; *Irvin v. Dowd* (1961) 366 U.S. 717, 723; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) "The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence 'based on the evidence presented in court.'" (*Skilling v. United States* (2010) _ U.S. _ [130 S.Ct. 2896, 2948]; se also *Irvin v. Dowd, supra,* 366 U.S. at p. 723; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is '"capable and willing to decide the case solely on the evidence before it"' [citations]." (*In re Hamilton, supra*, 20 Cal.4th at 294.) "'[A] conviction cannot stand if even a single juror has been improperly influenced.'[citations]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 523-24; see also *United States v.*

Hendrix (9th Cir.1977) 549 F.2d 1225, 1227 [the bias or prejudice of even a single juror violates a defendant's right to a fair trial].)

Both due process and the right to trial by jury require that a defendant be judged solely upon the evidence developed in court at trial on the witness stand "where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*People v. Nesler, supra*, 16 Cal.4th at 578, quoting, *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473; accord, *Smith v. Phillips* (1982) 455 U.S. 209, 217; *In re Carpenter* (1995) 9 Cal.4th 634, 648; *Dyer v. Calderon, supra,* 113 F.3d 927, 935; *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.) When this right is violated by the presence of a juror whose impartiality has been eroded, prejudice must be presumed. (*People v. Foster* (2010) 50 Cal.4th 1301, 1342.)

The prosecution must prove guilt beyond a reasonable doubt. Where a juror relies on prejudicial matter which is not part of the trial record on which the case was submitted to the jury, this principle is violated and a defendant's constitutional rights are denied. (*People v. Marshall* (1990) 50 Cal.3d 907, 951; *United States v. Vasquez* (9th Cir. 1979) 597 F.2d 192, 193; U.S. Const., 5th, 6th, 14th Amendments; Cal. Const., Art. I, §§ 15 & 24.)

The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. (*Dyer v. Calderon, supra*, 151 F.3d at 973.) In evaluating a claim of juror misconduct, the reviewing court must "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler, supra*, 16 Cal.4th at 582, citing, *In re Carpenter, supra*, 9 Cal.4th at 646; *People v. Mickey* (1991) 54 Cal.3d 612, 649.)

The test for determining whether juror misconduct likely resulted in actual bias is "different from, and indeed less tolerant than," normal harmless

error analysis. (*People v. Marshall*, *supra*, 50 Cal.3d at p. 951; see *In re Carpenter, supra,* 9 Cal.4th at p. 654.) If the record shows a substantial likelihood that even one juror "was impermissibly influenced to the defendant's detriment," reversal is required regardless of whether the court is convinced an unbiased jury would have reached the same result. (*People v. Marshall, supra,* at p. 951; see *In re Carpenter, supra,* at pp. 651, 654; *In re Malone* (1996) 12 Cal.4th 935, 964.) Although the strength of the prosecutor's evidence may be examined to determine the likelihood of juror bias, once actual bias has been found the judgment must be reversed regardless of the strength of the evidence. (*In re Carpenter, supra,* at p. 655.)

"'[A] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citation].'" (*People v. Cleveland,supra,* 25 Cal.4th 466, 478.) "[W]hen ... the [trial] court is on notice that there may be grounds to discharge a juror during deliberations, it must conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist." (*People v. Cleveland*, *supra*, at p. 480, quoting, *People v. Burgener* (1986) 41 Cal.3d 505, 520; see also, *People v. Rowland* (1999) 75 Cal.App.4th 83, 91-92 [hearing is required where the court possesses information which, if proven, would constitute good cause to doubt a juror's ability to perform and justify removal from the case].) The failure of a court to investigate misconduct under these circumstances is an abuse of discretion and prejudice is presumed. (*People v. Pinholster* (1992) 1 Cal.4th 865, 926.)

In *People v. Rowland, supra*, the court noted that although an inquiry might have produced sufficient evidence to allow the court to allay concerns that a juror had prejudged the case, it could not speculate about what facts

might have been adduced if the inquiry had been conducted. (*Id.* at p. 92, quoting, *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066.) "Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. [Citations]" (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) Where the trial court has been "alerted to facts suggestive of potential misconduct," the ultimate responsibility is on the court to make an adequate inquiry to determine the extent, if any, of prejudice. (*Ibid.*, citing, *People v. Knights* (1985) 166 Cal.App.3d 46, 51 [report by foreman that two jurors had outside discussions regarding case]; *People v. McNeal* (1979) 90 Cal.App.3d 830 [report by jury foreman that another juror had personal knowledge of case]; *People v. Thomas* (1975) 47 Cal.App.3d 178, 180 [fact that four jurors had read prejudicial newspaper article "brought to trial court's attention"].)

In *People v. Farnam* (2002) 28 Cal.4th 107, defense counsel moved for a mistrial based on the claim that the prosecutor had approached four jurors to commiserate with them after one had her purse snatched during a court recess. The trial court questioned both the jurors and the prosecutor about the incident, and "ultimately determined that no deliberate ex parte contact or misconduct occurred." (*Id.* at 162.) On review, the court found "sufficient evidence support[ed] that determination, and s[aw] no basis for overturning it." (*Ibid.*)

Once a trial court is put on notice that good cause to discharge jurors may exist, it is the court's duty to make whatever inquiry is reasonably necessary. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1347-1348 [emphasis added].) "A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Davis* (1995) 10 Cal.4th 463, 547.)

In *Remmer v. United States* (1954) 347 U.S. 227 (*Remmer I*), the United States Supreme Court held that "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial* ... ."[44] (*Id.* at p. 229; Emphasis added.) When a potentially disturbing outside contact is shown, the trial court must hold a hearing with all parties present. (*Remmer v. United States, supra*, 347 U.S. at p. 229-230; *United States v. Angulo* (9th Cir. 1993) 4 F.3d 843, 847; see also *United States v. Henley* (9th Cir. 2000) 238 F.3d 1111, 1115 [*Remmer* hearing is required unless the claim of jury tampering is "entirely frivolous or wholly implausible"].) If a disturbing contact with one juror was reported to other jurors, the trial court must investigate the effect of the contact on all of the jurors. (*United States v. Angulo, supra*, 4 F.3d at pp. 847-848; see also *Owen v. Duckworth* (7th Cir. 1984) 727 F.2d 643, 647-648 [full hearing held;

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[44] The Sixth Circuit has interpreted the court's analysis in *Smith v. Phillips* (1982) 455 U.S. 209, as shifting the burden of proof to the defendant to prove a substantial likelihood of bias. (See *United States v. Pennell* (6th Cir. 1984) 737 F.2d 521, 532; accord *United States v. Sylvester* (5th Cir. 1998) 143 F.3d 923, 934.) Appellant does not believe the Supreme Court's casual reference in *Smith* to a defendant's "opportunity to prove actual bias" was meant to make a substantial change in the longstanding rule that prejudice is presumed. (See *Smith v. Phillips, supra*, at p. 215; see also *United States v. Dutkel, supra,* \192 F.3d at p. 895 [*Smith* did not affect *Remmer* presumption in jury tampering cases].)

In any event, this Court has applied the *Remmer* presumption after *Smith*. (See, e.g., *In re Hamilton, supra*, 20 Cal.4th at p. 295; accord *United States v. Simtob* (9th Cir. 2007) 485 F.3d 1058, 1064; *United States v. Butler* (D.C.Cir. 1987) 822 F.2d 1191, 1195-1196; cf. *United States v. Cheek* (4th Cir. 1996) 94 F.3d 136, 141 [evidence that extrajudicial contacts occurred and were "more than innocuous interventions" triggers *Remmer* presumption].)

all jurors questioned]; *United States v. Sublet* (8th Cir. 1981) 644 F.2d 737, 740-741 [full hearing held; all jurors questioned]; *United States v. Dutkel* (9th Cir. 1999) 192 F.3d 893, 900 [remanding for full *Remmer* hearing to discover whether tampering affected the juror contacted or any other juror].)

Here, the trial court was put on notice that Juror #12 may have reported information about contact with his friend, appellant's cousin, to his fellow jurors. To be sure, he told Juror #5 and Juror #6 that he was friends with appellant's cousin after running into his friend at a store and then later having telephone contact with him. Moreover, appellant's cousin was in the courtroom observing the trial at the time the contacts between the cousin and the juror took place. In fact, appellant's cousin telephoned Juror #12, after he sat in the courtroom gallery with appellant's family, to inform him that he was appellant's cousin. (18 RT 2942.) The clear evidence that Juror #12 told this information to Juror #5 and Juror #6 gives rise to a strong inference that he also told the other jurors.

In addition, Juror #12 told Juror #5 and Juror #6 that appellant's cousin described appellant as a "cold, heartless killer" and an "active criminal." (18 RT 2952-2953.) According to Juror #5, Juror #12 said that based upon what appellant's family told him, he believed that appellant must have committed the instant crimes. (18 RT 2953.) Juror #5 also reported to the court that during deliberations, Juror #12 stated that appellant had "done stuff before," which Juror #5 believed arose from the cousin's description of appellant as an "active criminal." (18 RT 2958-2959.)

Despite the strong indication of juror misconduct, the trial court dismissed the significance of Juror #5's revelations based only on Juror #6's response that she did not really recall the conversation with Juror #12 about his friend, and the court's impression that nothing must have occurred during

deliberations to prompt or remind Juror #6 of any negative comments which may have been made by Juror #12. (18 RT 2946, 2950, 2979-2980, 2992.) The court stated that it did not find Juror #5 to be credible. (18 RT 2992-2993.)

Here, the trial court chose to ignore the express notice of Juror #12's misconduct and conducted no inquiry whatsoever of any juror, other than Juror #6, about the information given by Juror #5. The court abused its discretion and violated appellant's constitutional rights by not inquiring of the jurors at the time of the complaints, and exacerbated the error by failing to hold an evidentiary hearing upon considering appellant's motion for a new trial.

A harmless-error analysis is inappropriate in the context of jury misconduct. (See e.g., *People v. Holloway* (1990) 50 Cal.3d 1098, 1110, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *People v. Marshall, supra*, 50 Cal.3d at 951; *People v. Pierce* (1979) 24 Cal.3d 199, 207.) The rule requiring reversal applies irrespective of the probability that a more favorable verdict would not have been reached absent the error. (*People v. Pierce* (1979) 24 Cal.3d 199, 207; *People v. Diaz* (1984) 152 Cal.App.3d 926, 935.) Persuasive evidence of guilt does not deprive a defendant of the right to fair trial. (*People v. Robarge* (1952) 111 Cal.App.2d 87, 95.) A fair trial includes the right to an unbiased jury. (*People v. Martinez* (1978) 82 Cal.App.3d 1, 22.)

It cannot be determined what effect the trial court's failure to sua sponte conduct an adequate inquiry into the juror misconduct had on the ultimate outcome of appellant's trial. The trial court's omission was erroneous and foreclosed any evaluation of the extent of the prejudice which occurred. The allegation of jury misconduct raised a presumption of prejudice, and the reliance by the trial court upon Juror #6's failure to recall the conversation that

took place between her and Juror #12 and Juror #5 was insufficient to rebut that presumption. In fact, Juror #6's expressed lack of memory about the conversation, gives rise to a question as to her credibility and possible lack of candor with the court.

The error deprived appellant of his constitutional rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments.[45] Reversal of his convictions is required.

IV.

SUBSTITUTION OF ALTERNATE JURORS FOR ORIGINAL JURORS #5 AND #12 COERCED A VERDICT

Introduction

When a new juror is substituted, the jury is required to start deliberations anew in order to prevent existing jurors from imposing their views on the new juror, thus coercing a verdict. The dates on the verdict forms and the speed at which the jurors arrived at verdicts despite the vast quality of evidence demonstrates that there was no meaningful deliberation. Instead, as with past juror misconduct substitutions, the existing jurors simply pressured the new jurors into accepting their view of the evidence.

The record reveals that the original jury retired for deliberations at 2:15 p.m. on Wednesday, August 18, 2004. (4 CT 1005-1006.) On Friday, August 20, 2004, the jury was excused for the weekend, but upon leaving the clerk was given the three jury notes from Jurors #4, #5, and #12. (4 CT 1018-1019.) On Monday, August 23, 2004, the court and counsel conferred regarding the

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[45] Appellant notes that additional aspects of this claim, including actual juror misconduct, as well as ineffective assistance of counsel remain to be addressed via habeas corpus as a result of the trial court's denial and failure to conduct an evidentiary hearing at the time of the trial.

notes and the involved jurors were questioned. (4 CT 1025-1026.) On that afternoon, Jurors #5 and #12 were discharged and alternates selected to take their seats on the panel. (4 CT 1025-1026.) The reconstituted jury began deliberations that day at 1:55 p.m. (4 CT 1025-1026.) At 1:50 p.m. on Wednesday, August 25, 2004, the jury requested to hear additional argument from the attorneys. (4 CT 1030-1031.) Arguments were to take place the following day, and the jury left for the evening at 3:40 p.m. (4 CT 1030-1031.) At 10:48 a.m. on Thursday, the attorneys delivered their arguments and the jury resumed their deliberations at 11:48 a.m. (4 CT 1036-1037.) At 4:15 that afternoon, the jury alerted the court that they had reached verdicts. (4 CT 1036-1037.) The verdicts on all of the counts were dated August 26, 2004. (4 CT 1049-1067.)

Standard of Review

As with the previous issue, the standard of review is whether the trial court abused its discretion in substituting an alternate for a sitting juror during deliberations. That discretion, however, is not unlimited. (*People v. Roberts* (1992) 2 Cal.4th 271, 324 - 325.) "Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." (*United States v. Hernandez* , *supra* (2 Cir. 1988) 862 F.2d at p. 23.)

Substitution of Alternates Coerced a Verdict

The Sixth Amendment to the Constitution of the United States and article I, section 16 and article VI of the California Constitution guarantee an accused in a criminal prosecution the right to a trial by an impartial jury. (*People v. Price* (1991) 1 Cal.4th 324, 467.) Thus, a trial court must use "great care to avoid the impression that jurors should abandon their independent judgment 'in favor of considerations of compromise and expediency.'" (*Ibid.*,

citing *People v. Carter* (1968) 68 Cal.2d 810, 817.)

The basic test of whether a verdict was coerced is whether the conduct of the court, viewed in the totality of the circumstances, operated to displace the independent judgment of the jury in favor of compromise and expediency. (*People v. Peters* (1982) 128 Cal.App.3d 75, 91; *People v. Ozene* (1972) 27 Cal.App.3d 905,913, citing *People v. Carter*, *supra,* 68 Cal.2d 810, 817; see also *Jenkins v. United States* (1965) 380 U.S. 445 [where the judge told the jury it was required to reach a verdict, the Supreme Court "conclude[d] that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it"].)

The court's discharge of both Jurors #5 and #12 following contact with a relative of appellant (Juror #12) and a reported disagreement with the majority of the jurors (Juror #5) could not help but act as an endorsement of the position of the remaining majority jurors who favored guilt. Accordingly, the trial judge's actions operated to displace the jury's independent judgment and to coerce the verdict.

While it might be argued that the trial court's instructions to begin deliberations anew could dispel any taint, such an argument would not be persuasive in this case. Clearly there is a limit to how much an instruction or admonition can overcome. Many courts have held that juries are particularly unable to set aside indications of how the judge views the case despite curative instructions: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." *(Krulewitch v. United States* (1949) 336 U.S. 440 [Jackson, J. concurring.])

Moreover, even though a jury has been instructed to start its deliberations anew, there are some circumstances where following such an

instruction is simply unrealistic because it is impossible to incorporate into those deliberations the perception, memory and viewpoints of the new juror. This is especially true where (as here) the jury has already reached agreement for verdicts on the counts and the original jury had reported Juror #5 to be the holdout juror. (See, e.g., *People v. Aikens* (1988) 207 Cal.App.3d 209, 219 (conc. & dis. opn. of Johnson, J.) [where jury reached a verdict on a related count prior to the substitution of a new juror, a verdict by a reconstituted jury cannot meet the requirement of unanimity]; *State v. Corsaro* (1987) 107 N.J. 339 [526 A.2d 1046][46] [once jurors have reached any verdicts, the panel cannot be reconstituted to deliberate and reach the remaining verdicts].) As *Corsaro* explained:

> "[W]here the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated."

(*State v. Corsaro*, *supra*, 526 A.2d at p. 1054.)

Accordingly, the *Corsaro* court concluded:

> "The requirement that juries begin deliberations anew after a juror has been substituted would be rendered nugatory if the

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[46] As Justice Johnson explained in *Aikens*, the New Jersey statute governing substitution of jurors is similar to and interpreted in a manner similar to California's Penal Code section 1089. (*People v. Aikens, supra,* 207 Cal.App.3d at p. 218.)

> reconstituted jury is likely to accept, as conclusively established, facts that could underlie, if not necessarily establish, its verdict on the open charges .... While the jury was not technically required to accept the facts underlying the partial verdict, the likelihood that deliberations would truly 'begin anew' was so remote, in our opinion, as to foreclose juror substitution."

(*Id.* at p. 1055.)

Similar circumstances attended appellant's case at the time of substitution. Deliberations had progressed to the point where only the views of Juror #5 may have stood between the fixed positions of the rest of the jurors and the return of guilty verdicts. In fact, Juror #12 told the court that Juror #5 was the reason for the deadlock on all of the counts. (4 CT 1015, see 4 CT 1022-1023.) Moreover, the court implicitly endorsed the majority's position when it discharged Juror #5. It was totally unrealistic to expect the reconstituted jury to be able to deliberate de novo and fully involve the new jurors in such deliberations.

There is a substantial "inherent coercive effect upon an alternate juror who joins a jury that has ... already agreed that the accused is guilty...." (*United States v. Lamb* (9th Cir. 1973) 529 F.2d 1153, 1156.) The coercive effect is particularly strong where the sole dissenter is removed by the court, which can only telegraph to the majority that its guilty position was approved by the court. (Cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231,239-241 [recognizing that court's conduct more likely to be interpreted as coercive where jury is aware that the court knows the numerical breakdown of the division between the jury].) The new juror was under inordinate psychological pressure to go along with the group, whose one recalcitrant member the court had removed from its body after relatively lengthy deliberations. (See, e.g., *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981 [trial court coerced a verdict by its actions

that "sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity"].)

This Court has emphasized that the propriety of substitution of a juror during deliberations rests on the presumption that the new juror will participate fully in the jury's deliberation:

> "It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdicts."

(*People v. Collins*, *supra*, 17 Cal.3d at p. 693.)

The deliberations of appellant's jury were irretrievably skewed, however, when the court effectively gave its imprimatur to the majority by discharging the one juror who took issue with the majority's view during those deliberations. Under these circumstances, "[a] replacement juror, no matter how novel or persuasive her argument for [] acquittal may have been, would have been hard pressed to overcome the trial court's implied admonition to the original jurors to hold their ground and convict." (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429 (dis. opn. of Nelson, J.).)

For these reasons, requiring re-deliberation after the court removed Juror #5 as it did – even if such removal was proper and even with the explicit instruction to begin deliberations anew – invoked coerced verdicts.

Accordingly, the trial court deprived appellant of his state and federal constitutional rights to a fair trial by an impartial jury, requiring reversal of the convictions. Because the coercion of the guilt verdicts rendered them unreliable, it also deprived appellant of his right to a reliable death judgment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. For all these reasons, the judgment should be reversed.

V.

THE ABSTRACT OF JUDGEMENT SHOULD BE ORDERED CORRECTED TO PROPERLY REFLECT APPELLANT'S SENTENCES ON COUNTS 3, 4, AND 6 TO BE LIFE WITH THE POSSIBILITY OF PAROLE

Introduction and Proceedings Below

It appears that the trial court understood that appellant was properly to be sentenced to life with the possibility of parole on each of counts 2 and 3 for willful, deliberate and premeditated attempted murder, and count 6 for torture. (13 RT 3500-3501.) The court, however, did not state that appellant was eligible for parole on these counts, but simply pronounced the sentences to be "life in prison." (13 RT 3500-3501.)

This omission was carried over to the abstract of judgment for indeterminate sentences which states on page 1, at subsection 4, "Life Without the Possibility of Parole on counts 3, 4, 6." (13 CT 3723-3724.) Since the correct sentence on counts 3, 4, and 6 was life with the possibility of parole, this court should order the sentence corrected and the abstract of judgment amended.

Applicable Law

As to counts 3 and 4, pursuant to Penal Code section 664 the proper sentence for willful, deliberate and premeditated attempted murder is an indeterminate life sentence with the possibility of parole. Section 664,

which specifies the punishment for convictions of criminal attempts, provides in relevant part:

> "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: [¶] (a) If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole."

(See also *People v. Jefferson* (1999) 21 Cal.4th 86, 90 ["attempted premeditated murder is punishable by life imprisonment with the possibility of parole, . . . an indeterminate prison term"].) Thus, appellant should have been sentenced here for attempted premeditated murder to life in prison with the possibility of parole on each of counts 3 and 4.

Likewise, pursuant to Penal Code section 206.1, the proper sentence for the crime of torture is an indeterminate life sentence with the possibility of parole as follows: "Torture is punishable by imprisonment in the state prison for a term of life." (See also, *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1473-1476 [the statutory sentence for torture, life with the possibility of parole after seven years, is not cruel and unusual punishment].)

Based upon this authority, the abstract of judgment must be amended to reflect the appropriate prison terms of life with the possibility of parole for counts 3, 4 and 6. The error is remedied by an entry as to subsection 5,

life with the possibility of parole.

The court is empowered to correct clerical errors in the abstract of judgment without the necessity of a remand. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The court may correct such errors on its own motion or upon the application of the parties. (*Ibid.*)

To the extent that the error lies with the trial court's oral pronouncement of sentence, then the sentence of life without the possibility of parole is an unauthorized sentence. A claim that a sentence is unauthorized under the law may be raised for the first time on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) Accordingly, if reversal is not otherwise granted, this court should order that the judgment be amended to reflect that the sentence imposed for the attempted premeditated murder convictions in counts 3 and 4, as well as the sentence imposed for torture in count 6 is life with the possibility of parole.

PENALTY PHASE

VI.

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

CALJIC 8.85 was given in this case. The instruction is Constitutionally flawed because it fails to tell the jury which factors are mitigating and which are aggravating. This failure to designate allows jurors to make disparate judgments on similar factors and introduces an unacceptable level of arbitrariness in the capital sentencing process.

CALJIC 8.85 is Improper

At the conclusion of the penalty phase, the trial judge instructed the jury pursuant to CALJIC No. 8.85. (20 RT 3402-3405.) As discussed below, this instruction is constitutionally flawed. This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 191-192), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein.

The instructions given failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See 20 RT 3402-3405.) This Court has concluded that each of the factors introduced by a prefatory "whether or not"— factors (d), (e), (f), (g), (h), and (j) — are relevant solely as possible mitigators. (See *People v. Edelbache*r (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770;

People v. Davenport (1995) 41 Cal.3d 247, 288-289.)

While the jurors were instructed pursuant to CALJIC 8.88 that the absence of a statutory mitigating circumstance "does not amount to an aggravating circumstance" (20 RT 3412), nevertheless, jurors were still left free to conclude on their own with regard to each "whether or not" sentencing factor that any facts deemed relevant under that factor were actually aggravating. For this reason, appellant could not receive the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*." (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself

there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.* at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

By instructing the jury in this manner, the trial judge ensured that appellant's jury could aggravate his sentence upon the basis of what were, as a matter of state law, mitigating factors. The fact that the jury may have considered these mitigating factors to be aggravating factors infringed appellant's rights under the Eighth Amendment, as well as state law, by making it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory

circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of the trial judge's failure to define mitigating factors as mitigating will differ from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is presented, the evidence must be construed as mitigating. In other cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as allowing jurors to treat as aggravating any evidence presented by appellant under that factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different sets of aggravating circumstances because of differing constructions given to CALJIC No. 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (lead opn. of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Accordingly, the trial court, by reciting the standard CALJIC No. 8.85 violated appellant's Eighth and Fourteenth Amendment rights.

For these reasons, the instructions contained in CALJIC No. 8.85 are constitutionally flawed. Moreover, because CALJIC No. 8.85 fails to comply with constitutional requirements and unnecessarily introduces an

unacceptable level of arbitrariness into the capital sentencing process, appellant's death sentence should be reversed.

VII.

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT''S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Introduction

CAJIC 8.88 is an improper instruction because it fails to describe accurately the weighing process the jury must apply in capital cases. Moreover, by so failing, it deprives a defendant of the individualized consideration that the Eighth Amendment requires. Further, the instruction is improperly weighted toward death and contradicts the requirements of Penal Code section 190.3 by allowing a death judgment if the aggravating circumstances are merely "substantial" instead of requiring the jury to make the proper determination that if the mitigating circumstances outweigh the aggravating circumstances, it must return a verdict of life without parole.

Finally, the critical "so substantial" language in the instruction that describes the effect of the aggravating factors is unconstitutionally broad. That language would allow a death judgement if the jury found death was authorized under the statutes instead of whether it was appropriate under the circumstances . All of these problems effectively lower the prosecution's burden of proof below that required by the Constitution.

CALJIC 8.88 is Improper

At the penalty phase jury charge, the trial judge instructed the jury pursuant to CALJIC 8.88 as follows:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant .

After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. The jury need not be unanimous in finding that an aggravating circumstance or a mitigating circumstance exists. The absence of a mitigating circumstance does not amount to an aggravating circumstance.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. . . . In order

to make a determination as to the penalty, all twelve jurors must agree.

(20 RT 3412-3414.)

This instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. For all these reasons, reversal of appellant's death sentence is required.

Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

In Failing to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life Without Possibility of Parole, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)

The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.) The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction only addresses directly the imposition of the death penalty, and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violates the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which mis-describes the burden of proof, and thus "vitiates all the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [emphasis in original].)

This court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.) The court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the

State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure(1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this court stated the following about a set of one-sided instructions on self-defense:

> "It is true that the . . . instructions . . . do not incorrectly state the law..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles."

(*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*,

the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See e.g. *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle to appellant in the instant case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence. Indeed, any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as — if not more — entitled as noncapital defendants to the protections the law affords in relation to prosecution-slanted instructions. Appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd

and adopted, (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman v. California, supra*, 386 U.S. at p. 24, reversal is required.

By Failing to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan, supra*, 53 Cal.3d at p. 979; *People v. Brown* (1985) 40 Cal.3d 512, 538-541 [holding jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].) The jurors in this case were never informed of this fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was ipso facto the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation — and even if they found no mitigation whatever. As framed, then, CALJIC No. 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909; disapproved on other grounds in *People v. Carmen* (1951) 36 Cal.2d 768, 775.)

The overall impact of the penalty phase instructions, and in particular CALJIC No. 8.88, the concluding instruction, was to falsely give the jurors the impression (1) that the trial judge wanted the jurors to impose a sentence of death, and (2) that jurors did not have the right to just as easily give life without parole.

Since these defects in the instructions deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law (see *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; see also *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Is Unconstitutionally Vague and Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3

Under the standard CALJIC instructions, the question of whether to

impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." (20 RT 3414.)

The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Ibid.*; see *Zant v. Stephens, supra*, 462 U.S. at p. 867, fn. 5.) Regarding the word "substantial," the *Arnold* court concluded:

"Black's Law Dictionary defines 'substantial' as 'of real worth and importance,' 'valuable.' Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. [Footnote.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death

sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where a 'murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions' is unconstitutional and, thereby, unenforceable." (*Arnold v. State, supra*, 224 S.E.2d at p. 392.)

The United States Supreme Court has specifically praised the portion of the Arnold decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

There is nothing in the words "so substantial . . . that [the aggravating] evidence warrants death" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 429.) These words do not provide meaningful guidance to a sentencing jury attempting to determine whether to impose death or life. The words are too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

For all the foregoing reasons, appellant's death sentence must be reversed. CALJIC 8.88 fails to describe the capital weighing process accurately thus depriving a defendant of the individualized consideration that the Eighth Amendment requires. Further, the instruction is improperly weighted toward death and allows a death judgment if the aggravating circumstances are merely "substantial." The proper standard should tell the jury that if the mitigating circumstances outweigh the aggravating circumstances, it must return a verdict of life without parole.

Finally, the critical instruction is unconstitutionally broad because it would allow a death judgement if the jury found death was merely

authorized instead of appropriate under the circumstances .

All of these problems effectively lower the prosecution's burden of proof below that required by the Constitution and they are therefore fatal to the sentence imposed in this case.

VIII.

CALIFORNIA'S DEATH PENALTY SCHEME, BOTH IN THE ABSTRACT AND AS APPLIED AT APPELLANT'S TRIAL, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AND EIGHTH AMENDMENT RIGHT TO RELIABLE GUILT AND PENALTY DETERMINATIONS IN A CAPITAL CASE

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features 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 grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. 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)

126 S.Ct. 2516, 2527, fn. 6.)[47] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).)

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 meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside

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[47]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." (126 S.Ct. at p. 2527.)

the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all.

Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

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 Cal.4th 457, 468.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirty special circumstances[48] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.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

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[48] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See Section E. of this Argument, *post*).

B. *Appellant's Death Penalty Is Invalid Because 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.[49] The Court has allowed extraordinary 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,[50] or having had a "hatred of religion,"[51] or threatened witnesses after his arrest,[52] or disposed of the victim's body in a manner that precluded its recovery.[53] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.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

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[49] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[50] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[51] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[52] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[53] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

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 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

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; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.*

As explained 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 (§ 190.2) or in its sentencing guidelines (§ 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. Because The Jury That Sentenced Appellant to Death Was Not Required to Find Beyond A Reasonable Doubt The Existence of One or More Aggravating Factors that Outweighed Any Mitigating Factors, He Was Denied His Rights Under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Except as to conviction of other crimes and existence of other criminal activity, appellant's jury was not instructed it need find the presence of aggravating factors true beyond a reasonable doubt, nor find

beyond a reasonable doubt these aggravating factors outweighed mitigating factors. This court's previous conclusion--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" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255)--is, however, no longer tenable in light of more recent United States Supreme Court cases to the contrary. Nor can the issue be avoided by terming "'the sentencing function . . . inherently moral and normative, not factual,' and, hence, not susceptible to a burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the court concluded, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

In *Ring v. Arizona* (2002) 536 U.S. 584, 592-593, the high court 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 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. **Any** factual finding which 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.

Next, in *Blakely v. Washington* (2004) 542 U.S. 296, the high court 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 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.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that 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." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates 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." *(United States v. Booker, supra,* 543 U.S. at 244.)

Finally, in *Cunningham v. California* (2007) 549 U.S. 270, 277-278, the court held California's determinate sentencing law, according to which a defendant was to be sentenced to a statutory "middle term" unless the trial court made findings in aggravation by a preponderance of the evidence, violated the right to jury trial guaranteed by the Sixth and Fourteenth Amendments. (*Id.* at p. 293.)

a. In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

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,* 16 Cal.4th 1223; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

outweigh any and all mitigating factors.[54] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (37 RT 5792), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its severity or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[55] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate

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[54] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[55] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: '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.'" (*Id.* at p. 460.)

punishment notwithstanding these factual findings.[56]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow, supra,* 30 Cal.4th 43, 126, fn. 32; *People v. Prieto, supra,* 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[57] In *Cunningham* the principle that any fact which exposed a

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[56] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[57] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* p. 14.)

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

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traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

In the wake of *Cunningham*, it is 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 any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th 226 at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[58] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

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[58] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Arizona advanced precisely the same argument in *Ring*. It pointed out 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, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

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] expose[d] [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."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death 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.) In *Blakely*, *supra*, the high court 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." (*Id.*, 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 factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (AZ 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v.*

People (Colo.2003) 64 P.3d 256; *Johnson v. State, supra,* 59 P.3d 450.[59])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[60] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one.

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[59] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[60] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*] (1981) 451 U.S.430 at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. *The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.*

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself,

must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer*, *supra*, 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be

> distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky*

rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. *California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.*

"Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." (*Gregg v. Georgia, supra,* 428 U.S. at p. 195.) Unfortunately, this safeguard is not currently available in California. A penalty phase jury is given virtually unlimited discretion in its sentencing decision, and this court has specifically held a penalty phase jury is not required to make written findings regarding aggravating factors (*People v. Blair* (2005) 36 Cal.4th 686, 753)--which is not surprising, given that California jurors need not even agree upon such factors in the first instance, a separate error addressed above..

The United States Supreme Court "has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) It cannot be seriously disputed that written findings facilitate meaningful sentencing review. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.)

Given the need for a greater degree of scrutiny, it is anomalous that in California, written findings are required by due process in parole hearings (*In re Sturm* (1974) 11 Cal.3d 258, 272) but not capital penalty phase proceedings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*Ibid.*) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.)[61] The same analysis applies to the far graver decision to put someone to death.

It is further anomalous that in California's non-capital cases, Penal Code section 1170, subdivision (c), requires the sentencing court to "state

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[61] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

the reasons for its sentence choice on the record at the time of sentencing." By requiring stated reasons for imposing a discretionary punishment in non-capital cases but not in capital cases, California affords capital defendants lesser rather than enhanced constitutional protection.

Additionally, Penal Code section 190.4 provides that during the automatic application for verdict modification the trial court "shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." While the statute ultimately "requires the court to make an independent determination concerning the propriety of the death penalty, and to independently reweigh the evidence in aggravation and mitigation . . ." (*People v. DePriest* (2007) 42 Cal.4th 1, 56), it may be wondered how the trial court can determine "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented" without knowing what those aggravating and mitigating circumstances were.

Here, the failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538 at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that, as noted above, they are even required at parole suitability hearings.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Penal Code, § 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957 at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetroulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. *California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing 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 eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), 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."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

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 relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173 at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation

of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. *The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.*

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant including a jailhouse stabbing, a criminal threat, two batteries, and the throwing of a brick.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by an unanimous jury. Appellant's jury was not instructed on the need for such an unanimous

finding; nor is such an instruction generally provided for under California's sentencing scheme.

The Washington Supreme Court has succinctly stated the problem with the use of unadjudicated other crimes during the penalty phase: "A jury which has convicted a defendant of a capital crime is unlikely to fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions." (*State v. Bartholomew* (1984) 101 Wash.2d 631, 641; 683 P.2d 1079, 1046.)

In addition, although here the jury was instructed it had to find the existence of other unadjudicated criminal activity true beyond a reasonable doubt, it was also specifically instructed it need not unanimously find the other activity true before individual jurors could consider it a reason to execute appellant. (13 CT 3408.) In California jury verdicts in criminal cases must be unanimous (*People v. Russo* (2001) 25 Cal.4th 1124, 1132), and appellant submits the state's failure to apply its own rules by not requiring a unanimous finding appellant engaged in unadjudicated criminal behavior violates federal due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

The use of prior unadjudicated conduct, or if such conduct is permissible in the abstract, the failure of the trial court to instruct the jury it need unanimously find such conduct occurred before using it in aggravation, violated appellant's rights to due process, a jury trial, and reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant respectfully

requests this court reconsider its conclusion to the contrary. (*People v. D'Arcy, supra*, 48 Cal.4th at p. 308.)

6. *The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.*

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, (1988) 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

D. *The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants.*

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active

and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[62] as in *Snow*,[63] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

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[62] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another*." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[63] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another*." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Penal Code sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[64]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[65] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

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[64] In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[65] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. *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 nonuse 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.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world

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p. 609.)

to inform our understanding. "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. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113 at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. 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. 304 at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

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.) Furthermore, since the law of nations now recognizes the impropriety of capital punishment as a regular punishment, it is unconstitutional in this country since international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

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."[66] 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, for the reasons set forth above, the very broad death scheme in California and death's use as regular punishment violates both international law and the Eighth and Fourteenth Amendments. Therefore, appellant's death sentence should be set aside.

IX.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 (en banc) ("prejudice may result from the cumulative impact of

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[66] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

multiple deficiencies"); see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 at pp. 642-643 (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"); *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *(Chapman v. California*, 386 U.S. at 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The errors in the guilt phase included the dismissal of Juror #5, the apparent "hold out" juror, during deliberations, as well as the trial court's failure to fully explore whether Juror #12 committed misconduct in its discussions regarding appellant's cousin with the other jurors. The two jurors were excused and replaced by two alternate jurors who assisted the original ten jurors in reaching a verdict in very short order.

The cumulative effect of these guilt phase errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15.) Appellant's convictions, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ("even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"); see also *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-76 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-45 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers guilt phase error in assessing prejudice in the penalty phase].) In this context, this Court has recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown*, *supra*, 46 Cal.3d 432, 463 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the error affected the jury's verdict]; *In re Marquez* (1992) 1 Cal.4th 584, 605 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court to reverse his convictions in full. Alternatively, appellant requests the judgement of death be reversed. If this Court should affirm, the abstract of judgment must be amended.

Respectfully submitted,

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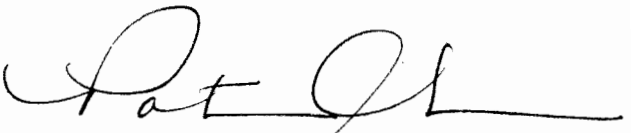
CERTIFICATE OF WORD COUNT

I am the attorney for appellant Craigen Lewis Armstrong. Based upon the word-count of the Word Perfect X6 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 64,151 words. (California Rules of Court, rule 8.630 (b)(1)(A).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: October 7, 2013



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I declare that the document was printed on recycled paper. Further, I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on October 7, 2012, at Prescott, Arizona.

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